
(1998) 10 AP CK 0026

In the Andhra Pradesh High Court

Case No : TRC No. 144 of 1996 and WP No's. 23827 of 1996, 9490 of 1998 and 9506 of 1998

Coromandal Fertilisers Limited, Sec"bad

APPELLANT

Vs

State of A.P. and others

RESPONDENT

Date of Decision : 30-10-1998

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 2, 2(1), 5
Andhra Pradesh General Sales Tax Rules, 1957 — Rule 6, 6(1)
Companies Act, 1956 — Section 173
Constitution of India, 1950 — Article 366(29A)
Gift Tax Act, 1958 — Section 5(1)
Income Tax Act, 1961 — Section 10(1), 2(4)

Citation : (1998) 6 ALD 752 : (1998) 6 ALT 730

Hon'ble Judges : P. Venkatarama Reddi, J; Krishna Saran Shrivastav, J; A. Hanumanthu, J

Bench : Full Bench

Advocate : Mr. C. Natarajan, for P. Srinivasa Reddy, M/s. P. Chidambaram, Pallavi Shroff, V. Venkataramana and T.S. Murthy, for Vedula Venkata Ramana, for the Appellant; Spl. Government Pleader for Taxes, for the Respondent

Judgement

P. Venkatarama Reddi, J.—This Tax Revision Case and the writ petition are before us pursuant to the reference made to the Full Bench by a Division Bench consisting of M.N. Rao, J (as he then was) and T.N.C. Rangarajan, J., before whom these cases came up for hearing initially. Seriously doubting the correctness of the Division Bench decision of this Court in Coromandel Lubricants Vs. Commissioner of Commercial Taxes, Andhra Pradesh, , and expressing their prima facie view of the issue involved, the learned Judges framed the following question for answer by the Full Bench:

"Whether in a transaction of sale of an undertaking as a going concern with all assets and liabilities for a lump sum without stipulating any price for individual items, the assessing authority could consider that there was a sale of goods within the meaning of Section 2(n) read with Sections 2(h) and 2(s) for charging

the same to tax u/s 5 of the APGST Act."

2. After referring to the definitions of "goods", "sale" and "turn-over" and the charging Section of the Act, the learned Judges observed as follows:

"A conjoint reading of the above three provisions leads to the prima facie conclusion that in respect of sale of a going concern with all its assets and liabilities comprising movables and immovables including stock in trade and other goods, no sales tax could be levied on the value of the stock in trade and other goods as if the transaction was one of sale of goods, especially when the sale-deed does not mention separate price for these items. Further, what was intended to be sold was not goods or other stock in trade but the concern in its entirety. In other words, the transaction is one of winding up of business. After the sale of the business, the assessee would no longer be continuing its business transactions."

3. The learned Judges referred to the decision of the Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), .

4. The relevant facts leading to the filing TRC and the writ petition by the same assessee are as follows: the petitioner-Company, which started its business of manufacturing and sale of fertilisers in 1966 also set up a cement manufacturing plant at a different place in the year 1982. Thus, at the material point of time, the petitioner was owning and managing a fertiliser division and a cement division. Having found that the cement division became economically unviable and that it would be in the best interests of the company to sell the cement division as a whole, issued tender notice on 2-4-1990 inviting offers for the purchase of the undertaking comprising cement division as a going concern on "as is and where is basis". Pursuant thereto, the India Cement Limited made an offer on 23-4-1990 for the purchase of the cement division undertaking as going concern. It culminated into an agreement entered into between the petitioner and India Cement Ltd., on 9-6-1990. The preamble to the Agreement says that the vendor had agreed to sell and the purchaser had agreed to purchase "for the consideration and upon the terms and conditions hereinafter set out, the entire undertaking of the vendor comprising its cement division as a going concern on "as is and where is" basis. The Agreement defines the "undertaking" as the operations and activities of the Cement Division of the vendor as a going concern including:

(1) The Cement plant and the free-hold lands and the premises situated in Chilamkur village, Cuddapah district together with all buildings and structures constructed thereon;

(2) The mines and mining leases on or in respect of the said land;

(3) All plant, machinery, equipments, capital work in progress, vehicles, furniture and fixtures;

- (4) All plant, machinery both at the factory site and at the vendor's divisional office at Secunderabad;
- (5) Net current assets as defined in the agreement;
- (6) All the industrial and other licences held by the vendor relating to the cement division;
- (7) Trade mark and brand name owned by the Vendor;
- (8) The good-will and other intangible assets;
- (9) The benefits and obligations of current and pending contracts subject to the purchaser's option to be exercised by a specified date.

5. It was agreed that all the employees would be taken into service by the purchaser from the transfer date. The consideration for sale and transfer is Rs. 105.30 crores excluding the sum equivalent to the value of the net current assets as determined in the manner set forth. The said consideration was payable in certain stages. Rs. 5.27 crores is the advance amount paid at the time of execution of the Agreement. Balance amount of Rs. 100.03 crores as reduced by the amount of secured loans outstanding as on the transfer date was payable by the specified date. It is the case of the petitioner that a total sum of Rs. 35 crores was received after deducting the amount due towards secured loans and no break-up price or value was fixed for the individual items, or for various items of movable properties. However, a deed of sale and transfer was executed on 29-11-1990 in respect of the immovable properties viz., lands and buildings and the consideration mentioned in the said deed is a sum of Rs. 27.07 crores. The said sale-deed was got registered as it was necessary to convey the title.

6. While filing a return for the month of November, 1990 the petitioner annexed a "rate" thereto disclosing the factum of transfer of the cement undertaking on "as is and where is" basis and the consideration therefor. It was pointed out in the note that no part of the sale consideration is exigible to tax as the sale was in the course of winding up of the undertaking comprising cement division and not in the course of business. It was also pointed out that it is a solitary transaction and the company had no intention to sell or resell the plant when it was constructed. Reliance was placed on reported decisions. After a show-cause notice, the assessing authority made a provisional assessment including a sum of Rs. 81.71 crores in the taxable turnover for the year 1990-91 and a tax of Rs. 7.02 crores was demanded. On appeal the provisional assessment order was set aside without going into the merits and the assessing authority was directed to make final assessment after a thorough discussion of the material facts and issues. Thereafter final assessment order was passed on 23-2-1993 by the Commercial Tax Officer including Rs. 81.71 crores in the taxable turnover and levying tax of Rs. 6.84 crores. On appeal, the Appellate Deputy Commissioner, instead of deciding the matter himself, thought it fit to remand the case of the assessing authority with certain directions - some of which seem to be

superfluous. Against this order of remand the petitioner preferred an appeal. While the appeal was pending the assessing officer proceeded to make the assessment in terms of the remand order in the absence of stay by the Tribunal. On 29-1-1994, the Commercial Tax Officer passed the assessment order accepting the contention of the petitioner-Company. On 18-7-1995 a notice proposing to revise the order dated 29-1-1994 passed by the assessing authority was issued by the Deputy Commissioner. At this stage when the appeal came up for hearing before the Tribunal, an application was filed by the Department praying for dismissal of the appeal on the ground that it became infructuous. That petition was dismissed by the Tribunal on 18-3-1996. Thereupon the State filed a writ petition in this Court in WP No.7734 of 1996. The writ petition was dismissed at the admission stage and the Tribunal was directed to dispose of the appeal. Accordingly, the Tribunal passed UK impugned order in TA No.25 of 1994 on 29-8-1996.

7. The Sales Tax Appellate Tribunal after referring to the relevant clauses in the Agreement and the sale-deed, found that it was a case of sale of the business as a whole for a lump sum consideration. The Tribunal observed that "there were no separate agreements for sale of the individual items of movable properties. It was however, observed that the parties must have separately evaluated the individual items. Relying upon Rule 6(1)(h) of APGST Rules and the Division Bench decision of this Court in *Commanded Lubricants* (supra), it recorded the conclusion that "the sale proceeds of the Cement Division of Coramandal Fertilisers Ltd., (so far as they relate to movable properties) fall within the definition of turnover being sale of movable property."

8. So holding, the order of the Deputy Commissioner was set aside and the assessing authority was directed to make a fresh assessment after examining "which of the movable properties sold by the appellant are liable to be taxed and at what rate". The assessing authority was directed to evaluate the movable properties sold, taking into account the evaluation that might have been made by the vendor and the vendee. It is this order of the Tribunal that has been questioned in the Tax Revision Case filed by the assessee. The assessee has also filed a separate writ petition questioning the vires of Rule 6(1)(h) of the APGST Rules and also seeking a declaration that the said Rule has no application to the sale of the business as a whole as a going concern. It is submitted by the learned Counsel for the petitioner that the writ petition has been filed by way of abundant caution.

Facts in WP Nos. 9490 and 9506 of 1998:

In these two writ petitions the provisional assessment order passed by the first respondent namely the Assistant Commissioner of Commercial Taxes (INT), Hyderabad (Rural) Division has been challenged by the two Companies which were parties to the transaction resulting in the transfer of the entire soft drink business undertaking including a bottling plant at Secunderabad. The petitioners seek a writ to declare the provisional assessment order and the consequential

demand notice dated 23-1-1998, the penalty notice issued on the same day and the attachment order dated 24-3-1998 as illegal and unconstitutional and for a further declaration that the sale/transfer of a business as a going concern on slump sale basis is not liable to be taxed under the provisions of the APGST Act. The petitioners also questioned the vires of Rule 6(1)(h) of the APGST Rules in case the Rule is so interpreted as to empower the Sales Tax Authorities to levy tax on such transfer/ sale.

9. It may be mentioned here that the provisional assessment order was passed ex parte against the petitioner in writ petition No.9490 of 1998 while declining to grant three days time sought for by the petitioner. As the rejection of such request in the facts and circumstances of the case amounts to denial of reasonable opportunity to the petitioner to present its case, the impugned assessment order is liable to be quashed on this short ground. However, when the matter came up for admission before a Division Bench consisting of two of us on 7-4-1998, a case in which more or less similar issues are involved was being heard by the this Full Bench. Hence, the learned senior Counsel appearing for the petitioners made a request to have this matter before the Full Bench so that he could supplement the arguments advanced in TRC No.144 of 1996 which came up before Full Bench on reference by another Division Bench. Accordingly, on the orders of the Hon'ble the Chief Justice, these two petitions have also been placed before the Full Bench. Both the parties have invited a decision on merits obviously because substantially similar issues are in any case pending consideration by the Full Bench and the decision on which the assessing authority placed reliance in the instant case has been doubted by the Division Bench which made the order of reference to the Full Bench.

10. The petitioner in writ petition No.9490 of 1998 (hereinafter referred to as the petitioner) is a Public Limited Company owning a plant at Secunderabad to bottle and distribute non-alcoholic beverages under a licence from the Coca-cola Company based in USA. On 19-9-1997, a Business Sale Agreement was entered into between the petitioner and M/s. Bharat Coca-Cola Bottling South East Private Limited (Petitioner in Writ Petition No.9506 of 1998) which is described as buyer in the said Agreement. The buyer's company was promoted by Bharat Coca-Cola Holdings which is also a party to the agreement in order to take over the undertaking owned by the petitioner. The Agreement refers to a Memorandum of Agreement dated 23-9-1997 whereunder the seller agreed to transfer the entire soft drink beverages business and undertaking as a going concern to the buyer on "slump sale basis". In continuation of the said Agreement, the Business Sale Agreement was entered into on 19-9-1997 whereunder the buyer agreed to purchase soft drinking beverage business assets and to issue equity shares to the seller in consideration of the transfer of business in addition to cash payment. The term "acquired business" is defined to mean "all of the seller's right, title and interest as of the First Stage or the Closing, as the case may be, in and to the soft drink business undertaking of Seller including the following:

- (i) the Acquired Business immovable Properties;
- (ii) the Acquired Business Contracts;
- (iii) the Acquired Business Movable Property;
- (iv) the Acquired Business Books and Records;
- (v) all Clearances which are transferable; (vi) all customer files, supplier lists etc.;
- (vii) all insurance policies relating to the Acquired Business and the proceeds of insurance claims;
- (viii) all rights of the seller arising out of any confidentiality agreement entered into with any employee or consultant.

11. Acquired Business Movable Property means "all such movable properties including equipment which has been immobilised as are listed in Schedule 1.1. (E).

12. Buyer's total consideration is defined to mean "the sum of buyer's cash consideration and buyer's share consideration in the total amount of Rupees fifty six crores and twenty three lakhs payable for the Acquired Business and for its good-will, the non-complete agreements and relinquishment of rights under the listed contracts". Buyer's Share Consideration means equity shares upto Rs.21.23 crores issued and allotted for consideration other than cash by buyer to seller at or prior to the closing for sale of the Acquired Business. Briefly stated, Buyer's cash consideration represents the difference between the buyer's total consideration and buyer's share consideration subject to the adjustments as per Article III. Clause 2.3 Article II requires the petitioner-Company (seller) to authorise the purchaser to issue its fully paid up shares for consideration other than cash upto 24.5 per cent of the issued share capital. On the transfer of the Acquired Business, the petitioner-Company is required to accept such issue and allotment of shares as consideration for the transferred business. Clause 2.4 says:

"Subject to the terms and conditions of this Agreement, Spectra will make a capital contribution to Bharat Bottling and as a credit sale shall convey, transfer and assign the Acquired Business to Bharat Bottling as set forth in Article III in this Agreement. The consideration for such capital contribution and credit sale is as set forth in Article III of this Agreement. The credit shall be set off and adjusted upon final issue and allotment of shares in accordance with Article III."

13. The Agreement sets out two stages for the fulfilment of mutual obligations. What is required to be done at the first stage and at the closing stage by the seller and the buyer are set out in Articles III and IV.

14. Clause 3.7 envisages the sale, assignment transfer and delivery of the seller's right, title and interest in the acquired business so that the acquired business in its entirety and the employees are transferred to the buyer at the

closing, subject to the satisfaction of the conditions set forth in Article IV. In clause 5.6, it is stipulated that the seller will convey to the buyer all of its right, title and interest in all the acquired business movable property free and clear of any charges and encumbrances and "following delivery of the acquired business movable property by the seller to the buyer, the buyer shall have good and marketable title to such property". Clause 7.18 requires the seller at or after the closing, to effect the registration of all the acquired business immovable properties that are subject to registration under the Registration Act. Accordingly, a deed of conveyance was executed by the petitioner-Company in favour of the buyer company on 26-12-1997 in respect of the land, buildings and structures situate at 44-6 P, Moulali, Hyderabad. The said immovable property was valued at R.15 crores which represents the consideration for the transfer of such property.

15. It is stipulated in Clause 7.12 that the immovables and movables listed in Schedules 1.1(d) and 1.1(e) respectively is an illustrative and not an exhaustive list of the items to be conveyed by the seller to the buyer pursuant to the Agreement and therefore the seller agrees to convey any other unlisted items of property essential and integral to the use of such movable or immovable properties without further consideration.

16. There is no more clause which needs to be mentioned. Clause 7.14 contemplates an inventory of the Acquired Business on or about the closing date to be taken by Botliboi and Co., auditors of the buyer so that it may be reflected in the closing balance-sheet. The other clauses in the Agreement are not relevant for our purpose.

17. The assessing authority, after referring to the Business Sale Agreement observed as follows:

"A perusal of such business sale agreement copy dated 19-9-1997 revealed that M/s. Spectra Bottling Company Limited had to transfer their whole soft drink beverage business and undertaking as a going concern to the buyer M/s. Bharat Coca-Cola Bottling South East Private Limited, consideration of Rs.56.23 crores on or before 30th November, 1997 after getting permission and approvals from Income Tax Department and all other clearances- The above sale consideration of Rs.56.23 crores included "Good-Will". A perusal of the records of Spectra Bottling Co. Ltd., reveal that the actual business transfer was completed by 25-12-1997 and indicated the following closing stock" value position as on 26-12-1997 which have become opening stock to M/s. Bharat Coca-Cola South East Ltd., and these transfer turnovers are liable to be taxed at different rates under the APGST Act."

18. It may be mentioned that finished goods (soft drinks) were not included in the turn-over. Placing reliance on Rule 6(1)(h) and the decision of this Court in Coramandal Lubricants (supra), assessment was made subjecting to tax various items of equipment, stores and spares, vehicles, raw material and even good-will at different rates and a demand was raised for Rs.6.30 crores. The value of each

item of movable assets was fixed on the basis of closing stock value as on 25-12-1997. Good-will was also taxed probably because it was not separately specified in terms of Rule 6(1)(b). It is interesting to note that the value of immovable properties was taken as Rs.1,87,51,417/-though as per Conveyance deed relied upon by the Department itself, the consideration is Rs.15 crores.

19. The contentions advanced by the learned senior Counsel Mr. C. Natarajan in the first case and Mr. P. Chidambaram in the second case are substantially the same and are overlapping. The contentions common in both the sets of cases are summarised below: In the cases on hand, there is no sale of goods either in the sense in which the sale is understood under the Sale of Goods Act or in the sense of "deemed sales" contemplated by Article 366(29-A) of the Constitution. What was sold or transferred is the business or undertaking as a whole. The agreement is in respect of an amalgam of items not confined to movables alone. There was no agreement to sell movables nor was the ascertainment of price or even valuation of goods provided for or intended under the agreement. The property in the goods does not pass pursuant to an agreement to sell them, but it passes only pursuant to an agreement to sell an undertaking or unit as a whole consisting of movable, immovable and even intangible assets. The Agreement cannot be split up and the materials cannot be attributed a price on some notional basis. To do so would amount to making out a new contract or creating a different legal relationship between the parties. The transfer of business as a going concern is a distinct specie of transaction different from a sale under the contract of sale. The scheme of the Act also recognises the transfer of business in contra-distinction to the transfer of goods belonging to the business concern. In any case, the transfer of property in the goods is not in the course of business. The dealer to be taxed under the APGST Act must be a person carrying on business and a sale to be taxed must be a sale in the course of business. These criteria are not satisfied because an act to put an end to existing business whether it be one line of manufacture or the whole undertaking is not in the nature of business, even according to the extended definition of business u/s 2(bbb). The sale of goods if any for the purpose of winding up the business activity cannot be treated as one connected with or incidental or ancillary to the trade, commerce or manufacture. The element of continuity and frequency are also lacking in the present case and these ingredients are still relevant. Rule 6(1)00 of the APGST Rules has to be read down, if not, it derogates from the scheme of the Act and gives rise to a liability not contemplated by the Act itself. Rule 6 applies only when the sale proceeds can be considered to be turn-over. It is not meant to amplify and expand the concept of turn-over. The decision of the Court in *Coromandal Lubricants* (supra) is distinguishable.

20. The learned Government Pleader Mr. M. Ramaiah has refuted the above contentions. He argued: Although the transfer is of an entire undertaking in one case and one of the Divisions in another case, all the ingredients necessary to give rise to a contract of sale of goods are present in the instant case. Merely the fact that price is not fixed is not decisive. As the Tribunal observed, the parties would

have as prudent persons valued the movable assets before striking the bargain. The fact that a separate conveyance deed is executed for immovable properties and the details of movable properties in which the property passed are set out separately in the Agreement makes it clear that there was an agreement in respect of movable properties as well pursuant to which the property therein passed for consideration. In the case of Spectra Bottling Ltd., the Agreement contemplates valuation of all assets by the buyer's auditor before the closing date (vide clause 7.14). The non-specification of price may be only a colourable device to avoid the tax. The agreement throughout speaks of "purchase and sale". The Agreement can be split up. On the question whether the transaction amounts to business activity within the meaning of Section 2 (bbb), it is submitted by the learned Government Pleader that it falls within the second limb of the definition because the sale of movables in the process of sale of entire undertaking or division is a sale connected with the trade or commerce in which the seller was engaged and at any rate it is incidental or ancillary to such activity. The sale of fertilizer division by Coramandal Fertilizers is certainly in the course of business because it is incidental to the business still being carried on by the assessee. It would go to improve the assessee's existing business. The decision in Mugneeram (supra) relied upon by the reference Bench has no application at all and the said decision has been explained in Commissioner of Income Tax, Gujarat Vs. M/s. Artex Manufacturing Co., . The decision in Coramandal Lubricants (supra) according to the learned Government Pleader, rests on a sound ratio and squarely applies to the facts of the present case.

21. Before proceeding farther, an insight into the relevant provisions more especially the definitions of "sale", "dealer" and "business" have to be noticed. The relevant portion of Section 2(n) which defines "sale" is extracted hereunder:

"Every transfer of the property in goods (whether as such goods or in any other form in pursuance of a contract or otherwise) by one person to any other in the course of trade or business, for cash for deferred payment or for any other valuable consideration....."

22. The bracketed words and the transactions brought within the purview of sale by some of the Explanations appended to Section 2(n) are meant to cover non-conventional sale transactions which are now specified in clause 29-A of Article 366 introduced by the Constitution 46th Amendment Act. We may recall that before the inclusive definition of the "tax on sale or purchase of goods" was introduced by the 46th Amendment, the expression "sale of goods" occurring in Entry 48 of list II of the Government of India Act was construed by the Supreme Court in the classical case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , as a term of well-recognised legal import in the general law and bears the same meaning as in the Sale of Goods Act. The expression "sale of goods" in Entry 48 was described as "Nomen Juris", its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. It was held in that case that in a building contract

which is entire and indivisible, there is no sale of goods as there could be no agreement to sell materials as such and more over, the property does not pass as movables. In order to enlarge the concept of sale and to ann the State Legislatures and Parliament with power to tax the transactions simulating sales but not conforming to the concept of sale obtaining under the Sale of Goods Act, Clause 29(A) was inserted in Article 366 by the 46th Constitutional Amendment. The Andhra Pradesh State Legislature fell in line with this amendment and changed the definition of sale so as to bring within the tax net the transactions which are not *Stricto Sensus* sales as per the law laid down in *Gannon Dunkerley* (supra). However, as far as the present cases are concerned, it is nobody's case that the disputed transaction of the sale of entire business falls within the scope of expanded definition of sale. The question is whether in the instant case there was sale of movables, understanding the expression "sale" as per the Sale of Goods Act. However, we do not consider it necessary to deal with this controversial issue though the question as formulated by the Division Bench seeks an answer to this question. We feel that the answer to another allied and equally crucial question will facilitate disposal of these cases, without going into the first question.

23. In order to highlight the issue which we propose to address ourselves in extenso, it is necessary to note that the Act ordains that transfer of property in goods for valuable consideration must be "in the course of trade or business" (vide Section 2(n)). This is so because the incidence of tax falls on a dealer who "carries on the business of buying, selling supplying or distributing goods" (vide Section 2(c)). A sale by a person who carries on the business of buying, selling etc., and a sale in the course of business are the twin indispensable requirements to attract the charge of tax under the APGST Act. The crucial question then is whether these requirements are satisfied. Is there an element of business present in these disputed transactions? Assuming there was a sale of goods, did such sale take place in the course of business and by a person who carries on the business of buying and selling goods?

24. The expression "business" was not defined till the year 1966. However, an inclusive definition of business was added to the APGST Act by an amendment brought about with effect from 1-4-1996. Though it purports to be an inclusive definition, for all practical purposes, it is an exhaustive definition. Section 2(1) (bbb) defines business as follows:

"(i) Business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and

(ii) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern".

25. Prior to the introduction of this definition, the traditional and normal connotation of the term "business" as explained by Supreme Court in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, was holding the field and "business" was being understood in its generic sense. The intention to carry on business was inferred from the nature of transaction, that is to say, whether it had a commercial thrust in it backed up by profit motive. In *Raipur case (supra)*, the question arose whether the assessee engaged in the business of manufacturing and selling cotton textiles can be said to be carrying on business of selling discarded and unserviceable materials such as old iron scrap, rags etc., the Supreme Court answered the question in the negative. What constitutes business was explained in the following terms by Shah, J., speaking for the Supreme Court:

"The expression "business" though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business, there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. By the use of the expression "profit motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive that pervades the whole series of transactions effected by the person in the course of his activity. In actual practice, the profit motive may be easily discernible in some transactions; in others it would have to be inferred from a review of the circumstances attendant upon the transaction"".

The Supreme Court proceeded to say:

"Where a person in the course of carrying on a business is required to dispose of what may be called his fixed assets or his discarded goods acquired in the course of the business, an inference that he desired to carry on the business of selling his fixed assets or discarded goods would not ordinarily arise. To infer from a course of transactions that it is intended thereby to carry on the business, ordinarily, the characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transactions must exist. But no test is decisive of the intention to carry on the business; in the light of all the circumstances, an inference that a person desires to carry on the business of selling goods may be raised".

It was then observed after referring to the Revenue's contention:

"But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly from the frequency, volume, continuity and

regularity of transactions carried on with a profit motive, an inference that it was intended to carry on business in the commodity may arise.

xxxx xxxx An attempt to realise price by sale of surplus, unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to the inference that business is intended to be carried on in selling those goods".

26. As regards the subsidiary or byproducts viz., kolsi and waste caustic liquor turned out in the factory regularly and continuously and sold from time to time, an intention to carry on business was inferred and the assessee Company was held liable to pay sales tax.

27. The first and foremost test applied in Raipur case (supra) is the test of profit motive which has been dispensed with by the definition of "business" introduced in the year 1966. The second test is whether the transactions were carried on with frequency, continuity and regularity, thereby excluding from the net of taxation, isolated transactions which are not integral or incidental to the usual business activity. The ultimate test was held to be whether there was intention to carry on business of selling the goods sought to be sold.

28. We may mention that the test of frequency, continuity had its origin in the vintage decision of CIT v. Shaw Wallace and Co., 59 IA 206 . It was observed by the Privy Council while construing the definition of "business" in Section 2(4) of the old Income Tax Act "By Section 2 sub-section (4), "business" includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity."

29. The reasoning and the ratio in Raipur case (supra) was applied and followed in two decisions rendered at or about the same. In State of Gujarat v. Vivekananda Mills, 19 STC 103 it was observed and held as follows:

"Here is a case in which bales of cotton were agreed to be purchased, because they were needed for the purpose of the business of the respondents. When they were received in pursuance of the agreement, the respondents had a large quantity of similar goods which they had purchased from another source. Holding up of the bales of cotton obtained would have meant locking up a large amount of money. If in those circumstances the respondents sold the cotton bales, it cannot be inferred that the sale was with the intention to carry on business of selling cotton".

30. Yet another case which closely follows that line of reasoning in Raipur (supra) and Vivekananda Mills (supra), is the judgment of Supreme Court in State of Madras Vs. K.C.P. Ltd., . In that case, the assessee-Company carried on the

business of manufacture and sale of machinery and machinery parts. It purchased two arc furnaces for the purpose of using the same in its foundry. The furnaces were found to be unsuitable and therefore they were disposed of for a loss. The Supreme Court held that in disposing of unserviceable or unsuitable fixed assets, an intention to carry on the business of selling them does not ordinarily arise. One of the crucial observations made therein is:

"there is no material whatsoever to show that there was any intention at the time when the furnaces were purchased of selling them at a profit".

31. This decision focusses the attention on yet another test as regards the intention of the assessee at the time of acquiring the goods. The test so laid down in the three decided cases cited above cannot be placed in watertight compartments nor can they be regarded as mutually exclusive.

32. We have referred to the pre-definition cases to outline the historical development of the law. These decisions have lost much of their relevance after the inclusive definitions have been introduced in the APGST Act and similar other Sales Tax Acts of other States. But, even now, they do have some bearing in a limited sphere and the first principles of business laid down therein may very well cover certain grey areas.

33. Now, the decisions which interpreted and applied Section 2(1) (bbb) of the APGST Act and analogous provisions in other States Acts deserve notice. In *The Hyderabad Asbestos Cement Products Limited and Another Vs. The State of Andhra Pradesh and Others*, the question arose whether sales of food-stuffs in the Worker's Canteen can be said to be in the course of business. The Division Bench speaking through Chinnappa Reddy, J., repelled the contention that even if profit motive was not an ingredient of business, it must still be established that the assessee intended to do business in food and beverages before it could be subjected to levy of sales tax. The learned Judges stressed the word "such" occurring in the second clause of the definition and observed that it obviously referred to the trade, commerce, manufacture, adventure or concern mentioned in the first part of the definition of which a motive to make gain or profit is not an essential requisite. It is impermissible to hold, according to the learned Judges, that there is no business in the commercial "sense of "business" with a motive to make profit when such motive has been expressly declared unnecessary by the legislature. In their Lordship's view, under both parts of the definition, profit motive is now immaterial and the concept of business in the commercial sense put forward in the earlier cases must be abandoned even as regards the second clause. The learned Judges dissented from the view taken by the Madras High Court in *Deputy Commissioner of Commercial Taxes, Coimbatore Division Vs. Sri Thirumagal Mills Limited*, wherein the question was whether the goods sold to the employees at the fair price shop maintained by the Mills was in the course of business. It was observed that the Madras High Court did not pay sufficient attention to the word "such" occurring in the second part of the definition.

34. The view taken by this Court in Hyderabad Asbestos (supra) was approved by Supreme Court in the case of State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, . In this case, the Supreme Court was dealing with the question whether in the light of the amended definition of "business" introduced in Madras General Sales Tax Act in the year 1964 which is similar to the APGST Act, periodical sales of scrap and unserviceable items and advertisement materials amounted to business. Relying on the second part of the definition "business", their Lordships held that the sales of scrap as well as advertisement materials at cost price was connected with the business of the assessee and the turnover in respect of those commodities was exigible to tax.

35. Following the ratio of the above decision, it was held in State of Tamil Nadu Vs. Binny Ltd., Madras, , that the sales of goods effected at the Stores maintained by the asscsce Company although it was by way of welfare measure still amounted to an activity incidental to the main business of the Company and therefore liable to be taxed.

36. Bhagwati, J., speaking for the Supreme Court succinctly expressed the ratio of the decision in Burma Shell case (supra) in the following words:

"This Court observed in the Burma Shell case, (supra), that for the purpose of attracting the applicability of clause (ii) of Section 2(d), it was not necessary that the transaction in question must partake of the characteristics of business, but it was sufficient if it was "in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern". The word "such" in clause (ii) was in the opinion of the Court, referable to trade, commerce, manufacture, adventure or concern referred to in clause (i) and if there was in existence some trade, commerce, manufacture, adventure or concern falling within clause (i), any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern, would constitute "business" within the meaning of clause (ii), even though the transaction by itself may not have the characteristics of business as understood in ordinary parlance."

37. The next decision which merits mention is that of The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, . After referring to the definition of "business"; in Rajasthan Sales Tax Act similar to the one introduced in APGST Act, the Supreme Court observed that the activity involved in selling scrap iron and unserviceable material by the Railways would constitute business both under the first and second parts of the definition. Mathew, J., observed:

"So even if it be assumed that the activity involved in selling unserviceable material and scrap iron etc., would not amount to carrying on business in the normal connotation of that term, it would be business within clause (i) as introduced by the Amending Act."

It was further observed:

"We also think that there is no fallacy in thinking that the Railway since it is concerned in the activity of transportation is engaged in commerce within the meaning of clause (i) of the definition and that the sale of unserviceable materials and scrap iron etc., is a transaction in connection with or ancillary to such commerce within the clause (ii) of that definition".

38. The concept of incidental or ancillary activity is further illustrated by another decision of Supreme Court in *State of Tamil Nadu Vs. Shakti Estate, Tamil Nadu*, . In that case, the assessee took on lease certain area from the Forest Department for the purpose of raising coffee and cardamom plantations. For this purpose, the assessee had to clear a portion of the forest growth and in the process to fell the unwanted trees standing thereon. The resultant firewood was sold from time to time and at times after converting the same into charcoal. Cut sizes of timber derived from the fallen trees were also sold. The Supreme Court viewed these activities as incidental and ancillary to the business which the assessee was carrying on or intended to carry on irrespective of the fact whether the assessee had a profit motive or not. Apart from that, the Supreme Court observed that the task undertaken by the assessee was really one in the nature of a venture to carry out sustained, systematic and organised activities in the nature of business which commenced right from the beginning when the assessee went in for the land with a view to develop it. The Supreme Court observed:

"Taken all together, one is left in no doubt that when the assesses went in for a purchase or lease of the forest for starting a plantation they also knowingly let themselves in for engaging in a trade in the forest produce."

39. There is one more important case which we would like to refer to. It is the decision of the Supreme Court in *Board of Revenue and Others Vs. A.M. Ansari and Others*, . There, one of the questions that arose was whether the Government can be said to have been carrying on business of selling the forest produce derived from its own forests. After referring to the observations in *Raipur case* (supra), the learned Judges held that even according to the amended definition of business, the Government was not a dealer carrying on the business of selling forest produce. The reasoning of their Lordships is this:

"As the consideration of profit motive cannot be regarded as an essential constituent of the term "business" in view of the amendment introduced in the definition of the term "dealer" in 1966, what we are left to consider is whether the other ingredients of the term "business" viz., volume, frequency, continuity and regularity of transactions of sale and purchase are satisfied in the instant cases. The auctions of the forest produce by the Government of Andhra Pradesh are admittedly carried on only annually and not at frequent intervals. Thus the important element of frequency being lacking in the instant cases, it cannot be held that the said Company was carrying on business of sale of forest produce."

40. After laying down the law in the above terms, their Lordships went on referring to the decisions wherein it was held that in selling standing trees grown

spontaneously in the forest and the forest produce or agricultural products grown on one's own land, the seller was not engaged in any business activity. It may be noticed that these decisions were rendered "de hors" the definition of "business" adverted to above. How exactly those decisions retain their relevance in the context of the enlarged definition of business has not been elucidated by their Lordships. However, suffice it to notice that the ratio of the decision in Ansari 's case rests on the application of frequency or regularity test which is one of tests enunciated in Raipur case (supra) and which test, according to the Supreme Court, is still relevant.

41. Having had a conspectus of the decided cases prior to and after the introduction of the definition of "business" dispensing with the element of profit motive and bringing in incidental transactions within the fold of business, we shall now proceed to examine one of the crucial questions before us i.e., whether in selling its entire movables including fixed assets as a part of disposal of the entire business or entire unit, the two assessees herein fit into the description of "dealer" and whether they must be deemed to have carried on business activity?

42. We think it appropriate to deal with the above question separately with regard to each of the two petitions. First, we take up the case of M/s. Spectra Bottling Co., which sold the entire soft drink business undertaking as a going concern. We do not think that the sale of movables involved in such transaction - assuming that there was sale in the eye of law, can be regarded as a sale in the course of business, nor can we treat the seller as having been engaged in any business activity in disposing of the entire undertaking including movables and immovables and all other properties. The transfer of property in goods as an integral part of the Agreement is not "in the course of business" for the obvious reason that the Assessee - Spectra Bottling Co., wants to put an end to its entire business and cease to do the trade or manufacture.

43. The phrase that precedes the expression "business" in Section 2(n) is "in the course of. In the context of Article 286(1)(b) of the Constitution, the Supreme Court in State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, , had an occasion to consider the meaning of the expression "in the course of. It was pointed out that the word "course" denoted movement from one point to another and the expression "in the course of implied not only a period of time during which movement was in progress but also postulated a connected relation. "A sale in the course of export out of the territory of India should be understood as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country, but also as part of or connected with such activities."

44. In Commissioner of Gift-Tax, Kerala Vs. P. Gheevarghese, Travancore Timbers and Products, , the Supreme Court construed the expression "in the course of carrying on business" occurring in Section 5(1)(xiv) of the Gift Tax Act. After referring to Travancore-Cochin case (supra) their Lordships observed that the expression "in the course of carrying on business" means that the gift should

have some relationship with the carrying on of the business. If a donor makes a gift only while he is running the business, that may not be sufficient to bring the gift within the first part of Clause (xiv) of Section 5(1) of the Act. It must further be established, to bring the gift within that provision, that there was some integral connection or relation between the making of gift and the carrying on of the business.

45. Applying the dicta laid down in these decisions, one has to ask himself the question whether there was integral or even incidental connection between the transaction evidenced by the Agreement and the carrying on of the business. We find it difficult to perceive any such connection when the assessee effects a sale not for the purpose of continuing the business, but for the purpose of putting an end to the business. The sale in the instant case is not a step taken with a view to carry on the business, but with a view to wind up and transfer the business to another.

46. The problem may be viewed from a little different perspective. The phrase "carries on business" in Section 2(c) necessarily means and implies a continuous exercise of trading or manufacturing activity as observed by the Supreme Court in *Liquidators of Purga Limited v. Commissioner of Income Tax, Bihar*, 1954 SCR 774. There, the Supreme Court was concerned with the expression "carries on business" found in Section 10(1) of the old Income Tax Act. The observations in *Shaw Wallace case* (supra) were cited with approval. In the context of the facts of that case which are quite akin to the facts of the present case, the following pertinent observations were made by their Lordships of the Supreme Court:

"Turning to the facts to be gathered from the records it is quite clear that the intention of the company was to discontinue its business and the sale of the machinery and plant was a step in the process of the winding up of its business. The sale of the machinery and plant was not an operation in furtherance of the business carried on by the company but was a realisation of its assets in the process of gradual winding up of its business which eventually culminated in the voluntary liquidation of the company."

47. The above reasoning applies with equal force to the case on hand and clears the possible doubt on the meaning to be ascribed to the words "carries on business" occurring in Section 2(c) of the APGST Act. Unless a person carries on a business, he is not a dealer. If he is not a dealer, the liability to pay sales tax cannot be fastened on him.

48. Applying the above test, we cannot possibly say that by entering into a Business Sale Agreement and delivering the properties to the buyer pursuant to such Agreement, M/s. Spectra Bottling Co., did it with a view to keep the business alive or for the purpose of promoting the business. With the sale fructifying as per the terms of the Agreement, the transferor Company goes out of business. The sale cannot, therefore, be regarded as a sale by a person

carrying on business nor can it be regarded as a sale in the course of business. The definition of "business" contained in Section 2 (bbb) does not, in our view, affect the applicability of the test formulated by the Supreme Court in the case of Liquidators of Pursa (supra).

49. That apart, the elements of frequency, continuity of the transactions of sale and purchase which were stressed by Privy Council in Shaw Wallace case (supra) and reiterated by the Supreme Court in Raipur case (supra) and in Ansari's case (supra) are conspicuously lacking in the transfer of goods effected under the terms of the Business Sale Agreement. Ansari 's case (supra) has firmly laid down the proposition that these tests cannot be abandoned even after the new definition of business. Here is a case in which the goods which would not have been disposed of while carrying on its normal business activity were "sold out" if that expression is appropriate, in furtherance of its scheme to close the business undertaking once and for all. Such an activity of sale marks the end point of the business of the assessee and it is not an event of frequent occurrence - not even capable of being ever repeated. We are therefore of the view that the assessee M/s. Spectra Bottling Co., effecting the sale of goods in the course of business or carrying on the business intended to be pursued or continued, does not arise. In coming to this conclusion, we are eschewing from consideration whether or not the assessee was prompted by a profit motive in undertaking the sale of business as a whole and the sale of goods in particular.

50, The learned Government Pleader time and again stressed that the sale of this nature can be regarded as a sale incidental to the assessee's business. In other words, the sale of goods effected in furtherance of the object of disposing of the entire business falls within the second part of the definition of "business", according to the learned Government Pleader. We find it difficult to accept this contention. When the entire movable property including plant, machinery, equipment and other capital assets are transferred together with its immovable and intangible assets, the assessee goes out of business. How can it be said that such a step is incidental to or connected with the manufacturing, trading or other business activity the assessee was hitherto carrying on? A step to close down and dispose of the entire business is obviously not incidental or complimentary to the business, that is to say, the manufacturing or trading activity which the assessee was carrying on. Hence, in our considered view, the second part of Section 2 (bbb) does not come into play at all. The second part of definition has an inextricable link with the first part. The transaction contemplated by second part should be some thing which takes place in the process and in the context of continued business activity and having the effect of aiding or promoting such business. That is not the case here. The second part has definitely no application to the case of Spectra Bottling Co.

51. Coming to the case law, the Madras High Court in more than one case and the Madhya Pradesh High Court have taken the view that sale of the business as a whole or a branch or unit is not a sale in the course of business. In all these

cases, a rule providing for deduction of the amounts realised by a dealer by the "sale of business" as a whole primarily fell for consideration. However, a view was expressed that there was no sale in the course of business under the substantive provisions of the Act as well.

52. In Deputy Commissioner (C.T.) Vs. K. Behanan Thomas, , the entire branch business of the assessee Company at Ooty was sold and the assessing authority treated the sale value of the closing stock held at Ooty branch as taxable turnover and accordingly revised the assessment. The Madras High Court while considering the question primarily from the stand point Rule 6(d) of the TNGST Rules, rested their conclusion on an alternative basis as well. It was observed: "if the matter can be looked at from another angle, the amount in question will not fall within the scope of the Act at all and, therefore, the question of either deduction or exemption will not arise." After referring to the definitions of "business" and "turn-over", the learned Judges said:

"When a person who is carrying on business sells the entire business or a branch of the business, he sells the same as a running business or a going concern. The sale proceeds of such a transaction cannot be said to constitute turnover as defined in the Act. The closure of a branch by sale thereof as a running concern to another person, apart from not constituting a sale of goods, cannot also be said to be a transaction in connection with or incidental or ancillary to such trade, commerce, adventure or concern."

At page 331, it was observed:

"The sale of the stock in trade for the purpose of closing down the business is different from the sale of the business as a whole as a running concern. The sale of a business, lock, stock and barrel, is not incidental or ancillary to the carrying on of a business so as to be taxable under the Act."

53. This decision was followed by the same High Court in Monsanto Chemicals of India (P.) Limited Vs. The State of Tamil Nadu, . That was a case in which the sale was effected in the process of closure of a particular line of business. Both on the general principle that the transfer of goods while closing down the entire business or a line of business cannot be incidental or ancillary to carrying on business and on the alternative basis of application of Rule 6(d), it was held that the assessee was not liable to pay sales tax.

54. Similar view was taken in Monsanto Chemicals of India (P.) Limited Vs. The State of Tamil Nadu, .

55. In Commissioner of Sales Tax Vs. L. Vasudeo Rao, , similar view was expressed by the Madhya Pradesh High Court. After referring to the amended definition of "business", which is similar to Section 2 (bbb) of Andhra Pradesh Act, the learned Judges observed:

"As held by the Board of Revenue the printing machine sold by the assessee was a fixed asset of the assessee and it was sold on account of closure of printing

business by the assessee. The printing machine was not purchased with the intention of carrying on business by selling the said machine whether with profit or without profit. In order that a particular transaction of sale be termed as forming part of the business activity of an assessee, it must be stated that it was made in the course of trade, commerce or adventure in the nature of trade or commerce by the assessee. This is not so in the present case..... In the present case, the assessee sold his fixed assets on the closure of his business and it cannot be said that this transaction is in the course of trade, commerce or adventure in the nature of trade and commerce and so it cannot be included in the term "business".

56. Although the conclusion reached in the decisions of Full Bench of Kerala High Court in *The Deputy Commissioner of Sales Tax (Law) Vs. Dat Pathe*, , and of the Allahabad High Court in *Ram Sahai Vs. Commissioner S.T.*, , was that there was no liability to pay sales tax when certain units of business or the entire business is sold, we do not propose to refer to those decisions as the conclusion rests on a different ratio which has no bearing on the first question we have been discussing.

57. As heavy reliance is placed on the decision of Division Bench of this Court in *Coromandal Lubricants (supra)*, we must now turn our attention to that case and see what exactly has been laid down therein, whether the ratio of that decision applies to the facts of the present case and whether the view expressed therein is in conformity with law. We will examine these aspects only in the context of the argument which we are just now discussing i.e., whether "sale" is in the course of business.

58. In that case, a firm by name Coromandal Lubricants was dissolved during the assessment year 1980-81 and a limited Company by name Coromandal Lubricants Private Limited was formed with four partners of the erstwhile firm as Directors. The finished goods, raw materials, plant, machinery and equipment, stores, furniture and fittings were transferred to the new Company. Separate value was shown for each item. The aggregate of the value of various items so transferred was treated as taxable turn-over under APGST Act and subjected to tax by the Commissioner on revision. In the appeal against the Commissioner's order, the learned Judges formulated the question as follows:

"Whether after dissolution of the firm of the assesses and closure of its business, the sale of plant, machinery, finished goods, raw materials etc., could be treated as sale "in the course of business within the meaning of Section 2 (n) of the Act and the proceeds thereafter could be liable to be taxed."

59. After referring to the pronouncements of the Supreme Court in *Burmah Shell (supra)* and other subsequent cases, the learned Judges observed that the expression "business" was construed in its widest amplitude. Reference was then made to the provisions of Indian Partnership Act dealing with the dissolution of firm. The Division Bench observed thus: "Until liabilities of the firm and its

partners are discharged, incomplete contracts are executed, assets of the firm are sold and final accounts are settled, it cannot be said that on the date of dissolution of the firm the business would come to an end. Since the plant, machinery, finished goods were sold during the winding up of the firm and before actual closure of business, the sales would be treated as sale of goods, before the business was said to be, finally closed down and in the course of business. The proceeds are, therefore, liable for levy of sales tax".

60. In the course of discussion, the learned Judges observed that "there is no factual basis to assume that there was sale of business as a whole to the Company". Again, it was pointed out : "for the purpose of finalisation of affairs of the firm, the plant and machinery was sold and there was no transfer of business." The question was answered in the affirmative and against the assessee.

61. The ratio of that decision rests, in our view, on the finding that there was no transfer of business as such and secondly on the provisions of the Partnership Act. Rule 6(h) of APGST Rules also swayed the conclusion reached by the learned Judges. It is in this back ground, the said judgment has to be appreciated. The provisions of the Partnership Act do not come into play in the present case as the assessee is a limited Company. Moreover, in the two cases on hand, there was transfer of business with all its assets, benefits of licences and contracts, goodwill, trade marks and even trained employees. The following conclusion recorded by the Division Bench needs to be commented upon:

"We, therefore, hold that the sale of plant and machinery, fittings, raw materials etc., was incidental to and connected to the closure of business, on the dissolution of the firm and was "in the course of business" within the meaning of Section 2(n)".

By treating the transactions incidental to the closure of business and not for the purpose of continuing the business, the learned Judges have unduly extended the concept and connotation of the term "business" by reading certain words into the second part of the definition of "business". The learned Judges, with great respect, missed to notice the crucial aspects which we have high-lighted supra. Insofar as the decision in Coromandal Lubricants (supra) lays down a broad proposition that any activity directed towards the end of termination of business is also a transaction in the course of business, we disapprove of the same, though we do not want to express final opinion whether transfer of goods by a firm after its dissolution and before winding up amounts to sale in the course of business.

62. Rule 6(h) of the APGST Rules which was relied upon by the Division Bench in Coromandal Lubricants (supra) is sought to be pressed into service by the learned Government Pleader. Rule 6(h) provides for deductions from the turnover of a dealer. The deduction that clause (h) of Rule 6 provides is "the amount realised by a dealer by the sale of good-will of his business when specified by the

dealer separately without including it in the amount realised by the sale of the business as a whole". After referring to this Rule, it was observed in Coromandal Lubricants case (supra):

Rule 6(h) of the Rules does not exempt from taxation the turn over realised from the sale of the business of the assessee as a whole. It exempts only the amount realised from the sale of good-will, if sold separately. Since good-will was not specified and sold separately in selling the plant and machinery, finished goods etc., the disputed turnover, even assuming that there is sale of business as a whole, is liable to be taxed. This Rule, in our view, is an answer, in a way, to the question whether the proceeds of sale of business is a taxable turnover".

63. The Rule was framed on the assumption that in a case of sale of business as a whole, the proceeds of sale may be taxable. It is axiomatic that the Rule cannot go counter to the charging provision and other provisions of the Act. If there is no sale within the meaning of Section 2(n) of the Act read with the definition of "business" and "dealer", the liability to tax cannot arise from the operation of this Rule, nor has it got the effect of bringing within the sweep of taxation transactions which are otherwise not exigible to tax. The Rule cannot be so construed as to derogate from the scheme of the Act. But, it is only intended to provide a limited relief to those who are otherwise liable to pay tax. If the tax is not liable to be paid under the main provisions of the Act, the question of resort to the Rule does not arise. Nor does the understanding of the rule-making authority control the meaning to be assigned to the concepts of "sale" and "business". As Sethuraman, J., observed in DIT v. K. Behanan Thomas (supra), "If the amount in question will not fall within the scope of the Act at all, the question of either deduction or exemption will not arise". Rule 6(h) does not therefore, render any assistance to the case of the respondents. With great respect, the learned Judges who decided Coromandal Lubricants case (supra) were not right in reinforcing their view point by reference to Rule 6(h).

64. We therefore hold that the transfer of entire business undertaking together with the movable properties, even assuming to involve sale of goods, cannot be regarded as a sale in the course of business by the dealer.

65. Turning to the case of Coromandal Fertilisers which is the petitioner in TRC No. 144 of 1996 and WP No.23827 of 1996, there is one distinguishing feature. Though it has sold out one of its Divisions viz., Cement Manufacturing Unit, it is still carrying on business and continues to do business in fertilisers. The test of continued pursuit of business activity is no doubt satisfied. But then, the question is whether the sale of entirety of its Cement Unit, lock stock and barrel, including the movables, can be regarded as a business transaction of the nature contemplated by Section 2(1)(bbb). Whereas it is the contention of the petitioner's Counsel that the petitioner stands on the same footing as Spectra Bottling Co., and the same reasoning should be applied, it is the contention of the learned Government Pleader that such transaction squarely falls within the second clause of Section 2(1)(bbb) which defines "business". In other words, it

is contended by the Government Pleader that the sale of Cement Manufacturing Unit is in connection with or incidental to the manufacturing or trading in Fertilisers which is still being carried on by the assessee. Reference is made to the explanatory statement furnished to the General Body u/s 173 of the Companies Act (at page 72 of the paper book). It is mentioned therein that the sale of Cement Unit was resorted to avoid the continued losses and to generate the requisite resources for improving and modernising the Fertiliser Division which is a profit-making concern. It is submitted that this background furnishes sufficient nexus between the sale in question and the business activity that is still being pursued by the petitioner.

66. The argument advanced by the learned Government Pleader though plausible, cannot be accepted.

67. The scope and amplitude of the second clause of the definition "business" cannot be unduly stretched so as to encompass within its scope a transaction entered into by the petitioner-Company to close down an undertaking to generate funds for improving some other business. The transaction in order to be incidental or connected with the trading/ manufacturing activity must have a regular and direct link to the trading or manufacturing activity being carried on by the Company. It is not an indirect or remote connection or link that is contemplated. True, such transaction or activity need not be integral to the process of manufacture and sale of fertilisers. But, it should be something appurtenant or adjunct to the Fertiliser business that is being run by the Company.

68. In the case of Binny Ltd., (supra), the Supreme Court referred to the decision in Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation, , where the question was whether the canteen maintained by a Cinema owner in the premises of the theatre could be said to be incidental to the business of running cinema. In that case, Krishna Iyer, i., pointed out: "a thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either." Applying the above test, the Supreme Court repelled the contention that canteen or a cycle stand is not even incidental to the purposes of the theatre. It was observed that the Cinema goers ordinarily find such work as an advantage, an amenity and some times a necessity. All that the Statute requires is that the work should not be irrelevant to the purpose of establishment. After referring to the above observations, Bhagwati, J., pointed out in Binny Ltd, case (supra): "If a canteen maintained by a Cinema owner for the benefit of Cinema goers can be regarded as incidental to the purpose of the Cinema theatre which is to carry on the business of exhibiting films in the theatre, we fail to see how a Store run by the owner of a textile undertaking for sale of provisions to the workmen employed in the factory can be said to be anything other than incidental to the business of manufacture of textiles". It was therefore held that sales of provisions in the Store fall within the

second limb of definition "business".

69. The Dictionary meanings of the words "incidental" and "ancillary" do not lead us to any different conclusion. In Concise Oxford Dictionary, the meaning of "incidental" is given as "something having a minor role in relation to a more important thing, accompanying, concomitant, occasional, casual" etc., In Collins Cobuild English Language Dictionary, it is noted: "Something that is incidental happens or exists in connection with something else that is more important". "Ancillary" is another word that occurs in the second part of clause 2(1)(bbb) . The meaning of that word according to the Dictionaries is subserving, auxiliary, supplementary, subsidiary, supporting etc.

70. The various meanings of incidental or ancillary postulate the continued existence of link or bond with the on-going business activity. In our view, what is incidental and what is not incidental to the primary business that is carried on by an assessee is a matter of difference in degree. So is the case with the phraseology "in connection with". Either the phrase "in connection with" or the phrase "incidental" excludes an indirect and a remote link or nexus. It is too much to say that the disposal of entire business Unit or a Division of a Company which is operationally and functionally independent for all practical purposes, could be treated as a transaction in connection with or incidental to the running of another independent Unit of the Company merely because the sale proceeds will be ultimately utilised for the overall improvement of the business Unit retained by the Company. An insight into the purpose for which the second clause was introduced in the definition of business and a close look at the setting of the two clauses embedded in Section 2(1)(bbb), would reveal that complete cessation of the business activity in relation to one line of manufacture for whatever reason it be, does not give rise to the requisite link or nexus to the business that is still being carried on.

71. Broadly speaking, a transaction appurtenant to or connected with the running business must be an on-going activity which goes along with such business as an adjunct or incident thereof. It must co-exist with the running business and should be a transaction of frequent or atleast occasional occurrence arising out of such business. For instance, scrap and unserviceable material may get accumulated over a period of time while running the business. Disposal of such items is not the usual trading activity of the manufacturer. But, he has to inevitably sell away such discarded items in order to save space and to keep the business going. Such activity though not integral to the manufacturing activity which the assessee undertakes, is incidental to its usual manufacturing and trading activity. The maintenance of a fair price shop or a canteen for the benefit of employees is also an instance of such incidental or connected activity because although they are not integral to the regular line of business, they serve as an amenity of facility to those engaged in the manufacturing and trading operations. In Raipur case (supra), the sale of by-product was considered to be incidental to the business of the Company. Yet, another instance of incidental or connected

transaction is the sale of gift articles or advertisement materials which would go to promote the sales of manufactured products. The Legislatures of various States thought it fit to introduce a specific clause in the definition of "business" so as to bring in such incidental or ancillary transactions within the net of taxation by overcoming the judicial decisions. If the sale of movables involved in the sale of entire business undertaking or a Unit thereof is intended to be a "business" activity, it is reasonable to expect that a clear and specific language is employed to give effect to that idea. But, we find none.

72. We are therefore of the view that transfer of goods involved in the process of disposing of the entire Cement Manufacturing Unit hitherto owned by the petitioner-Company does not tantamount to "business" within the meaning of Section 2(1)(bbb) of the Act and the sale is not "in the course of business". The charge to tax is therefore not attracted under the APGST Act. The conclusion which we have reached is in accord with the view taken by Madras, and Madhya Pradesh High Courts in the cases referred to supra. The view of the Full Bench of the Kerala High Court is also that there is no taxable sale in a transaction of this nature.

73. In the view, we have taken, there is no need to answer the question whether the disputed transactions can be regarded as "sales" within the meaning of Sale of Goods Act and any sale price is attributable to the movables involved in the transfer of the Business Undertaking.

74. In the result, the TRC stands allowed and the order of the Sales Tax Appellate Tribunal is set aside. T.Nos.9490 and 9506 of 1998 are also allowed and the impugned assessment orders and demand notices are quashed. As far as WP No. 23827 of 1996 (in which Rule 6(h) had been challenged) is concerned, the same is dismissed as unnecessary. We make an order as to costs in all these cases.