GUJARAT HIGH COURT

Ambica Mills Ltd.

Vs.

The State Of Gujarat

Sales Tax Ref. No. 34 of 1963 with Sales Tax Reference No. 3 of 1962.

(J.M. Shelat C.J. and P.N. Bhagwati, J.)

14/ 15.11.1963

JUDGMENT

J.M. Shelat, C.J.

1. In this reference, the petitioners own two units of textile mills in Ahmadabad, which were purchased some years ago as going concerns. In recent years, the petitioner-company embarked upon a programme of modernizing its machinery and as part of that programme, the company sold old looms, carding engines and other machinery during the assessment period 1953-54. There were in all 16 sales to different purchasers and the total price received by the petitioner-company was Rs. 2,01,808. The petitioner-company realized sales tax from the purchasers in respect of 12 sales out of the total 16 sales, the sale price whereof was Rs. 58,308 in the aggregate. No sales tax was realised on the remaining 4 sales, the sale price whereof aggregated to Rs. 1,43,500. During the assessment proceedings, it was contended by the petitioner-company that the remaining 4 sales of machinery, in respect of which the petitioner-company had realised the amount of Rs. 1,43,500, should be excluded from the total turnover and should not be subjected to sales tax. The contentions urged by the petitioner-company were rejected by the Sales Tax Officer and an appeal against the Sales Tax Officer's order was also dismissed by the Assistant Collector. A revision application filed by the petitioner-company before the Additional Collector of Sales Tax was likewise dismissed and the petitioner-company, therefore, filed a second revision before the Bombay Sales Tax Tribunal which was disposed of by the Gujarat Sales Tax Tribunal by its judgment dated the 14th July, 1960.

2. During the hearing before the Additional Collector, the petitioner-company produced its letter dated the 28th of September, 1959, which is annexed as exhibit 5 to the statement of the case. The Additional Collector held that that letter indicated that the sales were made by the petitioner-company with the motive of making profit, and relying on a previous judgment of the Bombay Sales Tax Tribunal in *Ashok Mills Ltd. v. State of Bombay, dated the*[1] that officer rejected the

revision. The letter, upon which reliance was placed by the Additional Collector, stated that the two textile mills owned by the petitioner-company had in all 73,796 spindles and 1325 looms and possessed up-to-date processing machinery. It was also stated in that letter that the petitioner-company had, since its inception, followed a progressive policy in the matter of manufacture of textile

[1]18th of December, 1958

goods and in order to maintain its position in the industry, the petitioner-company had thought out a plan of renovation and modernization of its two units and also its third unit at Baroda, and that in accordance with that plan, it had decided to replace old and obsolete machinery by new and modern machinery. During the replacement of the old machinery, it was but incidental that the old and discarded machinery had to be sold "and that too, at the best available price." During the period 1953-54, the company had discarded 89 looms, 28 carding engines, two lathes and some other small machines. The letter further stated "It is not possible and if possible, it would be commercially imprudent, to sell 89 looms and 28 carding engines to one party at one time. The machines must be sold and sold to the parties who are prepared to pay the highest price. In the circumstances, it is very natural that the transactions of sale of one item of machinery would apparently appear more." The letter further stated that the procedure followed by the petitioner-company in selling second-hand machinery was that delivery was effected against payment in cash or against payment in advance and, therefore, sale invoices used to be prepared when deliveries were effected. The result of this practice was that even though several machines were sold to one party, since the delivery of the machinery was effected on different dates convenient to the purchasers, different sale invoices had to be prepared and, therefore, there would apparently appear a number of transactions despite there being actually one transaction.

3. Before the Sales Tax Tribunal, the contentions urged by the parties before these officers were repeated, but they met with the same fate. Upon these facts, the Tribunal has referred to us the following question for answer :-

> "Whether on the facts and in the circumstances of the case the sum of Rs. 2,01,808 is liable to be included in the taxable turnover of the petitioner and subjected to tax ?"

4. It is clear from the judgment of the Tribunal that the factors which weighed with it in arriving at its conclusion were : (1) that the sales in question fulfilled the test of volume and degree of frequency, (2) that these sales were made by the petitioners as part of their business, and (3) that the fact that the petitioners had charged sales tax from their purchasers in 12 out of 16 sales, (the 4 remaining sales in which sales tax was not collected by them being the sales in dispute in this reference) was an indication of the intention on the part of the petitioners to treat the sales as part of their business. It is this conclusion which is challenged in this reference.

5. Mr. Mehta for the petitioners in this as also in the following three references, contended that the business of the petitioners is the business of manufacturing textile goods, that it is not of

buying and selling machinery, that the sales of machinery involved in this reference were made because the petitioners had launched a programme of modernizing their machinery in their mills and that it was in the course of that programme that new machinery was substituted for the old and that, therefore, the old and discarded machinery had to be sold, that the machines sold by the petitioners were fixed assets of the petitioners which could not be the subject matter of business of dealing in machinery and that the machinery, the sales of which are in dispute, were not purchased originally with the intention of selling them at profit, but were purchased as fixed assets intended to be used for the purpose of manufacturing textile goods and that they were sold because they were substituted by new and modern machinery and, therefore, they were old an discarded machinery which had to be sold away as they were, after their substitution, unnecessary. Finally, he contended that the test of volume and degree of frequency was not a conclusive test and that even if frequency were to be applied as a test, the same was wrongly applied in the sense that if a dealer were to sell machinery in several lots to different persons and at different times instead of in one lot at one time and to one person, that would not mean frequency in the sense in which that test has been applied in some decided cases. For this purpose, Mr. Mehta relied upon the petitioners' aforesaid letter dated the 28th of September, 1959, in which it is stated that though part of the machinery was sold to one party, different invoices were made out, as the practice followed by the petitioners was to deliver goods either against cash or advance payment and further that the machinery was not sold in one lot as it was neither practicable nor commercially prudent to do so, as it would not have fetched the best price. Mr. Mehta contented that these facts did not constitute frequency of sale, as understood by the authorities relied upon by the Tribunal.

6. Before we proceed to examine these contentions and the authorities cited before us, it would be better first to have a glance at the provisions of the Act which were applicable during the relevant period. The Act applicable is Act 3 of 1953 prior to is amendment in 1954. Section 5 thereof, which is the charging section and levies a general tax, provides that –

> "(1) Subject to the provisions of section 8 every dealer -
> (a) who immediately prior to the date of commencement of this Act was liable to pay the general tax under the Bombay Sales Tax (No. 2) Ordinance, 1952, or
> (b) Whose turnover in respect of all sales exceeds Rs. 30,000 during the year commencing on the 1st day of April, 1952, shall be liable to pay the general tax at the rates specified in sub-section (1) of section 6 on his taxable turnover in respect of sales of goods made on or after the date of commencement of this Act."

Section 10, which levies a special tax, provides that –

> "(1) Every dealer -
> (a) who immediately prior to the date of commencement of this Act was liable to pay the special tax under the Bombay Sales Tax (No. 2) Ordinance, 1952, or

> (b) whose turnover in respect of all sales of special goods exceeds Rs. 5,000 during the year commencing on the 1st day of April, 1952, shall be liable to pay a special tax at the rate specified against them in column 2 of Schedule II on his taxable turnover in respect of sales of special goods made on or after the date commencement of this Act."

It will appear from these two sections that the incidence of these two taxes is upon the dealer whose turnover of sales exceeds a prescribed limit. Section 2(6) defines a "dealer" meaning any person who carries on the business of selling goods in the State of Bombay, whether for commission, remuneration or otherwise, etc. Section 2(8) defines "goods" as meaning all kinds of movable property other than newspapers, actionable claims, stocks, shares and securities, and includes all materials, articles and commodities. Under section 2(13) "sale" means a sale of goods made within the State of Bombay for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of price or on fees or subscription. Section 2(20) defines "turnover", meaning by that expression, the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount, if any, refunded by the dealer to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period. It is clear from these definitions that what is subjected to two taxes is the turnover, meaning thereby, the aggregate amount of sale price, received or receivable by a dealer in respect of sales of goods effected by him during a given financial year. Reading these definitions together, it is clear that it is not as if all and every kind of sales are subjected to tax, but only those sales effected by a dealer as defined by section 2(6), that is, a dealer who carries on the business of selling goods. The definition thus contemplates a dealer carrying on the business of selling goods and it is such sales only which makes a person a dealer and whose sales, in the course of such business, are subjected to tax levied by section 5 and 10 of the Act.

7. The Act does not define "business" and, therefore, the word "business" as used in section 2(6) has to be understood in its ordinary meaning. The question a to what is business has arisen in the past in some decided cases, two at least of them were pointed out to us, where an attempt has been made not to define but to indicate what it is. In *Smith v. Anderson*[2], Jessel, M.R., observed that "business" is a word of large and indefinite import, and after examining its dictionary meanings proceeded to observe that it is a word of extensive use and indefinite signification. "Business" is a particular occupation as agriculture, trade, mechanics, art, or profession. At page 259, he observed :-

> "Now, knowing what 'business' means, is there any distinction between a person carrying on any other business which has for its object the acquisition of gain, and the words 'formed for the purpose of the acquisition of gain' ? It must be a business to acquire gain, and really the words and nothing to it
> .... You cannot acquire gain by means of a company except by carrying on some

business or other, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained .... For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language ? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say he was a land-jobber or dealer in land, but if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land-jobber or dealer in land."

[2](1820) 15 Ch. 247, at p. 258

Continuity of transactions and the profit motive were, thus, regarded as factors indicating business. Another decision which contains observations as to what constitutes "business", is to be found in *G. Venkataswami Naidu & Co. v. Commissioner of Income Tax*[3], which though a case under the Income-tax Act and though the meaning of "business" is wider there in the context of that Act than the meaning of the word in ordinary understanding, is to a certain extent useful in at least showing that though there are several factors indicating of a business, none of them by itself is fully determinative. The question in that case was whether a certain amount received by the assessee was a gain or a capital accretion, and the Supreme Court, while holding that it was gain and not capital accretion and that the transaction in question was an adventure in the nature of trade, observed as follows :-

"If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transaction several factors are relevant, such as, e.g., whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to it; the nature and quantity of the commodity purchased and resold; any act subsequent to the purchase to improve the quality of the commodity purchased and thereby make it more readily resaleable; any act prior to the purchase showing a design or purpose; the incidents associated with the purchase and resale; the similarity of the transaction to operations usually associated with trade or business; the repetition of the transaction; the element of pride of possession. A person may purchase a piece of art, hold it for some time and if a profitable offer is received sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if

> such a claim is upheld that would be a factor against the transaction being in the nature of trade. The presence of all these relevant factors may help the court to draw an inference that a transaction is in the nature of trade; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction.
> In case where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. The presumption may be rebutted."

It will be seen from these observations that though transactions effected by a person may be indicative of several factors, none of them by itself would be decisive and, therefore, it

[3][1959] 35 I.T.R. 594

would be necessary to consider them all from the point of view of their cumulative effect and then ascertain if that gives the transaction a distinctive character. If the goods sold were originally purchased solely and exclusively with the intention to resell at profit and the purchaser had no intention to hold them for himself or using or enjoying them, that would be a relevant factor indicative of trade or business unless such factor is offset by other factors showing to the contrary. But in spite of such initial intention, there might exist factors in a given case where the Court might come to the conclusion that the transaction of the subsequent sale was in the course of business.

8. Coming now to the cases decided under the Sales Tax Act, the case often cited is of course *The State of Bombay v. The Ahmedabad Education Society*[4]*,* The assessee-Society had, as its object, the spread of education, starting and taking over arts colleges and other similar objects. In furtherance of these objects, the Society gave a contract to a contractor for construction of buildings for colleges, residential quarters for staff and hostels for the students. Realising that it would be cheaper and more economical to manufacture bricks for the construction of the buildings, the Society set up a brick factory and supplied the bricks manufactured there to their contractor. As the Society manufactured more bricks than were actually necessary for their own construction work, they disposed of the surplus from time to time to sister educational institutions and individuals at cost price. The Society also obtained a permit from Government to import steel for the purpose of their buildings. After the arrival of the steel, the Government gave

them a permit to buy steel locally. As the Society thereafter did not require the imported steel, they sold, as directed by the Collector, the steel to other persons requiring it. These two activities did not result in any profit to the Society. The question was whether the Society, in respect of these transactions, came within the ambit of the definition of a "dealer" under the Bombay Sales Tax Act. It was held that as there was no intention on the part of the Society to sell the goods at the time when the bricks were manufactured or the steel was imported, the Society could not be said to be carrying on the business of selling or supplying goods, and, therefore, the Society did not come within the definition of a "dealer" in section 2(c) of the Bombay Sales Tax Act, 1946. The decision left open the question whether a profit-making motive is an essential ingredient in order that an activity could constitute business. In the course of his judgment, the learned Chief Justice observed that the object of the Sales Tax Act was not to tax income or profits, but that its object was a very narrow object and that was to tax sales effected by persons carrying on business of selling or supplying, that is to say, its object was to tax only those sales which were effected by persons carrying on business of selling or supplying goods. If the expression "carrying on the business of selling or supplying the goods" were to be construed in a commercial sense, then it would appear clear that the object of the person who carried on that business must be to sell or to supply. A person may purchase goods with the object ultimately of selling them and unless that object was present and that intention was clear, the mere activity of selling or supplying would not constitute "carrying on the business of selling or supplying the goods". An activity, however serious, and however continuous, unless it assumed the characteristics of a business, was not an activity which could come within the ambit of section 2(c). The learned Chief Justice further observed that if the intention of the Legislature was to simply tax every sale and every supply, then it was unnecessary

[4]([1956] 7 S.T.C. 497)

to state that the person must carry on the business of selling or supplying the goods, and that a further indication was given as to the nature of the activity by the Legislature by including in the definition of a "dealer" a society or a club or an association which sells or supplies goods to its members. The Legislature realized that a club or society does not carry on the business of supplying goods to its members, its business is to give amenities, to provide a place where people can spend their leisure hours, and realizing that a society, club or association would not come within the definition, the Legislature had to extend the definition of a dealer and include in that definition a society, club or association.

In view of the finding of fact in that case that the sole object of the Education Society was to make bricks for their own buildings, and for various reasons large quantity was produced and that quantity being liable to deteriorate, they had to be disposed of without the Society making any profit whatsoever, precluded the Society from being a dealer within the meaning of statutory definition of that word. As we have pointed out, the decision left open the question whether profit-making motive was an essential ingredient in order that an activity should constitute business and it is, therefore, clear that what weighed with the learned Judge was the fact that when the Society manufactured bricks, it did so only for the purpose of using them for construction of its own buildings and not with the initial intention or object to sell them at profit.

According to the view taken in this decision, if the intention was to sell the bricks ultimately, such an intention would be indicative of business, but in the absence of such an intention or object, the mere continuity of transactions or the degree of frequency of sales was not considered sufficient for the transactions in question to be transactions in the course of business. A point somewhat similar to the one in the case of the Ahmedabad Education Society, arose in *Raja Visheswar v. Province of Bihar*[5], which was a case of sale of grain and sugarcane which were in excess of the needs of the plaintiff there. The plaintiff possessed extensive fields on which he grew grain, paddy, wheat, grams besides sugarcane. After meeting his personal requirements and of his family and his large staff, he sold a portion of the excess which was not required to be stored for consumption. The Sales Tax Authorities served him with a notice that he should get himself registered as a dealer under the Bihar Sales Tax Act, 1944, but the plaintiff denied that he was a dealer and requested them to withdraw the notice. On their refusal to do so, he filed a suit against the Province of Bihar for a declaration that he was not a dealer. It was there held that although grain and sugarcane were goods within the meaning of the Act, the mere fact that the plaintiff sold the excess of his requirements would not make him a dealer within the meaning of section 2(c) of the Act. Section 2(c) of the Bihar Sales Tax Act, 1944, defined a "dealer" as meaning a person who carries on the business of selling or supplying goods, and the word "goods" by sub-clause (d) meant all kinds of movable property with certain exceptions. Though the definition did not contain the same expression as the one in the Act before us, it was substantially similar. The learned Judge there remarked that though the plaintiff sold agricultural products and goods, the evidence was that such goods were sold in each village where the agriculturists stored them after harvesting and after they were brought to granaries except sugarcane which had to be carried to the mills. They then said that it was true that the plaintiff had considerable lands under his cultivation and, therefore, the amount of goods produced would be large but the bigness of the figures realized by sale thereof was irrelevant. This decision lays down in clear terms that mere volume of goods sold is not a determinative factor, though that factor along with others may serve as a relevant factor in a given case. A case somewhat instructive cited in this decision is

[5]([1951] 2 S.T.C. 129)

Brown v. Watt[6], where a seed merchant took a farm and worked it in connection with the business which was that of selling the seeds. It was there pointed out that there may be engrafted upon that, no doubt, as in many cases there is, the occupation of producing that which the merchant sold, and then he was a manufacturer as well as merchant, and in such a case the occupation which he was carrying on at the farm was really the manufacturing of seeds to be used in his business. The principle emerging from this decision is that if a person is carrying on a certain activity, such as farming, though that activity might not be business, but if there was engrafted to that activity another activity, such as selling the seeds grown by him, as business, he would be both a manufacturer as well as a merchant. But it is clear that his activities would not constitute business unless sales of seeds made by him are sales in the course of business. In ***Steelage Industries Ltd. v. The State of Bombay, ([1957] 8 S.T.C. 376)***, the principle laid down was that if a sale is a casual one, having no connection with the business for which the person is registered

or is liable to be registered, the sale price would not be liable to be included in the taxable turnover nor would such sale price be liable to tax. In that case, the assessee-company carried on the business of manufacturing and selling steel furniture and was registered as a dealer under the Bombay Sales Tax Act. In the application submitted by it for registration as a dealer, the sales of motor cars were not mentioned as one of the lines in which it was dealing or intended to deal. The assessee sold a motor car, which was purchased by it for the use of its managing directed, after its user for more than three years. The cost of purchase and the proceeds of sale were credited and debited in the assessee's books of account. The car had been shown as part of the assessee's assets and it was sold at a profit. It was held that the assessee was not liable to sales tax in respect of the resale of the car. It was there observed that in order to regard a transaction as part of a business, the test of volume and degree of frequency of similar transactions must be fulfilled and the fact that there has been a casual sale of single item of the assets of the assessee does not make the sale a part of the business of the assessee. The learned Judge there observed that though the charging section rendered every dealer liable to pay tax, whose gross turnover exceeded the amount specified therein, and though the expression "turnover" meant the aggregate amount of the price received in respect of sales of goods, reading the provisions of section 5 and those of section 2, clauses (c) and (j), there was no doubt that the Legislature intended that only those transactions, which were carried out as part of the business of the dealer, were liable to be taxed under the Act. Negativing the contention on behalf of the State that the transaction of sale of the motor car, in any event, should be regarded as part of the business of the assessee and therefore liable to payment of tax, the learned Judge stated that though the motor car was part of the assets of the assessee, a transaction of sale of a part of the assets was not necessarily a part of the business of the assessee. It may be noticed that this was a case where the trader was a dealer but the sale was held not only to be a casual one, but unconnected with his business, and being a casual sale, was held not to be liable to be included in the turnover. Another case of a person who was a registered dealer under the C.P. and Berar Sales Tax Act, 1947, is to be found in *Girdharilal Jiwanlal v. Assistant Commissioner of Sales Tax (Appeals), Nagpur*[7], The petitioner there was an occupant of as many as 542 acres situate in different villages in Akola District. In about 440 acres, he had shown and raised crops of cotton, groundnuts and grains. After meeting his personal requirements he sold away the balance of the crops during three periods of assessments

[6]((1806) 2 Tax Cas. 143)

[7]([1957] 8 S.T.C. 732)

for a price of Rs. 69,000 and odd, Rs. 29,000 and odd and Rs. 88,000 and odd respectively. He was also carrying on business as sole proprietor under the name and style of Messrs Ramsukhdar Girdharilal in coal, machinery, cotton, cotton-seeds, groundnut and cotton bales, and in respect of this business was a registered dealer. In the assessment proceedings, the Sales Tax Officer, in computing the total turnover, took into account not merely the turnover of the business referred to above, but also the amount realized by sale of his agricultural produce. It was held that a person did not necessarily fall within the definition of "dealer" merely because he sold or supplied commodities and that in order to bring him within the definition of "dealer" it was

necessary to show that he carried on those activities as his business. While holding so, the learned Judges there observed that while in agriculturist cultivating his lands engaged himself in the business of agriculture, that was not the same things as engaging in the business of sale or supply of agricultural produce. An agriculturist might sell the produce from his lands but such an activity could not by itself be regarded as business of sale of agricultural produce, not would the two sets of activities taken together be said to constitute business unless his primary intention in engaging himself in such activities was to carry on business of sale of agricultural produce. Thus, although the lands held by the dealer were as much as 542 acres, larger by any test than he could conceivably need and the sale price of the crops in excess of his needs came to considerable amounts, the test applied was the test of initial intention at the time of the purchase of the land not being to carry on the business of sale of crops. The learned Judge also emphasized that in all cases of taxation, the burden of proving the necessary ingredients laid down by the law to justify taxation was upon the taxing authorities and that in the instant case, they had failed to prove the essential ingredient, namely, the intention of the petitioner to carry on the business of selling agricultural produce. The principle deducible from this decision may be stated as follows : that if it is shown that the initial intention of a person at the time of the purchase was not to sell at profit but to enjoy or use the property or the goods in question unless circumstances offsetting such an intention are proved to have existed at the time of the sale, the sale would not be regarded as business activity or part of the dealer's business, the burden of proving such circumstances being on the taxing authorities. The learned Advocate-General argued that in this case there was no reasonable nexus between the sales in question and the business of the dealer and that it was therefore that the sales could not be held to be includible in his turnover. But as we have just observed, that was not the test adopted by the learned Judges. It is clear from the report that the test applied was the test of initial intention of the assessee at the time of the purchase of his lands and that initial intention not having been offset by proving circumstances to the contrary. The case of *Aryodaya Spinning and Weaving Company Limited v. The State of Bombay*[8], is yet another case of a registered dealer but where a different test was applied. The assessees there had a factory which was a spinning and weaving plant. They applied for registration under the Sales Tax Act for sale of goods manufactured by them and in that application, they stated that they were carrying on the business of selling yarn, cloth, cotton, waste, waste stores etc., and accordingly the assessees were registered as dealers. During the relevant period, they sold some excess cotton and also cotton waste. These sales were sought to be charged to sales tax by the authorities and the contention of the assessees was that they were not carrying on the business of selling cotton or cotton waste and therefore, the price received for those sales could not be included in computing the

[8]([1960] 11 S.T.C. 141)

turnover. These contentions were negatived and it was held by the High Court that although the normal business of the assessee was the manufacture of yarn and cloth, cotton waste, which was a subsidiary product, was normally sold and, in the circumstances, an intention to carry on business of selling the subsidiary product as part or an incident of the business of the assessees might really be inferred and the transaction of sale might be regarded as an activity in the course

of the business of the assessees. As regards cotton, it was held that the assessees were selling cotton regularly and, therefore, they must be regarded as dealers in cotton and cotton waste and could be charged to sales tax. Thus, the tests applied in this case were, (1) that the sales of cotton waste were an allied business activity incidental to the dealer's normal business, and (2) the degree of frequency and volume. Though cotton waste was held to be a subsidiary product and their sales were held to be part of incident of the business of the assessees, that test could not be made applicable to the sales of cotton and the only circumstance, therefore, in so far as cotton was concerned, which appears to have weighed with the learned Judges, was the fact that it was surplus cotton and had been sold by the assessees regularly. That was the only ground upon which the assessees appear to have been held to be dealers in cotton. This decision came to be considered by the High Court of Mysore in *The State of Mysore v. The Bangalore Woollen, Cotton and Silk Mills Company Ltd*[9]*.,* where a Division Bench of the Court distinguished the decision on the ground that the mills, while applying for registration as dealers, had stated that they were carrying on the business of selling inter alia cotton and cotton waste and that it was that circumstance which made the High Court of Bombay infer that the sales of cotton and cotton waste were in the course of the mills' business. We may point out that that observation is not quite correct, for the learned Judges in the case of Aryodaya Mills ([1960] 11 S.T.C. 141) have expressly stated that such a statement in the application may not be a decisive circumstance. The learned Judges of the High Court of Mysore have also observed that in the case before them, the mills had not registered themselves as dealers in waste cotton, useless ropes, scrap, etc., and that the memorandum of association of the company mentioned only the manufacture of textile goods as the company's object and, therefore, the mills could not be said to be dealers in waste cotton etc. With the greatest respect, this would not be a test, for, it is not relevant whether the object clause in the memorandum of association includes such an object or not and it is equally irrelevant whether the mills had registered themselves as dealers in such commodities or not. Mr. Mehta, who pointed out this decision to us, himself conceded that these two reasons upon which this decision was based were not correct criterions and that the decision can hardly be of assistance to us in the present case *A. Ebrahim & Co. v. State of Bombay*[10]*,* is still another case where the assessee-company was a dealer, doing wholesale and retain business of selling separated parts of ship machinery and ferrous and non-ferrous metals. The assessee-company purchased a ship from an Indian company reserving to itself the option either of using the ship for trading or breaking up and selling its separated parts. It entered into an agreement with another company to sell the ship and the agreement provided inter alia that the steamer would be delivered as and where she lay in Bombay and that the purchasers or their representatives would be allowed to go on board the steamer on the day of the delivery and further that the purchasers were at liberty to use the vessel for trading or for breaking it up at their option. The sale price of the ship was included by the department in the total turnover of the assessee. The assessee contended that the sale price was not liable to be included in

[9]([1962] 13 S.T.C. 106)

[10]([1962] 13 S.T.C. 877)

his turnover, arguing that is business was to deal in scrap and not in ships and further that the sale if the ship was an isolated transaction which would not render it a dealer in ships. The High Court, negativing that contention, held that the assessee's activity in selling the ship had a very close connection with and was skin to the normal course of its business and was in the course of its business activity and, therefore, the sale price of the ship would be includible in its taxable turnover. It will be seen that the decision in this case was not on the ground that the transaction in question was incidental to the business of the assessee; but that the sale in question was so connected with and so similar to the normal business of the assessee, that it could be regarded as an activity in the course of that business. At page 888, the learned Judges made this position clear by stating that the circumstances in the case indicated that the applicant had purchased the ship in the course of its usual business activity of purchasing ships, breaking them up and selling separated parts thereof, though no doubt, an option was reserved by it to use the ship for trading purposes. It was true that the normal business activity of breaking of ships and selling separated parts had not been followed by the applicant, but it had sold the ship, leaving an option to the purchasers to break it up. They also pointed out that the circumstances indicated that soon after the purchase of the ship, the assessee had found a purchaser who was possibly in need of separated parts of a ship and, therefore, instead of breaking up the ship and selling separated parts, it had sold the entire ship, giving the purchaser an option to break it up. On these circumstances, it was held that the activity of the assessee in selling the ship had a close connection and was akin to the normal course of its business and was, therefore, in the course of its business, and the sale proceeds were therefore held to have been rightly included in the assessee's turnover.

9. Besides these decisions, there are a line of decisions which emphasize that before a person can be held liable to sales tax, it must be shown that his dealings were part of his business activity indicated as such by the existence of profit motive. Thus, in *H. Abdul Bakshi & Brothers, Hyderabad v. The State of Andhra Pradesh*[11], a case arising under section 2(e) of the Hyderabad General Sales Tax Act, 1950, and Rule 5(2) of the Hyderabad General Sales Tax Rules, 1950, the High Court of Andhra Pradesh held that the expression "business" in the definition of "dealer" was used in a commercial sense and therefore there must exist a profit motive in regards to the commodities in respect of which the impost is sought to be levied and therefore where a person bought large quantities of any category of goods for the purpose of consumption or for any other purpose unconnected with the business in that commodity he could not be regarded as a businessman within the mischief of rule 5. The test of profit motive was also emphasized by the High Court of Madhya Pradesh in *The State of M.P. v. Bengal Nagpur Cotton Mills Ltd*[12]., In that case, the mills gave a contract for the construction of some buildings to J. K. Mitra & Co. The mills obtained steel and cement required for the construction work and handed over the materials to the contractors and the price of the materials was debited to the contractor's account. The supply of the materials by the mills to the contractors was made from time to time till the completion of the buildings. During the relevant periods, the total price of the materials supplied came to Rs. 66,000 and odd. The department treated the supply of materials to the contractors as

sale transactions taxable

[11][1960] 11 S.T.C. 526

[12]([1961] 12 S.T.C. 333)

under the Act and accordingly, assessed the mills to sales tax
on those transactions. The High Court held that the mills could not be regarded as a dealer carrying on business of selling and supplying steel and cement and, therefore, were not liable to pay sales tax. The learned Judges there observed that for the imposition of tax under the Act on the sale transaction of a commodity, it was not sufficient that the sale was by a dealer carrying on business of selling or supplying some commodity. The business of the dealer must be of selling or supplying the particular commodity sought to be taxed, otherwise he cannot be regarded as dealer in relation to that commodity, and if he was not so regarded, he was not liable to be taxed under the Act for any sale of commodity effected by him. They also observed that merely because an activity was continuous or repeated, it did not follow that it was a business activity as understood in a commercial sense, and that the expression "carries on the business of selling or supplying goods" in the definition of "dealer" should be constructed in its commercial sense and that so constructed, it meant the carrying on of continuous trading operations with a view to earn profit. A person engaged in continuous trading operations might not actually obtain profit and might incur a loss. But if he engaged himself in those operations with the object of earning profit, then he was carrying on a business. The test was the object with which the activity was carried on, and not whether he actually got profit or loss. It is clear from this decision that the emphasis placed by the learned Judges was on the sales being made in the course of business of selling the very commodity, the sales of which are sought to be subjected to tax, and the profit motive with which such sales are made. It is also clear that mere continuity of transactions of sales was not regarded as a determinative factor in coming to the conclusion whether the assessee was carrying on business. The same High Court again emphasized the test of profit motive in *Commissioner of Sales Tax, Madhya Pradesh v. Ram Dulare Balkishan and Bros*[13]*.,* The assessees there were bus operators and carried on the business of providing transport and owned several buses and trucks. During the relevant period, they sold unserviceable cars, trucks, tyres and other used motor accessories to various persons. The question was whether these sales were includible in the total turnover of the assessees. The High Court held that the assessees' sales of unserviceable vehicles and motor accessories were not sales by a dealer in the course of business of selling or supplying those goods and the sales were, therefore, not liable to tax. The High Court again emphasized that an activity, though continuous, serious and large, could not assume the characteristics of business unless it was an activity coming within the definition of a "dealer" given in the Act and that the true test was not whether the selling activity was continuous repeated, but whether the carrying on of continuous operation was with a view to earn profit. The same test was also applied by the High Court of Madras in *Gannon Dunkerley & Co. v. State of Madras*[14]*,* Amongst the several questions raised in that decision, there was the question of the assessees having supplied food-grains for the benefit of their workmen and having recovered the costs of such food-grains by debiting its value against the wages of the workmen. The question was whether

the supply of food-grains to the workmen would make the assessees liable to sales tax on the value of such food-grains. The High Court held that as the supply of food-grains was not carried on with a view to earn profit, and no profit having in fact accrued, the assessees were not liable to sales tax on the value of the

[13]([1963] 14 S.T.C. 202)

[14]([1954] 5 S.T.C. 216)

food-grains. After examining the dictionary meanings of the word "business" the learned Judge stated that the taxing statutes which attempt to levy tax on business turnover are generally intended to impose a tax on commercial transactions and that from the intention of the Legislature gatherable from the provisions of the Act, it was obvious that the word was not used in a general sense, but in the sense of business which consisted of carrying on continuous trading operations with a view to earn profit. They also stressed that the words "buying and selling" appearing in the Act were qualified by the expression "carries on the business of" and therefore, the context required that the words should be understood in a restricted and commercial sense, namely, that the activity was with a view to earn profit. The High Court in that case adopted the construction of the words "carrying on the business" given in *Graham v. Lewis*[15], where the Court of Appeal in England had to construe the expression "carry on business" used in Mayor's Court (Extension) Act, 1857, and where Fry. L.J., had stated as follows :-

> "Now, I think that the expression 'carry on business' is not ordinarily used in the sense of a person being busy or doing business merely. A butler employed to look after his master's plate and perform the other duties of his occupation may be a very busy man, but he could not be said to be carrying on business. A man who busies himself about science, the volunteer movement, or politics, though he may have a great deal of business to transact in respect of those matters, does not carry on business. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion, it imports that the person has control and direction with respect to a business, and also that it is a business carried on for some pecuniary gain."

The profit motive was again emphasized by the High Court of Madras in *L.M.S. Sadak Thamby and Co. v. The State of Madras*[16], where, dealing with the definition of a "dealer" in section 2(g) of the Madras General Sales Tax Act, 1959, the learned Judges stated that though the definition of "dealer" would include a person who solely carries of the business of buying goods, such buying of goods must be in the course of business, which means that the activity should be associated with a profit-making motive.

10. The test of volume and degree of frequency was canvassed before the High Court of Kerala in *Gosri Dairy, Vyttila v. The State of Kerala*[17], It is necessary to state a few facts in this case and the reasoning applied thereto by the learned Judges there, as it is a decision considerably relied upon by the learned Advocate-General. The assessees in this case were a firm dealing in dairy products and the business of the firm necessitated keeping of productive live-stock. As the productivity of milch cows was not without limitation of time, the farm had necessarily to sell

away the dry-stock annually to be replaced by fresh life-stock. The question was whether the proceeds of such sales were to be counted as part of the turnover of the firm liable to sales tax. The learned Judges there held that the assessees' sales of cattle were part of their business, constituting the firm a dealer within the meaning of the Sales Tax Act and attracted liability to tax in respect thereof. They observed that though the firm was a registered dealer only for dairy products, that did not mean that it could not be dealing in other commodities also. They held that the firm had been regularly selling its unserviceable cows in such numbers that

[15]((1889) 22 Q.B.D. 1 at p. 5) [17]([1961] 12 S.T.C. 683)
[16]([1963] 14 S.T.C. 753)

the annual proceeds thereof ran to the tune of Rs. 11,000 to Rs. 16,000 and that in the nature of things, these sales could not be merely casual dealings or isolated transactions, but acts done in the carrying on or carrying out of the firm's business. After citing the decision in Aryodaya Spinning Mills ([1960] 11 S.T.C. 141], the learned Judges held that the frequency, regularity and volume of sale effected by the assessee before them were such that they could be regarded as an activity in the course of the business of the assessee. They also observed that the question whether the sales were of capital assets and amounted to capital receipts or not did not arise in a sales tax assessment as all sales were operations in the course of business and attracted taxation and that whether one was a dealer in a particular commodity or not would largely depend upon the volume and regularity of his transactions. Referring to the decision in Gannon Dunkerley & Co.'s case ([1954] 5 S.T.C. 216], they also observed that they were not sure whether supplying of food-grains by a contractor to his workmen at the work spot was not with a view to earn profit out of the work in which they were employed, for, contentment and happiness amongst the workmen would also contribute to earnestness in their work and better outturn must yield better profits. With respect, this reasoning would amount to straining the meaning of the expression "profit motive" too much and giving it a connotation wider than generally understood in decided cases where it is accepted as acquisition of monetary gain, and not the contentment of the labour employed or the resultant better outturn. Running a canteen for the benefit of the employees does not amount to business activity, as held in *State of Mysore v. The Bangalore Woollen, Cotton and Silk Mills Co., Ltd*[18]*.,* The contention of the mills there that the stores run by them were a mere amenity and not an activity with a profit motive was accepted by the High Court. If running a canteen is regarded as an amenity, it is difficult to appreciate how supply of food-grains can be regarded as not an amenity, but a business activity. As we have said, the learned Advocate-General leaned heavily upon the decision of the High Court of Kerala and argued that the disposals of dry cattle in that case were a regular and frequent feature of the business of the assessee-firm and were regarded by the High Court as acts of carrying on business by the firm as such disposals were the necessary incidents of that business, cattle being the vital means of business and the sales of dry cattle being necessary for economical running of that business. He also argued that in the case of such a dealer, the profit motive would be there in such disposals in the sense that the disposal of such unserviceable cattle would lead not only to the economical running of the industry but would also lead to the reduction of the cost of production. The sales

of commodities, he argued, which are essential for the carrying on of the business of a dealer, which have become unserviceable, are so connected with the business that they must be held to have been made in the course of business. Except perhaps the decision of the High Court of Kerala, no other decision goes as far as the learned Advocate-General would like us to go. We have read the judgment of the Kerala High Court with care, but we are unable to see how on the facts in that case, the principle laid down in the decision in Aryodaya Mills case ([1960] 11 S.T.C. 141) could have been relied upon. The decision in the case of Aryodaya Mills ([1960] 11 S.T.C. 141) was a decision of sales of cotton waste which the High Court regarded as an allied product or subsidiary product or a bye-product, whereas, in the Kerala case, cattle were obviously the assets of the business which seasonably became dry and therefore unserviceable and uneconomical to maintain. There could,

[18]([1962] 13 S.T.C. 106)

therefore, be no question of there being in their disposals a profit motive in the sense of pecuniary gain. The profit motive as generally understood is that which actuates the sales of things in question upon an anticipation that acquisition of monetary gain will ensue. The sales of surplus cotton in the case of Aryodaya Mill ([1960] 11 S.T.C. 141] were treated as part of the business of the mills presumably on the footing that the mills were purchasing cotton in excess and selling the surplus cotton. Such an inference was presumably drawn from the regularity of sales. Mere regularity of sales of dry cattle, as in the Kerala case, could not properly be held to be decisive as the phenomenon of the cattle going dry was a seasonal phenomenon and, therefore, dry cattle had in the circumstances to be sold at regular intervals. No decision was pointed out to us of any High Court which goes as far as to hold that sales of assets of a business, which are or have become unserviceable, however regular or continuous, are sales made with profit motive and constitute business. In *Commissioner of Sales Tax, Madhya Pradesh v. Ram Dulare Balakishan and Bros*[19]*.,* of the Kerala High Court. In *Shri Vivekanand Mills Ltd. v. The State of Bombay*[20]*,* by a Division Bench of the High Court of Bombay (Unreported), it was laid down that sales, if they are to be treated as part of the turnover, must posses not only regularity and continuity but must be incidental to the normal business conducted by the assessee or have some relation with his business. The learned Judges there observed that the statement of the case before them did not indicate that the assessees were disposing of cotton purchased by them as an incident to their normal business and they further observed that the sales of 411 bales of Californian cotton, which was the sale in dispute was a casual transaction and not as an incident of the business of the assessees, and was occasioned because the cotton was regarded as unsuitable for manufacturing yarn or for some other similar reasons. Therefore, merely because a person sells goods or commodities which have become unserviceable or which are unsuitable for his business, does not by itself make him a dealer in those goods or the sales a business activity.

11. The analysis made by us of the different decisions of the different High Court shows that though various tests were applied in those decisions dealing with different circumstances, there is uniformity of opinion that the Sales Tax Acts do not attempt to tax all sales but that they have, compared to the Income-tax Act, a narrower and a restricted field. The sales which are amenable

to tax under the Sales Tax Acts are not all sales, but those sales which can be said to have been effected as part of the business of the assessee or in the course of business activity. Where an assessee who is a registered dealer or one who is liable to be registered, has effected sales which are incidental to his normal business or sales of subsidiary products or bye-products arising out of his normal business, such sales would be considered as having been made in the course of his business. The word "business" having a wide connotation, spreading over a vast and an indefinite field of activity, the Courts have to apply different tests to different types of sales involving a variety of articles or goods in order to ascertain whether they fall under the category of sales effected in the course of business. In the nature of things, therefore, it would be impossible to lay down a hard and fast rule which would uniformly or in a symmetry govern all cases. Therefore, though different tests governing different sets of circumstances have been laid down, such as volume and degree of frequency, continuity and regularity of transactions, the nature of the goods sold, the initial intention at the time of their manufacture or purchase etc., each test so laid down must be taken as governing

[19]([1963] 14 S.T.C. 202

[20] Sales Tax Reference No. 36 of 1958 decided on the 23rd of July, 1959

the facts to which it was applied, and at best, is an indication which however would be liable to be offset by other circumstances existing in a given case.

12. Regarding the facts in this reference, Mr. Mehta contended that a sale of a fixed asset of a company can never be subjected to sales tax, for, a company cannot be said to be carrying on business in fixed assets and that unless the sale is one of stock-in-trade, there can be no business. That, in a way, is true, for, a business of selling can only be with respect to stock-in-trade of a particular business. But at the same time, it is possible that what was once a fixed asset can be converted into stock-in-trade and in that view, sales of such fixed assets can possibly be regarded as sales in the course of business. The learned Advocate-General, on the other hand, tried to analyse these various decisions and sought first to classify the assessees into two classes, (1) a dealer, and (2) a non-dealer, and then attempted to formulate a rule, viz. that there would be three tests applicable in all cases : (1) a reasonable nexus with the normal business activity of a dealer, (2) profit motive including the intention or the object to curtail loss, and (3) volume and degree of frequency. According to him if two at least of the three criterions were existent, the sale would be amenable to tax and that criterions (2) and (3) would apply to dealers and non-dealers both whereas criterion (1) would apply to dealers only. But as we have already observed, the term "business" being of a wide connotation and the activities in a trade or a business being of an extremely varied character, it would be hazardous to lay down a hard and fast criterion and it would not be possible to say that only the three criterions suggested by the learned Advocate-General would be exhaustive. Nor would it be possible to say that where the two of them apply, that would mean business of selling. That being so, while deciding such cases the proper way is to examine the facts and circumstances of each case and then ascertain whether the sales in question were effected in the course of business of selling, in other words, as business activity, and whether there are circumstances which would lend to the sales the distinctive character of business.

13. In the light of this discussion, we proceed now to consider the sales in the present reference.

14. The point for consideration is whether sales of old machinery can be said to constitute business or business activity on the part of the assessees. The articles sold were 89 looms, 28 carding engines, 2 lathes and some other small machines and the total sales during the relevant period were 16, in 12 out of which the mills had collected sales tax from their purchasers. As already pointed out, the Tribunal was of the view that the sales fulfilled the test of volume and degree of frequency and furthermore, as the learned Advocate-General put it, there was an indication appearing from the collection of sales tax from the purchasers in as many as 12 out of 16 sales, that the assessees themselves regarded those sales as part of their business or business activity. But, as has been explained by the mills in the letter dated the 28th September, 1959, these sales were effected in different lots and were made to different purchasers, because it was not considered commercially prudent to sell them in one lot and because the assessees felt that if that were done, they would not derive the best price. Different vouchers had also to be made out because the mills would not deliver the goods unless price was first paid or deposited and therefore, whenever a purchaser took delivery, a separate voucher used to be made out for so much of the machinery taken delivery of at that time. It will also be noticed that out of the 16 sales, there are 9 sales which are made to two mills and the remaining 7 are made to different persons or concerns. It is, therefore, impossible to over-emphasize the element of frequency in such a case. In fact, if the entire machinery had been sold in one lot, it could hardly have made any significant difference. What has to be remembered is that the sales were effected because new and modern machinery was substituted for the old and obsolete machinery. The sales, therefore, were realizations of the assets of the mills effected in consequence of their phased programme for installation of modern plant and machinery and were not in pursuance of a design or a scheme for profit-making. In view of these circumstances, neither the volume not the degree of frequency in the present case would be a decisive test. It cannot be disputed that the machinery that was disposed of was not purchased with any original intention to sell it. It was obviously purchased and installed for its use for producing textile goods. As we have said before, ordinarily one cannot be said to be carrying on business of selling assets and therefore, sales of such assets, when they have become useless or unserviceable either by reason of their having to be substituted by modern machinery or by the usual wear and tear, cannot be regarded as business or business activity.

15. But the learned Advocate-General contended that the assessees had to install new machinery for the old and modernize their mills if they wanted to survive economically and, therefore, new machinery had to be installed and the old ones disposed of as an incident of the business and the sales therefore were so intimately connected with the conduct of the business of the mills that they should be held to be part of the business itself. In support of his proposition, he relied upon the decision in the case of Aryodaya Mills ([1960] 11 S.T.C. 141) and the decision in Kerala case as also the decision of the Madras High Court in *L.M.S. Sadak Thamby and Co. v. The State of*

Madras[21], However, the decision in Aryodaya Mills ([1960] 11 S.T.C. 141) turned upon the sales being of cotton waste, which was held to be a bye-product or a subsidiary product resulting from the process of manufacturing textile goods which was the business of the assessees there. We are unable to draw an analogy between the sales of such subsidiary product or bye-product, produced during the course of manufacturing process, and the sales of old and unserviceable or unsuitable assets. As regards the Kerala case, we have already stated that we are not in a position to agree with the conclusion arrived at in that case. The Madras decision, in our view, is not applicable to the facts of the present case, for, the question that fell for consideration there was whether the purchase of raw materials necessary for the production of the finished goods fell within rule 5(2) of the Madras sales Tax Rules and the question considered there was whether those purchases were made with a profit motive. The decision of the High Court of Madras was that they were so made because the purchases of raw materials in a case, such as the one before them, must be held to have been motivated by a profit motive, as those raw materials were essential for the making of the goods, the sales of which were in the course of business of the assessees conducted for acquisition of gain. Such purchases, therefore, would contribute to such acquisition of gain and therefore fell within the scope of rule 5(2). It is difficult to see how this decision can help or advance the contention of the learned Advocate-General. In our view, a sale of an asset, such as old machinery, cannot be regarded as one made with a profit motive or as one made in the course of business of a dealer. In such case, the initial or the original intention when its purchase was made to use it for making the goods, would remain unless circumstances are established which would offset the presumption that the intention was to use it for making goods rather than to sell it at profit

[21]([1963] 14 S.T.C. 753)

at some future date. When such an asset is sold, it cannot therefore be said to have been sold with a profit motive.

16. But the learned Advocate-General contended that whenever plant or machinery is sold by a trading concern, the excess or the deficit of the sale price, as compared to the depreciated value, is always credited or debited, as the case may be, to the trading account and it is, therefore, reflected in the profit or loss of the trading concern. The sale of plant or machinery, though capital assets, thus affects the profit or loss and it cannot therefore be said that there is no profit motive involved in the sale of plant or machinery. In our view, this contention is founded upon a misapprehension of the correct position. Since the plant and machinery are used for earning revenue and in the process they suffer depreciation, such depreciation is charged to the profit and loss account, for, as observed by Fletcher Moulton, L.J., in the case of *The Spanish Prospecting Company Limited In re*[22], cited with approval in *Ashokbhai Chimanbhai (H.U.F.) v. Commissioner of Income-tax, Gujarat*[23], profit is the difference between the state of business at two different points of time and if there is depreciation of capital assets in the interval, profit to that extent must stand reduced. If, therefore, plant or machinery is sold and the sale proceeds exceeds the depreciated value, obviously, such excess must go to augment the revenue, for the undebited depreciation which was charged to revenue would be found to be more than the actual

depreciation and vice versa. But merely because the excess or the deficit to the sale proceeds is credited or debited to the trading account and is ultimately reflected in the profit or loss, does not mean that the plant or the machinery is sold with a profit motive. For that, one has to see what were the circumstances in which the plant or the machinery was sold and what was the motive which operated on the mind of the seller in selling it. The fact that the excess or the deficit of the sale proceeds goes to the trading account is, therefore, not a relevant circumstance.

17. In our view, the test of volume and degree of frequency in the present case cannot be treated as a determinative factor, nor is it possible to hold that sales were made with any profit motive. The fact that sales tax was charged and collected by the mills from their purchasers also cannot be held to be conclusive. Even the learned Advocate-General conceded that that fact was only an indication that the mills themselves regarded the sales as having been effected in the course of business. It is possible, however, that the mills might have charged and collected sales tax either as and by way of abundant caution or through a mistaken belief that the sales would be liable to tax. In either event, it cannot be said to amount to estoppel or an intention clearly indicative of their having made these sales in the course of business, or their having treated them as a business activity. In our view, the view taken by the Tribunal of these sales was not correct. We are fortified in this conclusion by at least two decisions, one of the High Court at Bombay and the other of the High Court of Allahabad. In *Commissioner of Sales Tax v. Hindoostan Spinning and Weaving Mills Co., Ltd*[24]*.,* the question arose with regard to the sales by the assessees of one Roto Coner High Speed Warping Machine for a sum of Rs. 35,700. This was, however, not the only or the isolated sale effected by the assessee-company. The assessee-company carried on business as manufacturers of cloth and during the years 1953-54, 1954-55, 1955-56 and 1956-57, the company sold some of its old machinery

[22]([1911] 1 Ch. 92)

[23]([1962] 2 G.L.R. 78 at p. 82; 44 I.T.R. 41)

[24](S.T.R. No. 16 of 1962 decided on the 24th of April, 1963; since reported at [1964] 15 S.T.C. 69)

and replaced it by new machinery. It was urged by the learned counsel for the State that the sale of the old machinery by the company was in the course of its business activity, and in support of that contention, he relied upon the memorandum of association of the company which authorized the company to re-sell from time to time machinery and plant as the directors might think proper. The memorandum was also relied upon as showing that it permitted the company to carry on business, apart from their main business as manufacturers of cloth, in any other business which might seem to the company capable of being conveniently carried on and it also empowered the company to sell or dispose of the undertaking of the company or any part thereof, and it was contended that the sale of its old machinery could as well form part of the business of the company. The learned counsel for the State also contended that the sale of the Roto Coner High Speed Warping Machine was not an isolated transaction of sale, but that there had been a continuous course of transaction extending over several years during which old machinery worth considerable amount had been disposed of by the company, and that the sale of this particular machinery was one of the transactions of a series of transactions by the company during those several years. On behalf of the State, reliance was placed upon the test of volume and degree of

frequency of these transactions. The learned Judge held that the power contained in the memorandum of association to re-sell from time to time the company's plant and machinery or to carry on any other business or to sell or dispose of any part of its undertaking, was not sufficient to hold that any particular sale of old machinery was in the course of its business. They also held that though frequency, regularity and volume of transactions would no doubt be factors relevant and helpful in determining whether any particular transactions were in the course of business or not, the mere existence of this factors would not be themselves be sufficient to hold that the transactions were business transactions, and have approved the test laid down in *Commissioner of Sales Tax, Madhya Pradesh v. Ram Dulare Balkishan and Bros*[25]*.,* The true test was not whether the selling activity was continuous or repeated, but whether the selling activity was continuous or repeated, but whether the carrying on of continuous operations was with a view to earn profit. They also observed, reiterating what they had said in *A. Ebrahim & Co. v. State of Bombay*[26]*,* that if the sale in question has a reasonable connection with the nature of the business carried on by a dealer, then such a sale can be said to be in the course of his business. But if there is no such reasonable connection between the sale effected and the nature of the business carried on by the dealer, then the sale cannot be said to be in the course of the business of the dealer, and the sale proceeds cannot be included in his turnover. They relied upon the two findings given by the Tribunal, (1) that the sale of the old machinery by the assessees had been done with a view to replace it by new machinery, the old machinery having become unserviceable or less serviceable, and (2) that the sale of the old machinery and its substitution by a new one was not the business of the assessee, thought the transactions were necessary for the effective carrying on of their business, and held that the sale in question, though it was an item of several such sales, could not be said to have been done in the course of business activity, and therefore the assessees would not be a dealer as regards the transaction in question. They there observed :-

> "The business of the respondent-company was the manufacture of cloth. For the said business the company had from time to time replaced its old and

[25]([1963] 14 S.T.C. 202)
[26] ([1962] 13 S.T.C. 877)

> unserviceable machinery by new machinery. Although such replacements of the old machinery by new machinery may have been necessitated for the purposes of the business of the company the disposal of the old machinery for the purposes of replacing it by new machinery cannot be said to be a part of the business of the respondent-company."

The facts and circumstances in the case before the High Court at Bombay were substantially similar to the facts and circumstances before us and, as we have already stated, the decision referred to above considerably fortifies the conclusion which we have arrived at. The Allahabad decision in *Mining and Chemical Industries v. Commissioner of Sales Tax*[27]*,* also concerned with the sale of machinery and the conclusion arrived at in that case also was the same as in the

Bombay case. It is true that the machinery there was sold for the purpose of liquidating the debts of the company, the businesses of which, both chemical and mining, were closed, and it was therefore held that there was no profit motive behind those sales. In principle, however, it makes no difference whether the machinery is sold for the purpose of wiping off the debts of the company or whether it is sold because such machinery is either old or unsuitable or unserviceable.

18. For the reasons aforesaid, our answer to the question referred to us is in the negative. The State will pay to the petitioners the costs of this reference.

Answer Accordingly.

[27]([1963] 14 S.T.C. 391)