
(1970) 04 CAL CK 0021
In the Calcutta High Court
Case No : Matter No. 459 of 1967

Fort Gloster Industries Ltd.

APPELLANT

Vs

Member, Board of Revenue

RESPONDENT

Date of Decision : 08-04-1970

Acts Referred:

Constitution of India, 1950 — Article 226, 246
Factories Act, 1948 — Section 46

Citation : (1970) 26 STC 141

Hon'ble Judges : P.B. Mukharji, Acting C.J.; T.K. Basu, J

Bench : Division Bench

Advocate : N. Mukherjee and C. Goswami, for the Appellant; S. Bose and B.P. Banerjee, for the Respondent

Judgement

P.B. Mukharji, Actg. C.J.

1. This is a complex and interesting case of reference to the High Court u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941. The following question is set out in the statement of case for a decision by this court :-

Whether on the facts and circumstances of the case proceeds of the sales made through the canteen run by the petitioner for the benefit of its employees should form any part of the petitioner's turnover?

2. The facts lie within a small compass. The name of the dealer is Fort Gloster Industries Limited of 21 Strand Road, Calcutta. It is a registered dealer under the Bengal Finance (Sales Tax) Act. The company has to run under statutory obligation a canteen for the benefit of its workers u/s 46 of the Factories Act, 1948. The dealer included in its gross turnover the sum of Rs. 46,258 as canteen sales for the assessment for the period ending 31st March, 1957. Out of this sum he claimed exemption for the sum of Rs. 15,426 u/s 5(2)(a)(i) of the Act on the ground that this amount represented sales of cooked food.

3. The Commercial Tax Officer assessed the dealer by his order dated the 20th

March, 1958 and allowed only 50 per cent. of the claim u/s 5(2)(a)(i) of the Act. The dealer appealed from that assessment to the Assistant Commissioner, Commercial Taxes, In that appeal before the Assistant Commissioner the dealer contended that the whole of the sum of Rs. 46,258 representing the canteen sales should be excluded from the admitted gross turnover and the taxable turnover. The argument was that the sales of foodstuff by the canteen were not effected by the petitioner as a dealer in the course of its business of selling goods which were jute ; secondly, that there was no profit-motive in these transactions in the canteen sales. The Assistant Commissioner rejected the dealer's contention. But he allowed a further exemption of Rs. 7,713 u/s 5(2)(a) (i) of the Act. From that order the dealer filed a revision petition before the Commissioner, Commercial Taxes. Before the Commissioner in the revision matter the dealer repeated its arguments made before the Assistant Commissioner. The Additional Commissioner who dealt with the case rejected the revision petition by his order dated the 20th May, 1960. From there again the dealer filed a revision petition before the Board of Revenue, West Bengal. The Board of Revenue also rejected the dealer's petition and upheld the order dated the 20th May, 1960, passed by the Additional Commissioner, Commercial Taxes. The dealer thereafter required the Board to refer to the High Court the question of law involved in this controversy. Upon that the above question has been set down for decision by this court.

4. The Board of Revenue obviously was under a great embarrassment in this present case. That embarrassment will be found in the Board's decision in Case No. 309 of 1969 appearing in the paper book dated the 18th January, 1964, where the Board observed :

The question raised before the Board was whether sales tax could be levied on the sales made by the canteen run by the petitioner for the benefit of its employees. The Board answered the question in the affirmative. It is out of this decision that the present petition for reference arises. I have doubts about the correctness of the decision given by the Board. Certainly the point raised requires clarification.

5. If the Board had doubts about the correctness of the decision, it appears it still wanted to follow the wrong decision on the ground mentioned in resolution 19328 S.T. of the Additional Member of the Board of Revenue dated the 5th September, 1961, appearing in the paper book where it was said :

The same point has been decided by the Board in a few cases before, two of which are Cases Nos. 61 of 1957 and 208 of 1958. It has been held that these sales are liable to be taxed. I do not find any reason that will justify the departure from the view already taken by the Board in this matter.

6. Therefore, the Board although in the present case doubted the correctness of the decision arrived at, it chose to come to a wrong decision on the ground of practice followed.

7. It will be appropriate at this stage to come to the merits of the decision of the Additional Commissioner dated the 20th May, 1960, in this case which was upheld by the Board subsequently. The main argument before the Board on behalf of the dealer may be briefly summarised. They are :

(1) The articles of association of the dealer Fort Gloster Jute Manufacturing Co. Ltd. show from the objects of the company as enumerated therein that the running of a canteen or selling of food was not one of the objects of the company and not only so, in fact the company was not authorised by its articles to carry on such business ;

(2) The canteen had to be run under the statutory obligation provided in Section 46 of the Factories Act, 1948 and therefore was not a business in any sense of the term ;

(3) It was also argued that there was an award given by the Tribunal in the matter of industrial disputes in the jute textile industries, West Bengal, dated the 31st August, 1948, where the award directed that jute mills were required to run canteen for the benefit of the workers ; and

(4) The canteen was not being run as a part of the business of the company and as the food was being sold at or below cost price before charging the salaries of attendants etc., there was invariably a loss incurred by the canteen which was debited to the workmen and staff welfare expenses account.

8. These arguments were developed to establish that having regard to the definitions of "dealer", "sale" and "business", the disputed amount was not liable to tax at all. For that purpose the three major points made by the dealer were: (a) it should be a transfer of property in goods, (b) a transfer in the course of business and (c) a profit-motive in order to attract such a tax. It was the contention of the dealer that the last two tests were not fulfilled in the present facts.

9. The Additional Commissioner rejected these arguments and contentions made on behalf of the dealer. He also distinguished some of the decisions which were cited by the dealer in support of his argument by saying that the Bengal Sales Tax Act was different from other Sales Tax Acts on which other decisions were based in other States. In particular he drew a distinction between the Madras Act and the Bengal Act. In the first place, he distinguished Section 2(g) of the Bengal Act defining "sale" from the definition of sale in Section 2(h) of the Madras Act. The point of distinction he made was that sales in the Bengal Act were not limited to sales in the course of trade or business as they were in the Madras Act. Secondly, he points out that the interpretation put by the Madras High Court on the words "in the course of trade or business" meaning sale in a commercial sense with a view to earning profit, was not applicable to the Bengal sales because of the absence of those words in the definition of sale in the Bengal Act. Therefore, he came to the conclusion that sale in the Bengal Act was not restricted to sale in the commercial sense with the profit-motive. In coming to

that decision on the 20th May, 1960, the Additional Commissioner was anticipating legislation because the judicial view was to the contrary and the State Legislature here had to bring in an amendment to include business without profit to override such decision, by the West Bengal Taxation Laws (Amendment) Ordinance (Ordinance No. 11 of 1967) followed by the West Bengal Taxation Laws (Amendment) Second Ordinance, 1968 (Ordinance No. 5 of 1968) and ultimately followed by the West Bengal Taxation Laws (Amendment) Act, 1968 (Act No. 6 of 1968) which being the President's Act was re-enacted by the State Legislature in the West Bengal Taxation Laws (Amendment) Act, 1969 (Act No. 25 of 1969).

10. The situation in law is acute in the present context. When the assessment of sales tax was made and throughout the proceedings before the taxing authorities leading to the decision by the Board of Revenue and its ultimate reference to this court dated the 27th July, 1967, this new law about business without profit was not on the statute book and was not considered by the sales tax authorities and the Board of Revenue. Now when the matter comes up on a reference in 1970 for disposal the statute book contains this change in the definition of "business" by the amendment stating that business includes business without profit.

11. The first complexity that arises in this context is, which law is to be applied. Is it the law when the assessment proceedings for sales tax were going on and concluded and when the reference by the Board of Revenue was made to this court or is it the new law which has come since then and which neither the Board nor the taxing authorities in the Sales Tax Act had any occasion to consider ? In *Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras*, , the Supreme Court has laid down that "a tribunal called upon to decide a taxing dispute must apply the relevant law applicable to a particular transaction to which the problem relates and that law normally is the law applicable as on the date on which the transaction in dispute has taken place." No doubt, if the law which the Tribunal seeks to apply to the dispute is amended, it should be bound to decide the question in the light of the amended law. The Supreme Court lays down further in that case that "similarly when the question has been referred to the High Court and in the meanwhile the law has been amended with retroactive operation, it would be the duty of the High Court to apply the law so amended if it applies." It is said there that by taking notice of the amended law which has been substituted for the original provision, the Supreme Court is only giving effect to legislative intent and it is no more than what must be deemed to be necessarily implicit in the question referred to by the Tribunal provided of course that the question is couched in terms of sufficient amplitude as to cover an enquiry into the question in the light of the amended law without having investigation of fresh facts. Next, the Supreme Court lays down the proposition that if the question is not so framed, the High Court may refuse to answer the question.

12. The point of importance of this decision of the Supreme Court is that it lays

down there that the application of the relevant law to a problem raised by the reference before the High Court is not normally excluded merely because at the date when the Tribunal decided the question the relevant law was not or could not be brought to its notice. And it goes on to say that "there is nothing so peculiar in the nature of a reference under the Indian Income Tax Act or the Sales Tax Act that in deciding it the High Court is restricted to the application of the law which has been superseded by legislation since the date when the reference was made by the Tax Tribunal and is obliged to refuse to apply the law which by legislative direction has to be applied to a particular transaction which is the subject-matter of the reference.

13. It must be pointed out, however, that the actual amendment and its nature and its provisions in the decision in Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, were very different from the nature and terms of the amendment with which we are concerned in the present reference. There in the Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, , the amendment was directed to alter the rate and was expressly made to override any judgment, decree or order of any court and of assessments or orders made or actions or proceedings taken, directions issued, jurisdictions exercised or even taxes levied or collected and was retrospective in operation. The amendments considered by the Supreme Court are set out at pages 660-61 of that report. They are of a very different nature from the amendments with which the present reference is concerned.

14. The next two cases on this point as to what law is to be applied are to be found in Ramgopal Mills case [19611 41 ITR 280 and The State of Uttar Pradesh and Others Vs. Raja Syed Mohammad Saadat Ali Khan, . The Supreme Court in the The Commissioner of Income Tax, Hyderabad Vs. Dewan Bahadur Ramgopal Mills Ltd., emphasized the principle that a change in the law validly made and applicable to a case pending in appeal must be considered and given effect to by the appellate court. In the other case of The State of Uttar Pradesh and Others Vs. Raja Syed Mohammad Saadat Ali Khan, , it lays down the principle also that a court of appeal, in an appeal properly before it, must give effect to the law as it stands if the law has, at some stage anterior to the hearing of the appeal, been amended retrospectively with the object of conferring upon the authority or tribunal of first instance, from the order whereof the appeal is filed, jurisdiction which it originally lacked. This was a case on the Agricultural Income Tax Act in U.P. and the other case in Ramgopal Mills [19611 41 ITR 280 was with regard to the Finance Act read with the Indian Income Tax Act and was not concerned with the Sales Tax Act; but the principles formulated should be equally applicable.

15. The last case cited on this point is the Supreme Court decision in the Commissioner of Income Tax, Madhya Pradesh etc. Vs. Straw Products Ltd., Bhopal, . Here the Supreme Court came to the conclusion that the department was entitled to rely upon the amendment of para. 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, by the Taxation Laws

(Merged States) (Removal of Difficulties) (Amendment) Order, 1962 and it was the duty of the Supreme Court to answer the reference in accordance with the amendment unless the question referred to by the Appellate Tribunal was not couched in terms of sufficient amplitude to cover an enquiry into the question in the light of the amendment.

16. Having regard to these decisions, it is at least prima facie clear that the amended law has to be applied in the present instance. The amended law in the present instance is provided by the definition in "business" in Section 2(la) and (b). It reads as follows :

In this Act, unless there is anything repugnant in the subject or context, business includes-

(i) 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 with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and

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

17. This amendment was expressly made retrospective by Section 4 of the West Bengal Taxation Laws (Amendment) Act, 1968, preceded by the Ordinance mentioned above and was couched in the following language: "The following Clause (amendment) shall be and shall always be deemed to have been inserted." Retrospective operation is therefore clear but retrospective legislation is to be construed strictly in the sense that the retrospect should be clearly limited to the language used. This language, significantly enough in sharp contrast with the Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, , does not use the words "notwithstanding any decrees, orders, proceedings or tax collected or assessed" nor does this West Bengal amendment say that this clause-which "shall be and shall always be deemed to have been inserted"-should be taken to mean that it will be applicable in respect of orders, assessments, steps and actions taken and concluded. Therefore, there is scope for distinction between the Supreme Court decision in the case of Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, and this one. The general proposition certainly remains applicable that the amended law has to be applied if at the time of the relevant decision by the appropriate court, authority or tribunal, the amendment becomes applicable to its pronouncement or decision by the very terms of the retrospective amendment. But the terms of the retrospective legislation are decisive and significant in this respect. The question here is whether by reason of this deeming provision alone, saying that this amended definition of "business" shall always be deemed to have been there inserted, this particular amendment could reopen past transactions closed and finished in the matter of assessment proceedings and orders passed ? In other words, could such an amendment in

1967, when it came first by way of Ordinance, reopen and rip up assessments made and completed and proceedings closed as early as the 5th September, 1961, about six years before ? Prima facie, it appears that the term and scope of the Bengal amendment do not justify the application of this amended law to such completed and closed assessments as in the instant reference. But having regard to the decisions of the Supreme Court in the Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, and the other cases discussed above we shall assume and follow the principle that the amended law should be applied in the present case without deciding the question whether these decisions are distinguishable from the present reference. We shall discuss how far the amendment helps the revenue authorities later on in the judgment.

18. But the next complexity in the present reference is the question of the vires of the amendment and whether the High Court in its advisory jurisdiction dealing with a reference under the Sales Tax Act can go into the question of this vires at all. The problem again is beset with many difficulties.

19. It is essential in this connection first to formulate the problem of the vires. The Bengal Finance (Sales Tax) Act, 1941, was originally a Provincial legislation and the amendment which is in issue is a State legislation passed under Article 246(3) of the Constitution read with item 54 of List II of the Seventh Schedule of the Constitution of India which uses the words "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I". The argument for the dealer is that legislation relating to "taxes on the sale or purchase of goods" means sale or purchase in a commercial sense with profit-motive. Hence, any legislation or legislative attempt by the State to include a sale or purchase not in a commercial sense and without any profit-motive would be to exceed the legislative competence of the State Legislature under the Constitution. Therefore the amendment of the definition of "business" to include a business without profit so as to include non-commercial sale or purchase within its ambit is ultra vires the Constitution so far as the powers and competence of the State Legislature are concerned. In support of this argument for the dealer it is necessary to notice some of the decisions and authorities on the point.

20. In *Young Men's Indian Association v. Joint Commercial Tax Officer* [1963] 14 S.T.C. 1030 SC, it is laid down that the expression "sale of goods" occurring in entry 54 of List II of Schedule VII of the Constitution is a composite expression having a defined meaning involving the existence of all the elements required to constitute a valid sale and there can be no sale of goods unless all the component elements are present. It will not be open to the Legislature to make a transaction which is not a sale, a sale by statutory fiction and impose a tax thereon. There the main concern was with the element of transfer of property in a sale transaction. The Division Bench of the Madras High Court came to the conclusion that Sections 2(g) and 2(n) of the Madras General Sales Tax Act, 1959, were ultra vires the powers of the State Legislature for the reason that they enabled the State Legislature to tax transactions which were not really sales

and therefore fell outside the ambit of its legislative power under the Constitution. The Madras Act of 1959 which introduced the amendment was enacted after the Constitution came into force just as the Ordinance and the Act in the Bengal Amendment were also introduced after the Constitution came into force. The main Act itself in Madras, just as here in the Bengal Act, was enacted prior to the Constitution. (See the observations of the learned Chief Justice of the Madras High Court at pages 1042-43). This Madras decision at page 1045 of the report relied on the Supreme Court decision in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,* , where the following observations were made :

...the Supreme Court has laid down in unmistakable terms the rules that should guide us in interpreting the words "sale of goods" occurring in entry 54 in List II to Schedule VII in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,* . The Supreme Court has pointed out that prior to the Government of India Act, 1935, there was no legislative practice in this country or in England relating to sales tax ; but as the topic enumerated is "tax on sale of goods" the real question will be the true import of the expression "sale of goods" and that that expression should have the meaning which it had in the Common Law of England relating to sale of goods.

21. This judgment of the Madras High Court was delivered on 23rd November, 1962.

22. The next decision is one of the Supreme Court in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar,* . This was a decision on the Bihar Sales Tax Act, 1947. At page 1211 of the report, Shah, J., delivering the majority judgment made the following observations :

The Provincial Legislature by entry 48, List II, of the Seventh Schedule of the Government of India Act, 1935, was invested with the power to legislate in respect of "taxes on sale of goods". The expression "sale of goods" was not defined in the Government of India Act, but it is now settled law that the expression has to be understood in the sense in which it is used in the Sale of Goods Act, 1930. In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,* , this court in considering whether Section 2(i), Explanation I(i), of the Madras General Sales Tax Act (9 of 1939), as amended by the Madras General Sales Tax (Amendment) Act (25 of 1947), was intra vires the Provincial Legislature has decided that the expression "sale of goods" in entry 48, List II, is used not in the popular but in the restricted sense of the Sale of Goods Act, 1930.

23. This, therefore, is a clear authority for showing that the expression "sale of goods" must be understood in the sense of sale of goods under the Sale of Goods Act. In explaining this concept of sale of goods under the Sale of Goods Act, the Supreme Court at page 1212 of the report observed : "A contract of sale postulates exercise of volition on the part of the contracting parties." The test of

volition, therefore, is integral to the concept of sale of goods within the meaning of that expression in entry 54 of State List II to Schedule VII of the Constitution. This judgment of the Supreme Court was delivered on 26th November, 1962.

24. The next case cited is Bhopal Sugar Industries Ltd., Madhya Pradesh and Another Vs. D.B. Dube, Sales Tax Officer, Bhopal Region, Bhopal and Another, . This was a case under the M.P. Sales of Motor Spirit and Lubricants Taxation Act of 1958. Shah, J., delivering the judgment for the Supreme Court in that case, at page 1039 of the report after citing The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., made the following observations :

Consumption by an owner of goods in which he deals is therefore not a sale within the meaning of the Sale of Goods Act and therefore it is not "sale of goods" within the meaning of entry 54, List II, Schedule VII, of the Constitution. The legislative power for levying tax on sale of goods being restricted to enacting legislation for levying tax on transactions which conform to the definition of "sale of goods" within the meaning of the Sale of Goods Act, 1930, the extended definition which includes consumption by a retail dealer himself of motor spirit or lubricants sold to him for "retail sale" is beyond the competence of the State Legislature.

25. The judgment in this case was delivered on 21st December, 1962.

26. The next case cited is The Davangere Cotton Mills Ltd. v. The State of Mysore AIR 1957 Mys. 72. This was a decision of the Division Bench of the Mysore High Court on the Mysore Sales Tax Act of 1948. It came to the decision in that case that a mill cannot be assessed to sales tax in respect of sales effected by it in the canteen run by it for the benefit of its employees as such sales cannot be regarded as sales effected in the course of business. At page 73 of that report the learned Judge made the following observations :

It appears to us to be quite clear that the Act does not seek to levy sales tax on all sale transactions but only on such transactions as are effected in the course of business. In this view we are supported by three decisions of the Madras High Court: Gannon Dunkerley and Co. (Madras) Ltd. v. State of Madras AIR 1954 Mad. 1130, in which it was held that the sale of foodgrains by an engineering firm to its workmen which was carried on as an ameliorative measure and without any profit-motive was not a sale within the meaning of the Madras General Sales Tax Act; Deputy Commercial Tax Officer, Triplicane Division, Mount Road, Madras and Another Vs. Cosmopolitan Club, , in which it was held that the sale of refreshments by a club to its members was not a sale within the meaning of the Madras General Sales Tax Act, as the club was an association not designed for making a profit nor striving after profit and as there was no intention of making profit by sale of refreshments to members. It may also be mentioned that in the present case in addition to there being no intention on the part of the petitioner mills of making profit by running a canteen the mills are bound to run a canteen on a "no profit, no loss" basis by virtue of a statutory obligation

imposed u/s 46 of the Factories Act and Rules thereunder; Sree Meenakshi Mills Ltd. Vs. State of Madras, was a case wherein an identical question arose. There also the assessee mills were assessed to sales tax in respect of sales effected by them in canteens run by them for the benefit of their employees in conformity with the requirements of the Factories Act. The Madras High Court held that such sales could not be regarded as sales effected in the course of business and amenable to the levy of sales tax. We respectfully agree with the view.

27. This authority sets out appropriately the Madras decisions on the point and is significant so far as the instant reference before us is concerned bearing the closest similarity. The only point of distinction is that this was before Mysore made the amendment in introducing the concept of business without profit. This leads us to the next case cited at the Bar, The Deputy Commissioner of Commercial Taxes, Coimbatore v. Sri Thirumagal Mills Ltd. [1967] 20 S.T.C. 287 SC. This is a case almost directly on the point. It discusses almost all the points raised in the instant reference before us. This Division Bench decision of the Madras High Court holds that unless a transaction is connected with trade, it will not be within the definition of "business" in the Madras General Sales Tax Act, 1959, even as amended by Act 15 of 1964. It is distinctly pointed out here that the intention of the Madras Amendment Act 15 of 1964 was not to bring into the tax net a transaction of sale or purchase which is not of a commercial nature. This is a most significant observation on the point because the definition of "business" was amended by Madras Act 15 of 1964 with retrospective effect by saying "business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such a trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern." This is almost in pan materia with the Bengal amendment introducing the business concept of business without profit. In spite of that it was held that the amendment did not succeed in including sale of goods of a non-commercial nature without profit because it was pointed out at page 288 of that report by Veeraswami, J. :

Prior to the Madras General Sales Tax Act, 1959, there are series of decisions of this court that "business" for the purpose of the 1939 Act had to be understood in the context of the definition of "dealer" in that Act and meant a commercial activity and that unless it was shown that the transaction was in the course of any trade or commerce with a motive to make profit it could not be said to be "business" within the definition. Sales effected as amenity to workers or by clubs to their members were excluded from the purview of tax. It was for this reason apparently the definition was amended. But "business" as defined in the 1959 Act, as it originally stood, paid attention only to the factual aspect of accrual of profit or not and not to the motive aspect. This defect appears to have been rectified by Madras Act 15 of 1964. Under that Act for any activity to be "business" it is not necessary that it should be with a motive to make gain or profit and there should be any profit accrued from trade or commerce. It is this

aspect of the matter that was under consideration in *Southern Railway Employees' Workshop Canteen v. Deputy Commercial Tax Officer, Tiruchirapalli* [1965] 16 S.T.C. 187 SC. It is there held that the definition as it occurs in Madras Act 15 of 1964 is within the competence of the State Legislature, as the expression "sale of goods" in the relevant entry enabling the State to levy taxes on sales has been used in the sense defined in the Sale of Goods Act....The primary requisite of "business" as defined even under Madras Act 15 of 1964 is that it should be a trade or commerce or adventure or concern in the nature of trade or commerce. Presence or absence of profit will not matter. But the activity must be of a commercial character and in the course of trade or commerce. The second clause in the definition of "business", as it appears to us, is still one invested with commercial character, for the reference is to any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern. Unless the transaction is connected with trade, that is to say, it has something to do with trade or has the incidence or elements of trade or commerce, it will not be within the definition. The words "in connection with or incidental or ancillary to" in the second part of the definition of "business", in our opinion, still preserve or retain the requisite that the transaction should be in the course of business understood in a commercial sense. The intention of Madras Act 15 of 1964 does not appear to be to bring into the tax net a transaction of sale or purchase which is not of a commercial character.

28. We respectfully associate ourselves with the view expressed there as will be presently seen from our discussion of the Bengal amendment later on in this judgment. We have been told by the learned counsel at the Bar that this decision is pending appeal in the Supreme Court in Civil Appeal No. 1454 of 1969.

29. But this is not the end of the difficulties in this matter. The next question that arises is whether this court as a reference court u/s 21(1) of the Bengal Finance (Sales Tax) Act can at all go into the question of the vires of the above amendment made thereto.

30. Section 21 of the Bengal Finance (Sales Tax) Act, 1941 provides, inter alia, as follows :

(1) Within sixty days from the passing by the Board of Revenue of any order under Sub-section (3) of Section 20 affecting any liability of any dealer to pay tax under this Act, such dealer may, by application in writing accompanied by a fee of Rs. 100 require the Board to refer to the High Court any question of law arising out of such order.

(5) The High Court upon the hearing of any such case shall decide the question of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send to the Board of Revenue a copy of such judgment under the seal of the Court and the signature of the Registrar and the Board shall dispose of the case accordingly.

31. This is the origin of the jurisdiction of this High Court in hearing sales tax references. Section 21(1) of the Act mentions, "any liability of any dealer to pay tax under this Act" and "require the Board to refer to the High Court any question of law arising out of such order". In other words, the reference can deal with any liability of any dealer to pay any tax under the Act and any question of law arising out of the Board's order. u/s 21(5) the High Court has the jurisdiction and the obligation to decide "the question of law raised thereby". The first question that arises in the instant reference is whether this question of the Bengal amendment could at all be said to be a "question of law arising out of" the Board's order. Obviously it is not because the Board had no occasion to decide any question relating to the Bengal amendment for the simple reason that the amendment had not come into force at that time when the Board was making its order. But this question may be answered by the argument that although the actual Bengal amendment was not a question arising out of the Board's order, yet the question as framed and set out above and which does not expressly mention the Bengal amendment, can be brought within the implicit purview of the question as framed and as a question arising out of the Board's order. This has already been indicated in some of the Supreme Court judgments to which reference has already been made. As the question has to be determined in the light of the law now existing, the question has to be disposed of according to the existing law after the amendment and in accordance with the terms of the amendment. It is at that stage that the learned counsel for the dealer submits that if the amendment is to be examined then the argument is that the amendment is invalid and void and beyond the competence of the State Legislature. The question, therefore, of the vires of the amendment is directly raised in the arguments. The answer of the learned counsel for the revenue authorities is that this court cannot go into the question of vires because it is acting only as a reference court u/s 21(1) of the Bengal Finance (Sales Tax) Act. That is the issue to be determined.

32. The law on the point is extremely complex. The Supreme Court in *K.S. Venkataraman and Co. Vs. State of Madras*, dealing with sales tax under the Madras General Sales Tax Act lays down the principle that the authorities under, the Indian Income Tax Act like the Income Tax Officer, Appellate Assistant Commissioner and the Appellate Tribunal are creatures of the statute and they function thereunder and therefore they could not ignore any source of income on the ground that the relevant provisions offended against the fundamental rights or were bad for want of legislative competence. The Supreme Court there expressed the view that the Income Tax Act does not confer any such right on them and their jurisdiction was confined to the assessment of the income and the tax under the provisions of the Act. Whether the statutory provisions were good or bad was not their concern. The Supreme Court also emphasised the principle that the Tribunal is also a creature of the statute and could only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction.

The Supreme Court proceeds to express the view there that if an assessee raises such a question the Tribunal can only reject it on the ground that it has no jurisdiction to entertain such objection or decide on it. This principle was extended by the Supreme Court in that decision even to the High Court and the Supreme Court expressed the view that as no such question could be raised or could arise in the Tribunal's order, the High Court could not possibly give any decision on the question of vires of such a provision. The dissenting judgment of Shah and Ramaswami, JJ., however, expressed the view that the Tribunal invested with exclusive authority in the matter of assessment and collection of tax would have the power to entertain an objection and to decide whether a provision of the Act which it is called upon to administer was ultra vires and hence unenforceable. The next case of the Supreme Court is reported in the same volume as Commissioner of Income Tax, Madhya Pradesh etc. Vs. Straw Products Ltd., Bhopal, At page 163 of that report the Supreme Court made the following observations:

Mr. Desai then raises two questions in respect of the Order. First he says that it is the first time that the Order is being relied on in these proceedings and he is entitled to urge before us that the Order is bad. He has given a number of reasons in support of his plea that the Order is ultra vires, but in view of the decision of this court in K.S. Venkataraman and Co. Vs. State of Madras, , we refuse to allow him to develop these objections. We may mention that he seeks to distinguish K.S. Venkataraman and Co. Vs. State of Madras, on the ground that the Supreme Court and the High Court are not creatures of the Order which he was impugning. He further says that the Appellate Tribunal would also have been entitled to go into the question of the validity because the Order is not a part of the Income Tax Act and it is not the creature of the Order in the sense mentioned in K.S. Venkataraman and Co. Vs. State of Madras, . We are not able to sustain the distinction sought to be made by Mr. Desai.

33. The same view was reiterated by the Supreme Court in C.T. Senthilnathan Chettiar Vs. State of Madras, , which was a decision relating to the Madras Agricultural Income Tax Act. The ratio of that decision will appear from the observations of the Supreme Court at page 105 in the following terms:

The learned counsel then urges that Section 9(1) of the Act is void. He points out that a similar question regarding the validity of Section 16(1)(c) of the Indian Income Tax Act, 1922, was left open in Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer, and Balaji Vs. Income Tax Officer, Special Investigation Circle, . But we are unable to allow him to raise this point because this court has held in K.S. Venkataraman and Co. Vs. State of Madras, , that the authorities under a taxing statute are not concerned with the validity of the taxing provisions and the question of ultra vires is foreign to the scope of their jurisdiction. As no such point could be raised before the Income Tax authorities, neither the High Court nor the Supreme Court can go into these questions in a revision or reference from the decision of those authorities. This case was

followed in Commissioner of Income Tax, Madhya Pradesh etc. Vs. Straw Products Ltd., Bhopal, .

34. These decisions of the Supreme Court indicate that in a tax reference neither the taxing authorities nor the Tribunal nor the High Court and now not even the Supreme Court has any jurisdiction to determine the question of vires of the statute concerned. We are bound by these decisions and for the purpose of this reference shall proceed on the assumption that as a court of reference u/s 21(1) of the Bengal Finance (Sales Tax) Act we have no jurisdiction to decide the question of vires of the Bengal amendment including within the meaning of business a kind of business without profit. In a recent decision in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, , the Supreme Court at page 89 affirming the view expressed in the other decision, has observed as follows :

Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from a decision of the Tribunals.

35. Although that is the recent position of the Supreme Court decisions, we cannot but refer to the decision of the Supreme Court in Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, , delivered on 22nd March, 1968. At pages 316-17 of that report the Supreme Court noticed the argument in that case that in a number of cases in which the proceedings relating to taxation laws had reached the High Courts by way of reference, appeal or revision, the question of constitutional validity of the statute under which the authority functions was raised, entertained and decided. For instance, in The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar, , a reference was made by the Board of Revenue raising the question as to the validity of certain provisions of the Bihar Sales Tax Act and decided by the High Court and ultimately by the Supreme Court. Similarly, in Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer, , in an appeal from the order of the Income Tax Appellate Tribunal, with special leave the constitutional validity of Section 23A of the Indian Income Tax Act was permitted to be challenged. Again, in Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , in a reference u/s 66(1) of the Indian Income Tax Act, the question as to the vires of Section 12B of the Indian Income Tax Act was raised before the Income Tax Appellate Tribunal and was referred to the Bombay High Court. The Supreme Court in appeal from the opinion expressed by the High Court on the reference also considered that question. Finally, even in Gannon Dunkerley's case [1954] 5 S.T.C. 216 SC, in the proceedings in the Madras High Court in a revision petition u/s 12B of the Madras General Sales Tax Act, the High Court entertained the plea of ultra vires and even decided in favour of the taxpayer. At page 317 in Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, , the Supreme Court however expressed the view that it was not necessary in that case to decide the question whether the principle laid down in K.S.

Venkataraman and Co. Vs. State of Madras, was applicable on the ground that the appellant did not challenge the jurisdiction of the High Court to examine the question of law regarding the constitutional validity of explanation II to Section 2(h) of the Act and that there was no such challenge made in the SLP to the Supreme Court or in the statement of case and, on the contrary, the appellant had itself applied to the Judge (Revisions) u/s 10 of the Act contending that the explanation II to Section 2(h) was ultra vires. Therefore, the learned Judge of the Supreme Court at page 317 expressed the view of the court in these terms :

In other words, it must be taken that the appellants had voluntarily submitted to the jurisdiction of the revisional authority and of the High Court on the matter in issue and having submitted to the jurisdiction and having taken the chance of judgment in its favour, it is not right that the appellant should take exception to the jurisdiction of the High Court when the judgment has gone against it. We cannot, therefore, permit the appellants to canvass in this court for the first time the question whether it was competent for the High Court to decide the question of law referred to it u/s 11 of the Act. We accordingly reject the argument of the appellants on this aspect of the case.

36. Apparently, Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, as above, shows that the Supreme Court did notice that the question of vires of the statute had been decided in a number of cases in reference or revision petitions under the taxing statutes. The ground on which it rejected that contention in Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, was that the parties had submitted to the jurisdiction and had not challenged this position. It is not for us to go into the question whether it is possible to create jurisdiction by consent or by submission or estoppel in a court with only a statutory jurisdiction.

37. But we cannot help making a reference also to another decision of the Supreme Court given on 10th September, 1968, in Commissioner of Sales Tax v. Ganga Sugar Corporation [1970] 25 S.T.C. 155 SC. This again was a sales tax case under the U.P. Sales Tax Act where Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, was followed and the following observations were made at page 160 :

It has now been laid down by this court in Tika Ram and Sons Ltd. etc. Vs. The Commissioner of Sales Tax U.P., Lucknow, , decided on 22nd March, 1968, that when the jurisdiction of the High Court is not challenged to examine the question of law regarding constitutional validity of a taxing provision in a sales tax reference, it is not open to the sales tax authorities to challenge the jurisdiction of the High Court to examine such a question of law and to pronounce upon the constitutional validity of the impugned section.

38. Apparently, here again the Supreme Court was expressing the view that by submission and non-challenge there would be created a situation in the High Court and in the Supreme Court to decide the question of vires even on a

revision petition under the taxing statute.

39. That would seem to indicate that there is no basic absence of jurisdiction in the High Court or in the Supreme Court to deal with and decide the question of vires even on a reference or revision proceedings under the taxing statutes.

40. In these two streams of decisions, it is not necessary in the instant reference before us to take a particular view as we propose to decide on the merits of the question involved in this case independently of the vires of the Bengal amendment. But before leaving this subject, it is only necessary to say that arguments have been advanced to us from the Bar supporting one view or the other, viz., that this court can go into the question in a reference or revision petition under the taxing statute. If the Supreme Court has occasion to reconsider this point of jurisdiction of the High Court and the Supreme Court in its advisory character in the reference proceedings under the taxing statutes, then the matter might be different. But we are content to follow the line here in this instant reference by deciding the question on the merits independently of the problem of vires of the amendment.

41. We have already quoted the language of Section 21(1) of the Bengal Finance (Sales Tax) Act, 1941. These references are almost on the similar language as in the Income Tax Act. The ambit of the language is almost similar. Its main conditions are that (1) it must be a question of law, (2) it must arise out of the order of the Tribunal or the Board and (3) the reference court shall decide such question. If the reference court is tainted with the limited jurisdiction that it is hearing the reference under the taxing statute, as indeed it is, then this advice which this reference court has to give under these statutory provisions becomes only a very contingent advice and may be useless and nugatory in its effect for the simple reason that in giving the advice it proceeds on the assumption that the vires of the Act is good but which, in a different proceeding in a suit or under Article 226 of the Constitution, can be challenged and decided that the legislation is ultra vires in which event the advice given by the reference court becomes a ritualistic ceremony for the advice is illegal and based on a wrong assumption of an Act or amendment which is void and unenforceable. Such advice promotes not justice according to law but injustice according to non-law. The expression "decide the question of law" requires serious consideration whether it should not include lawlessness of the basic decision of the Tribunal. This advisory jurisdiction on reference under the taxing statutes has a responsibility of its own. It is not like an ordinary decision in a private litigation determining some specific issues. It is expressing an opinion on a question of law on the basis of which the taxing authorities concerned have to act. The advice should, therefore, be comprehensive and basically sound in the sense that if the law on the faith of which the advice is rendered cannot be questioned, then both the quality and the weight of such advice are seriously jeopardised. The present unsatisfactory situation in law can be illustrated by a short example. The example can be taken from the instant reference before us. Assuming that this court on this reference

cannot determine the vires of the Bengal amendment, then the advice is given on the basis that the legislative amendment is good and valid. But in a proceeding under Article 226 of the Constitution or even in a suit, the vires of the Bengal amendment can be gone into and put in issue and can be decided and determined. Suppose in such proceedings under Article 226 of the Constitution or in a civil suit, after our advice is given, it is found and decided by the court that the Bengal legislative amendment is bad and invalid, then our whole advice becomes bad and misleading. No doubt, the taxing authorities are creatures of the statute. No doubt, the references to this court in connection therewith are also statutory. But the question remains: what is the interpretation the court should give of the expression "question of law" and deciding such question of law, expressions used u/s 21(1) of the Bengal Finance (Sales Tax) Act and also in similar other statutory provisions which are in pari material Is it a question of law whether the law itself that has to be applied is valid or invalid ? Is it then an answer to say that because the authorities are under the statute, therefore the validity of that statute itself is beyond its jurisdiction ? Then the next question is : how far is this limitation, even if there be any, on this view of the interpretation to be carried ? Administrative expediency, if it has at all a consideration in these matters, can justify perhaps the view that the taxing authorities may be debarred from deciding their own jurisdiction. Is that a sufficient reason to extend that limitation even to the High Court or the Supreme Court, the highest courts of record and courts otherwise of general jurisdiction and fasten them with the same limitation in interpreting their functions as an advisory court on reference proceedings under these statutes ? We need not proceed any further except noticing these points which were advanced or canvassed before us from the Bar, having regard to the view that we propose to take in answering the question on merits.

42. We shall now discuss and decide the question on the merits. The question is whether the sale proceeds in the canteen run by the dealer for the benefit of the employees in the facts and circumstances of this case form any part of the dealer's turnover which can be taxed under the Bengal Finance (Sales Tax) Act. The view expressed by the Additional Commissioner on 20th May, 1960 and set out elsewhere in the judgment put an interpretation that sales in the Bengal Act were not limited to sales in the case of trade or business anticipating the present Bengal Amendment Act. That view, in our opinion, is incorrect and not justified in law. Before giving our reasons for holding this opinion, we shall only repeat, what we have said before, that the authority in favour of our view is Deputy Commissioner of Commercial Taxes, Coimbatore v. Sri Thirumagal Mills Ltd. [1967] 20 S.T.C. 287 SC. In our view, that decision is directly on the point raised by this reference before us.

43. Apart from the authority, we now proceed to give our reasons for the view we are taking on the Bengal amendment which is already quoted elsewhere in the judgment. The amended definition of business u/s 2(1a) insists that it must be a trade, commerce or manufacture or any adventure or concern in the nature

of trade, commerce or manufacture. That is the first and essential requisite for a business even under that amendment. The second limitation provided by the amendment in this section is the negative aspect to say that there may or may not be the motive to make profit. But even in describing that negative aspect, the basic condition of trade, commerce or manufacture or adventure or concern remains and all that it says is that "such trade, commerce, manufacture, adventure or concern" may or may not be carried with the motive to make profit. Unless, therefore, the turnover relates to trade, commerce, manufacture, adventure or concern there can be no question for its attracting a tax under the Bengal Finance (Sales Tax) Act simply on the ground that it is without profit and that such absence of profit motive is not a sufficient ground for exemption. If the thing itself is not basically trade, commerce, manufacture, adventure or concern then no further question of the motive for profit or not making a profit arises. The basic test of trade, commerce, manufacture, adventure or concern must be satisfied before any tax can be attracted. Once the basic test is satisfied the further fact that it was not carried on with the motive to make a profit will not matter and will not grant an exemption. That is our view of the interpretation of the amended Section 2(1 a) of the Bengal Act. Similarly, the incidental or ancillary doctrine formulated in Section 2(1a)(ii) is also, in our view, limited to "such trade, commerce, manufacture, adventure or concern" and not otherwise. This test in the present facts of the reference is also not satisfied to attract the tax. The running of the canteen by the dealer is not ancillary or incidental to its trade, commerce, manufacture, adventure or concern.

44. The articles and memorandum of the dealer-company in this case prohibit and do not authorise carrying on of canteens. Left to such articles and memorandum this dealer-company would have engaged in unauthorised and illegal business if it tried to carry on the business or trade or commerce or manufacture or adventure of running a canteen. The significant definition of a "dealer" in Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941, as meaning "any person who carried on the business of selling goods in West Bengal" clearly indicates that the dealer must be one who carries on the business of selling goods. Now this dealer's business in this case is not the business of running canteens. It cannot be its business under its charter of incorporation. What then is the meaning of the word "business" in such a context ? Obviously, plainly and indisputably the business of this dealer-company is the business of manufacturing and selling jute.

45. In that context the running of a canteen by the dealer has to be understood in the light of the statutory obligations contained in Section 46 of the Factories Act. But for Section 46 of the Factories Act, 1948, this adventure of this dealer-company to run a canteen would have been illegal under its charter of incorporation. The canteen had to be run by the dealer-company under the Factories Act or else it would have been penalized under that statute. The running of this canteen therefore was not a part of the business of this dealer-company at all. Section 46 of the Factories Act provides, "the State Government

may make rules requiring that in any specified factory wherein more than 250 workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of workers." This is not a business of the company. This Section 46 of the Factories Act appears in Chapter V of the Factories Act which deals with "welfare". This is a social and economic welfare which is the policy of all progressive legislations in the industrial world for the amelioration of the conditions of work of the employees and labourers. This is a "welfare" activity in that context and as the chapter of the Factories Act indicates. This "welfare activity" is not business within the meaning of Section 2 of the Bengal Finance (Sales Tax) Act with the amendment. This concept of social welfare activity apart from business is further fortified by the Factories Rules made u/s 46 of the Factories Act where the relevant Rule 70 on the point reads as follows :

Food, drink and other items served in the canteen shall be sold on a non-profit basis and the prices charged shall be subject to the approval of the canteen managing committee.

46. It is, therefore, clear that this is not on any profit basis, but that does not mean that because it is not on a profit basis, therefore it becomes a business to attract the tax. The fallacy of the taxing authorities lies in this case in misleading themselves on the question of no-profit basis and losing grip on the first basic condition that in any event the canteen has to be a business for this dealer-company, which it is not. In other words, this welfare activity u/s 46 of the Factories Act compelling the employers of more than 250 workers to run canteens does not convert the running of such canteens into a business of the company or the factory or the dealer. We, therefore, hold that this is not business but social welfare activity by all the tests that we can think of. Commercially it is not a business. It is not a business of the company under its charter of incorporation. It is certainly an activity without profit. Without Factories Act this activity if it were engaged in by the dealer would have been illegal and unauthorised. No doubt in the case of a company whose business it is to run canteens or cafeterias entirely different considerations will apply and tax will be attracted in such circumstances. We are, therefore, satisfied that even after the amendment of Section 2(1 a) in the Bengal Finance (Sales Tax) Act, 1941, business, trade, commerce, manufacture or adventure or concern must be understood in a commercial sense, carrying a commercial meaning and the dealer according to Section 2(c) of that Act must be a person who carries on the " business" of selling goods. The whole context is that of a business in the commercial sense. All that the amendment has succeeded in doing and what it intended to do, is that once there is a business then whether it has profit-motive or not or whether it actually makes a profit or not becomes immaterial. This interpretation we adopt all the more readily because such an interpretation, in our view, makes the Act intra vires and does not throw it open to the challenge of ultra vires. A statute, in our view, should be construed in such a manner as to make it intra vires and not ultra vires. In our opinion, it must never be lost sight

of in this connection that sales tax is based on the dealer's gross turnover exceeding the taxable quantum on all sales as provided in Section 4 of that Act. The taxable quantum, as defined in Section 4(5) of the Bengal Finance (Sales Tax) Act, inter alia, means goods for sale producing Rs. 10,000 in the case of a dealer who imports for sale or manufactures or produces any goods, or in relation to any other dealer Rs. 50,000. It is therefore not a tax on any and every sale but a tax on the turnover understood in the sense made clear in Section 4 of the Act.

47. That brings us to the conception of sale in Section 2(g) of the statute meaning inter alia "any transfer of property in goods for cash or deferred payment or other valuable consideration" and its cognate concept of a sale price which, u/s 2(h), inter alia means the amount payable to a dealer as valuable consideration. Reading and interpreting these concepts in the general context of business, we are satisfied that business and these consequential concepts must be construed in the commercial sense and within the notice of the Sale of Goods Act, as laid down by the judgments of the Supreme Court cited above.

48. We shall conclude by reference to the preamble of the Bengal Finance (Sales Tax) Act where it says, "whereas it is necessary to make an addition to the revenues of Bengal and for that purpose to impose a general tax on the sale of goods in Bengal." This preamble shows that it was intended to be a general tax on the "sale of goods". This sale of goods must, in our view, be understood within the meaning of the Sale of Goods Act. Therefore, no interpretation should be given to the word "business" which will divorce it from the commercial context of business and sale of goods as understood in the Sale of Goods Act.

49. For the reasons stated above, we answer the question in the negative in favour of the dealer-assessee and we hold that the sale proceeds of the canteen do not form part of the turnover on merits.

50. In the circumstances, each party will bear its own costs.

T.K. Basu, J.

51. I agree.