

State Of Tamil Nadu And Another vs Board Of Trustee Of The Port Of Madras on 26 March, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1647, 1999 (4) SCC 630, 1999 AIR SCW 1262, (1999) 2 SCALE 283, 1999 (3) ADSC 407, 1999 (2) SCALE 293, 1999 (2) LRI 369, 1999 (5) SRJ 91, 1999 ADSC 3 407, (1999) 2 SCJ 56, (1999) 114 STC 520, (1999) 46 KANTLJ(TRIB) 370, (1999) 3 SUPREME 321, 1999 BRLJ 258, (1999) 2 JT 410 (SC), 1999 (3) KLT SN 37 (SC)

Author: M.Jagannadha Rao

Bench: M. Jagannadha Rao, S.N. Phukan

PETITIONER:
STATE OF TAMIL NADU AND ANOTHER

Vs.

RESPONDENT:
BOARD OF TRUSTEE OF THE PORT OF MADRAS

DATE OF JUDGMENT: 26/03/1999

BENCH:
M. JAGANNADHA RAO, & S.N. PHUKAN.

JUDGMENT:

M.JAGANNADHA RAO,J.

Leave granted.

This appeal is preferred by the State of Tamil Nadu and the Commercial Tax Officer, Harbour- I, Assessment Circle, Chennai against the Judgment of the High Court of Madras in Writ Appeal No.1015 of 1994 dated 10.12.1996. By that Judgment, the Division Bench allowed the appeal and set aside the Judgment passed by the learned Single Judge in Writ Petition No.5509 of 1994 dated 30th March, 1994. The learned single Judge had dismissed the writ petition No.5509 of 1994 filed by the first respondent, the Board of Trustees of the Port Trust of Madras (hereinafter called the `Port Trust') and by the Judgment under appeal, the writ petitions stood allowed and the notices issued by the Second appellant, the Commercial Tax Officer on 1.9.1993 and 8.2.1994 stood quashed.

The facts are as follows:

The Madras Port Trust is now a major Port Trust governed by the provisions of the Major Port Trusts Act, 1963 (earlier it was governed by an Act of 1905). It provides services of landing, shipping or trans-shipping, receiving, shifting, transporting, storing or delivery of goods brought into the premises of the Port Trust. Goods are brought into the Port Trust and delivered to the importee/consignee or their cleaning Agents etc. Goods are also exported through the Port Trust by means of its services. In the case of uncleared or abandoned goods, the Port Trust brings them for sale in public auction after the approval of the customs authorities. Before 1959, the Sales Tax Authorities in Madras sought to assess the Port Trust to sales tax under the Madras General Sales Tax Act (Act 9 of 1939) in respect of charges collected for water supplied by the Port Trust to ships. At that time, the Port Trust was governed by the Madras Port Trust Act (Act 2 of 1905). A Division Bench of the High Court of Madras in Trustees of the Port of Madras vs. State of Madras [1960 (11) STC 224](Mad) held by Judgment dated 27.11.1959 that the Port Trust was not constituted for the purposes of "carrying on any business" of buying and selling with a view to make profit and that while supplying water to the ships that called at the Port, it was only discharging a statutory duty imposed upon it by the statute and was not a "dealer", within the meaning of 'dealer' in Section 2(b) of the Madras General Sales Tax Act, 1939. At that time Section 2(b) which defined the word "dealer" stated that a dealer would be any person who carried on the business of buying or selling goods. The definition did not say that it was not relevant whether the said person was carrying on business with or without profit motive. In other words, profit motive was treated, at that time, as an essential element of business. The High Court, therefore, held that inasmuch as the Port Trust was performing certain statutory functions and rendering duties without any intention to make profit, it was not a 'dealer' within the definition of the said expression.

The above said statute of 1939 was replaced by the Tamil Nadu General Sales Tax Act, 1959. It contained a definition of "business" in Section 2(d) and a definition of "dealer" in Section 2(g). The definitions were amended from time to time. Section 2(d) which defined "business" did not initially state that the motive to gain or profit was not relevant. But the said sub-clause 2(d) was substituted by a new clause by the Madras Act 15 of 1964 which included within the said definition of "business", the activity of carrying on business whether or not such business was carried on with a motive to make gain or profit. After the said amendment of 1964 the matter in regard to the Madras Port Trust again went before the Madras High Court in State of Madras vs. Trustees of Port of Madras [(1974) 34 STC 135] (Mad). The dispute in that case related to the sale of unclaimed and unserviceable goods by the Madras Port Trust through auctioneers. The question raised was whether the Port Trust was a department of the Central Government and whether the Port Trust was a 'dealer' and its activity of selling the unclaimed and unserviceable goods could be subjected to sales tax. It was held by a Division Bench of the High Court of Madras in the above cited case in State of Madras vs. Trustees of Port of Madras [(1974) 34 STC 135], that even though the sales in question related to the assessment years 1964-65 and 1965-66 and were effected after the amendment of the definition "business" by Madras Act 15 of 1964, still the above said transactions of sale were not liable to sales tax inasmuch as the Port Trust could not be treated as a 'dealer' carrying

on the business of selling, supplying or distributing goods as a commercial venture in the course of the exercise of its statutory duties. It was also held that the Port Trust was a statutory body constituted by the Madras Port Trust Act, 1905 and though it was subject to certain control by the Central Government, it could not be treated as a department of Central Government so as to come within Explanation 2 read with Section 2(g) of the Act of 1959 nor was the Port Trust liable as a local authority within the meaning of 'dealer' in section 2(g)(i) as it was not established that it was carrying on business of buying and selling etc. Subsequently, sub-clause (iii) of Section 2(g) of the Tamil Nadu General Sales Tax Act, 1959 was amended by Tamil Nadu Act 31 of 1992. Section 2(g)(iii) after amendment included within the definition of 'dealer' a factor, broker or commercial agent or Arhati, a del Credere Agent or a commercial or any other mercantile agent by whatever name called, and whether of the same description as stated above or not, who carried on the business of buying, selling, supplying or distributing goods on behalf of any principal or through whom the goods were bought, sold, supplied or distributed. On the assumption that after the above said amendment by Tamil Nadu Act 31 of 1992 in the definition of "dealer", the Judgment of the Madras High Court in State of Madras vs. Trustees of Port of Madras [1974 (34) STC 135] (Mad) would not come in his way, the second appellant namely, the Commercial Tax Officer issued a notice dated 1.9.1993 calling upon the Port Trust to register itself as a dealer under the Tamil Nadu General Sales Tax Act, 1959. The respondent then replied on 26.10.1993 relying upon the above Judgment of the Madras High Court rendered in State of Madras vs. Trustees of Port of Madras [(1974) 34 STC 135] (Mad) and it contended that the amendment did not make any difference. Thereupon, the second appellant gave a further notice dated 8.2.1994 directing the respondent to furnish details of the auction sales conducted during the year 1993-94 upto 1.4.1993. In the said notice the respondent was asked "to furnish the details of auction sales conducted during 1993-94 and the quantum of sales effected by way of auction commodity-wise, date- wise" to the second appellant. It was at that stage that the Port Trust filed Writ Petition No.5509 of 1994 contending that the Tamil Nadu General Sales Tax Act, 1959 did not apply to it and that the notices issued to them were without jurisdiction. A learned single Judge of the High Court dismissed the writ petition by Judgment dated 30.3.1994 holding that the definition of 'dealer' in section 2(g)(iii) as amended in 1991 was wide enough to cover the case of the respondent and that the Judgment of the High Court in State of Madras vs. Trustees of Port of Madras [(1974) 34 STC 135] (Mad) rendered before the said 1991 amendment was not applicable. It was also observed that the proceeding being a show-cause notice, the respondent could go before the Commercial Tax Officer and pursue further remedies under the Act.

The Port Trust preferred an appeal to the Division Bench of the High Court, which on a consideration of the provisions of the Major Port Trust Act, 1963 and the amended provisions of Tamil Nadu General Sales Tax Act, 1959 came to the conclusion that there was no element of profit or gain in the duties discharged or in the services rendered by the Port Trust, the services were statutory and these services did not come within the definition of the word "business" in Section 2(d) of the Act and, therefore, the respondent was not a "dealer" within Section 2(g) of the Act notwithstanding the amendment to Section 2(g)(iii) by the Tamil Nadu Act 31 of 1992. The Writ Appeal was allowed and the notices of the second appellant were quashed.

Aggrieved by the above said Judgment of the Division Bench of the High Court in the writ appeal, the State of Madras and the Commercial Tax Officer have filed this appeal. The Port Trusts of Cochin, Kandla, Calcutta have filed Interlocutory Applications for intervention but inasmuch as the concerned State Governments which levy sales-tax under the respective State Laws are not before us, we have not permitted any arguments by the said Ports in regard to the levability of sales tax under the respective State enactments. We have merely allowed them to support the submissions of the Madras Port Trust in the context of the Tamil Nadu Statute. Their applications are, therefore, liable to be dismissed.

In this appeal, we have heard elaborate submissions of the learned senior counsel Shri A.K.Ganguli for the State of Tamil Nadu and of Sri T.L.Viswanatha Iyer, learned senior counsel for the Madras Port Trust. Counsel cited a large number of rulings in support of their respective contentions.

The notices in the present case refer to the auctions conducted by the Port Trust during 1993-94 and in the Civil Appeal it is stated in ground No.

(i) (l) and (r) that the Port Trust is liable to pay sales tax in regard to the auctions of unclaimed or unservicable goods including scrap. Therefore, the dispute was in relation to these items.

Under the Tamil Nadu Sales Tax Act, 1959, after the amendment by Madras Act 15 of 1964 and Tamil Nadu Act 31 of 1992, sub clause (g) of section 2 defines 'dealer' and in so far as it is material for the purpose of this case, reads as follows:

"S.2(g): "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes--

(i) a local authority,..... which carries on such business;

(ii).....

(iii) a factor,, or an auctioneer, or any other mercantile agent by whatever name called,.....who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal or through whom the goods are bought, sold, supplied or distributed;

(iv) to (ix).....

Explanation (1):.....

Explanation (2):The Central Government or any State Government which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, shall be

deemed to be a dealer for the purposes of this Act.

Section 2(d) defines 'business' as follows:

"S.2(d): "business" includes

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

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

Sub-clause (n) of section 2 defines 'sale' as every transfer of the property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration. The inclusive part of the definition of 'sale' contains sub-clauses (i) to

(vi). There are four Explanations to the section and Explanation (1-B) deals with transfer of property involved in the purchase, sale, supply or distribution of goods through various persons including an auctioneer.

Section 3 of the Act, in sub-clause (1), states that every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year exceeds three lakhs of rupees and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, shall pay tax for each year in accordance with the provisions of the Act.

As will be clear from the definition of 'dealer' in section 2(g) the question is whether the Port Trust, - treated as a person under section 2(g) or a local authority under section 2(g)(i) or as an auctioneer under section 2(g)(iii) - is a 'dealer' "who carries on the business of buying, selling etc.". The emphasis here is on "carrying on business" and not merely buying and selling. In view of the definition of "business" in section 2(d) after the 1964 Amendment, it does not matter whether the business is carried on without a motive to make profit or gain or whether profit has in fact accrued.

Now the definition of "business" in section 2(d) and in most of the sales tax statutes is an inclusive definition and includes 'trade or business or manufacture etc.'. This itself shows that the legislature has recognised that the word 'business' is wider than the words 'trade, commerce or manufacture etc.'. The word 'business' though extensively used is a word of indefinite import. In taxing statutes, it is normally used in the sense of an occupation, a profession - which occupies time, attention and labour of a person, normally with a profit motive and 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[State of A.P. vs. H.Abdul Bakhi & Bros. (AIR 1965 SC 531)]. Even if such profit motive is

statutorily excluded from the definition of 'business' yet the person could be doing 'business'.

The word 'carrying on business' requires something more than merely selling or buying etc. 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 (Board of Revenue & Others vs. A.M.Ansari & Others (1976 (3) SCC

512). Such profit motive may, however, be statutorily excluded from the definition of 'business' but still the person may be 'carrying on business'.

Counsel on both sides cited various rulings before us some relating to definition of 'business' before the profit motive was excluded and some thereafter. Some rulings related to cases where the main transaction was 'business' with profit motive while some were sales where it was not the motive. In some cases the sales were of subsidiary products. Cases where the main activities were not 'business' were also cited. Cases where the transactions arose out of statutory duties were also cited and some were in connection with services rendered. Some were by governments. These various types of cases cited could appear to be somewhat overlapping, but in our view, if the principles on which they are based are kept in view, it can be seen that there is no such overlapping.

We would categorize the rulings cited before us by learned senior counsel on both sides into two basic and distinctive categories, the first one where the main activity of the person amounted to "carrying on business" and the second where it did not. In the first category where the main activity was business, there could be sales relating to certain transactions 'connected with', 'incidental' or 'ancillary' to the main business though without profit motive, and the question would arise as to whether these sales were liable to sales tax or not. The second category would be one where the main activity did not admittedly amount to "carrying on business". Even so, in regard to sales which were connected or incidental or ancillary to such main activity, question would arise whether such sales were exigible to sales tax. The contention of the Port Trust before us is that its case falls under the second category and not under the first category. The State contends contra.

So far as the first category of cases are concerned, we may state that initially most sales tax statutes did not provide in the definition of 'business' that profit motive was irrelevant. Thus the profit motive remained relevant. Nor did the statutes include in the definition of 'business' sales 'in connection with' or 'ancillary' or 'incidental' to the main business.

In a large number of cases belonging to this first category the person was held not to be 'carrying on business' if he was not doing business for profit, an element which, not being excluded, was to be treated as a basic component of 'business' and, therefore, implied under various sales-tax statutes. It was held in these cases that though trading activities were no doubt proved, there being no profit motive involved in the relevant activity, the sales were not liable to sales tax, and the person could not be held to be 'carrying on business'. To this line belonged Director of Supplies and Disposals, Calcutta vs. Member, Board of Revenue, West Bengal, Calcutta [AIR 1967 SC 1826 = 20 STC 398] cited for the respondent Port Trust, which related to disposal of war equipment taken over from the

American forces in the Second World War. The Directorate of Disposals which carried on the disposals was merely disposing of surplus material by way of realisation of capital and there was no profit motive. On the same basis, in *Government Medical Store Depot, Gauhati vs. Superintendent of Taxes, Gauhati & Others* [1985 (4) SCC 239], again cited for the respondent Port Trust, it was held that, as per the unamended definition of 'business', profit-motive was not excluded and, on the facts found, as there was no profit-motive established, the transactions of sales of medicines by the Medical Store Depot to various departments, did not amount to 'carrying on business' in spite of the volume, frequency, continuity and regularity of the transactions. This was followed in *Government Medical Store Depot, Karnal vs. State of Haryana & Others* [1986 (3) SCC 669]. In *State of Punjab vs. Assessing Authority, Chandigarh* [1991 Supp. (1) SCC 153], the sales were by Canteens run by the Hospitality Organisation, Punjab. In all these cases, it was held that sales tax was not leviable because of absence of profit motive (which was not excluded by statute) in regard to the main activities. But these cases are not directly in point inasmuch they are based on a definition of 'business' which did not exclude profit motive and cannot help the respondent - Port Trust.

Again, before the statutory exclusion of 'profit motive' from the definition of 'business', question arose whether certain sales of commodities other than the goods relating to the main business could also be included in the turnover. The definition did not, in the initial stages, include sales made "in connection with" the main business activities. The said word is obviously wider than the word 'ancillary' or 'incidental'. We shall start with the leading case. In *State of Gujarat vs. Raipur Manufacturing Co. Ltd.* [AIR 1967 SC 1066 = 19 STC 1], relied upon for the respondent - Port Trust, it was held by Shah, J. (as he then was) that the definition of 'business' did not exclude profit motive nor did it include sales "in connection with" the main activity. The Textile Mill's main activity did indisputably amount to 'carrying on business' but in regard to the incidental sales of 'unserviceable or discarded' goods, it was held that these sales were intended only for reduction of the space and to save accommodation and were not so integrated with (or connected with) the main business, even if they were of considerable volume and frequency. There was no proof that the Mills intended to carry on business in unserviceable and discarded goods. However, in the same case, 'Kolsi and Waste Caustic Liquor' which were sold regularly and continuously were held to be part of the business being subsidiary products of the main business of the Textile Mill and sales of these items were held liable to sales tax inasmuch as an intention to trade in these items could be presumed. Likewise in *State of Gujarat vs. Vivekanand Mills* [(1967) 19 STC 103 (SC)], cited for the respondent- Port Trust, the Mills purchased cotton locally believing that shipment from California would take 6 months time to arrive but the Californian Cotton arrived suddenly and therefore the local cotton had to be sold to avoid blocking up of a large sum of money. It was held that it could not be inferred that the Mills intended to carry business in selling cotton. The sales were not liable to tax. Position was similar in *State of Gujarat vs. Arvind Mills Ltd.* [(1967) 19 STC 12 (SC)] where sales of old containers such as cans, boxes, discarded stores, machinery and iron scrap, discarded hessian, oil and chemicals were held not part of business but sale of 'Waste Caustic liquor' were held liable to tax. Again in *State of Gujarat vs. Ambica Mills Ltd.* [(1967) STC 12 (SC)] the sale of 89 looms, 28 carding engines, 2 lathes etc. were held not exigible to tax. In *Hindustan Steels Ltd. vs. State of Orissa* [AIR 1970 SC 253], the main activity was production of steel but there were sales of bricks to contractors at a fixed percentage over cost price. These sales were held not part of the main business activity and were held not liable to sales tax. All these cases being based on a definition of 'business' which did not

include connected, ancillary or incidental sales, cannot help the respondent -Port Trust.

After the amendment to the definition of 'business' in 1964 or thereabouts in most sales-tax statutes, profit motive was statutorily treated as irrelevant. Further, by including sales made 'in connection with' or 'incidental' or 'ancillary' to the main business as part of 'business', the scope for taxation was widened and questions arose again whether, the incidental sales of certain commodities could be treated as amounting to 'carrying on business'.

The words 'in connection with' occurring in the definition of 'business' fell for consideration in State of Tamil Nadu vs. M/s Burmah Shell Oil Storage and Distributing Co. of India Ltd. & Another [1973 (3) SCC 511 = 31 STC 426] strongly relied upon for the appellant - State of Tamil Nadu. In that case, sales fell into two periods. The oil company's sales during 1-4-64 to 31-8-64 and those during 1.9.64 to 31.3.65 were in question. The amendment which made profit motive irrelevant and included sales made 'in connection with' main business in the definition of 'business' came into force w.e.f. 1.9.64 in Madras State. In respect of the pre-amendment period, this Court followed Raipur Manufacturing Co. Case [AIR 1967 SC 1066]. Jaganmohan Reddy, J. held that the sale of miscellaneous, old and discarded items, could not be treated as part of the activities of carrying on business even if the sales were frequent and their volume was large. It was also observed that the discarded goods were not by-products or subsidiary products of or arising in the course of manufacturing process. Nor could they be treated as sales 'in connection with' the main business for such a contingency was not part of the then definition of 'business'. But in respect of the period after 1.9.64, it was held that the addition of the words in section 2(d) (ii) of transactions "in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern" and the exclusion of 'profit-motive' made the definition of 'business' wider. It was, therefore, held that the scrap that was sold after 1.9.1964 was "connected with" the business of the company. The Court distinguished Raipur Manufacturing Co. Case on this ground. An argument was advanced for the assessee in that case that the word 'such' in the inclusive part of the definition of 'business' in section 2(d)(ii) viz.

"any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, etc.", governed the word 'trade' etc. and that a commercial element was intended to be part of the subsidiary sale transaction. But this contention was rejected by this Court holding that the word 'such' referred to the concept of absence of profit motive, as per the amended definition of 'business' in section 2(d)(i). It was held that the decision of the Andhra Pradesh High Court in Hyderabad Asbestos Cement Products Ltd. vs. State of A.P. [(1972) 30 STC 26] had correctly explained the position after a similar amendment. Adverting to that judgment, it was held(p.516):

"In their view (Andhra Pradesh High Court), under both parts of the definition, profit motive is now immaterial and the concept of business in respect of matters falling under section 2(d)(ii) in the commercial sense put forward and accepted in the earlier cases must be abandoned. We think the view adopted by the Andhra Pradesh High Court is in consonance with our own reading of the section which we have indicated

earlier."

In other words, the "concept of business in the commercial sense" was, it was held, abandoned. That would mean that after the amendment, it was sufficient if these sales were made "in connection with" the trade and there was no need to prove in these sales any commercial element. The word 'such' in sub-clause (ii) of section 2(d) defining 'business' after amendment would mean the absence of profit motive and it did not matter so far as these sales were concerned, if there was no profit motive or commercial element. Such sales were also to be treated as part of 'business' under the inclusive part of section 2(d)(ii). Thus sales of scrap and unserviceable goods, even if made for reduction of space or such other reason and even if there was no profit motive, they would become exigible to sales-tax. This was a radical departure from Raipur Manufacturing Co. but this was because of the amendment in the definition of 'business' in 1964 and not because of any change in legal principle. This decision would support the case of the appellant, State of Tamil Nadu, if however, it was proved that the main activity of the Port Trust amounted to 'business'.

The words 'incidental' in section 2(d)(ii) came up for consideration in State of Tamil Nadu vs. Binny Ltd. Madras [1980 Suppl. SCC 686] cited for the respondent - Port Trust. The company was having business of manufacture and sale of textiles. It was also running a store in the premises of the factory to enable the workmen to buy provisions which were assessed to tax. The sales to workmen were on no profit basis. The company contended that it was only running a facility for its workmen and its main business was certainly not that of selling provisions. The issue related to 1967-68 after amendment of section 2(d) of the Madras Act. The argument that there should be a "direct" connection between the main business and these sales of provisions was rejected by this court and it was held that these sales were 'incidental' to the main business and covered by the amended definition of 'business' in section 2(d). Bhagwati, J.(as he then was) adverted to the observations of Krishna Iyer, J. in Royal Talkies, Hyderabad vs. Employees State Insurance Corporation [1978 (4) SCC 204], a decision under the ESI Act to the following effect:

"a thing is incidental to another, if it merely pertains 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."

It was pointed out that in the case relating to Royal Talkies, it was held that it was impossible to hold that a canteen or cycle stand or cinema magazine booth was not incidental to the purpose of the theatre. The cinema goers ordinarily find the above to be facilities, amenities and sometimes even a necessity. All that the statute required was that the work should not be irrelevant to the purpose of the establishment. Adverting to the facts in the case before them (i.e. Binny Case), this Court held that if a canteen maintained by a cinema-owner for the benefit of cinegoers could be regarded as 'incidental' to the purpose of the Cinema theatre, namely, the business of exhibiting films in the theatre, it was difficult to see how a store run by the owner of a Textile undertaking for sale of provisions to workmen employed in the factory could be said to be not 'incidental' to the business of manufacture of textiles. [This case stands in contrast with State of Tamil Nadu vs. Thirumagal Mills Ltd. [(1972) 29 STC 290(SC)] where, before amendment of definition of 'business' in the T.N.Act, sales made during the running of a fair price shop by a spinning mill for benefit of employees

without profit motive were held not liable to sales tax]. On the same parity of reasoning, it was held in *State of Tamil Nadu vs. Shakti Estates* [1989 (1) SCC 636] that where a reserve-forest was purchased or taken on lease by a firm for raising coffee and cardamom plantation thereon and a portion of the forest produce was cleared by felling trees and then the cut trees and natural growth were sold in various forms like firewood, timber/sleepers/charcoal,- then these sales were 'incidental or ancillary' to the business. It was immaterial that in these sales there was no profit motive. In the context, it was to be noted that a 'casual dealer' was also included in the definition of 'dealer' and even sales effected before the plantation had started yielding results would be covered. In *Indian Express (P) Ltd. vs. State of Tamil Nadu* [(1987) 67 STC 474 (SC)], it was held that the sales of old and unsold copies of newspapers by a newspaper publisher as waste paper regularly with profit motive, were 'incidental' to the main business of printing and publishing newspapers and were liable to sales tax. This case was followed in *The Hindu vs. State of Tamil Nadu* [(1987) 67 STC 477 (SC)] which related to sales of glazed newsprint by a newspaper publisher(during the period when the publication was stopped) and also sales of old newspapers, print waste and cut waste and these sales were treated as 'incidental or ancillary' to the main business of printing and publishing of newspaper and liable to sales-tax. These cases would be of help to the appellant, State of Tamil Nadu, if the main activity of the Port Trust amounted to 'business'.

Learned senior counsel for the appellant, State of Tamil Nadu contended that merely because the Port Trust was performing statutory functions or duties, it could not be contended that there was no 'business' in the eye of the law. It was pointed out that even the Central Government and State Governments had been brought within the purview of the definition of 'dealer' in section 2(g) by way of an Explanation. Similarly, compulsory sales under Control orders had also been brought within the tax-net.

It is true that in the Explanation 2 to section 2(g) which defines 'dealer', the Central Government and State Governments have been brought within the definition of 'dealer' in certain respects. In *District Controller of Stores, Northern Railway, Jodhpur vs. Assistant Commercial Taxation Officer & another* [(1976) 37 STC 423], relied upon for the appellant, State of Tamil Nadu, sale of unserviceable stores and scrap by the Northern Railway were held exigible to sales tax in view of the enlarged definition of 'business' under the Rajasthan Sales Tax Act, 1954. It was pointed out that there was no fallacy in thinking that the Railway, since it was concerned in the activity of transportation, it was engaged in commerce. Similarly in *Member, Board of Revenue, West Bengal vs. Controller of Stores, Eastern Railway, Calcutta* [(1989) 74 STC 5], it was held in a batch of cases that sale of unclaimed goods made the Railway a 'dealer' under section 2(g) of the Bengal Finance(Sales Tax) Act, 1941. The South Eastern Railway was a carrier of goods and its activity of selling goods which remained unclaimed was adjunctive to its principal activity as carrier of goods. It was 'incidental' or 'ancillary' to its business as carrier of goods. On that basis, in the same batch, in a case arising from Andhra Pradesh, the Central Government was held to be a 'dealer' within section 2(b) of the Andhra Pradesh General Sales Tax Act, 1957. There the Central Government sold, through the Joint Director of Food, foodgrains and fertilizes to the A.P. State and other States, for a price fixed by the Government. Though the tax was levied on the Government of India, it was stated that this was for the benefit of the State Governments and through a machinery of the State tax agency. The State had power to trade or do business as was manifest from Article 19(6)(ii) of the

Constitution of India. The trade in essential commodities, though carried on to fulfil a State obligation of ensuring even distribution of vital goods to needy sections of the people, was nevertheless trade or business. Necessarily, therefore, the Central Government became a 'dealer' by definition as it carried on business and this was so even if the State Act excluded the profit motive. Again in *M/s Vrajlal Manilal & Co. and another vs. State of Madhya Pradesh and another* [AIR 1986 SC 1085] it was held that the M.P. General Sales Tax Act, 1959 was amended by enlarging the definition of 'dealer' in section 2(d) and that the Explanation added brought the Central or State Governments within the purview of the said definition. Then in the seven Judge decision in *M/s Vishnu Agencies (Pvt.) Ltd. vs. Commercial Tax Officer and Others* [1978 (1) SCC 520], this Court had to consider the transactions of supply of cement by a distributor to a permit holder in terms of the W.B. Cement Control Act and Control Order to find out if they amounted to 'sale' within section 2(g) of the Bengal Finance (Sales Tax) Act, 1941. The case was also concerned with the compulsory sales of paddy by paddy growers to licensed agents appointed by the State Government under the A.P. Paddy Procurement (Levy) Orders. The issue related to the absence of a consensual option as between the parties to the bargain. It was held that a transaction effected in compliance with the obligations imposed by statute might nevertheless be a 'sale' in the eye of the law, so long as mutual assent, express or implied, was not excluded. There was no obligation for a trader to deal with business in these controlled goods. But once a dealer opted, he was bound to trade strictly within the terms of the Control orders. Further though the terms were mostly predetermined by statute, it could not be said that there was no area or scope for parties to bargain. Thus, these sales were held liable to sales-tax. These decisions could help the appellant, State of Tamil Nadu, if the main activity of the Port Trust amounted to 'business'.

In this context reference was also made by the appellant's senior counsel to *Food Corporation of India vs. State of Kerala* [1997 (3) SCC 410] as a case where the services were governed by statute. In that case, purchase of food grains by the Food Corporation of India pursuant to levy orders issued under section 3 of the Essential Commodities Act were held liable to sales tax under the U.P. Sales Tax Act, 1948. The facts of the case showed that the FCI had reserved the right to accept or reject the offer of the State. Several earlier judgments relating to sales which were governed by Control orders were approved by the three Judge Bench. But this ruling cannot help the appellants because the Food Corporation, as seen from the preamble of the Food Corporation Act, 1964 was established for purpose of trading in food grains and other food stuffs. Hence the appellants must establish that the Port Trust was established for carrying on business.

It will thus be noticed that in all these cases the main activity of the person or body was undoubtedly 'business' even though the motive of profit was excluded by statute and even though the connected, incidental or ancillary sales were statutorily included in the definition of business. The question in issue before us is whether the Port Trust was established by statute to 'carry on business'.

We now come to the second category of cases cited for the respondent, Port Trust where the main activity of the person or body does not amount to 'carrying on business'. If that be the case the activities will stand far removed from any business. Let us assume that such "non-business"

activities might result (say) in some scrap or unwanted material which should be cleared so that accommodation could be saved. If the sales were then made with an intention to reduce the congestion and not with the intention of running an independent business in the scrap or unwanted material, then would they be liable to sales-tax? If in such situations, the activities of sale of the scrap or unwanted material were only a very infinitesimal part of the activities when compared with the main "non-business" activity, could they be brought under the tax net?

In our view, if the main activity was not 'business', then the connected, incidental or ancillary activities of sales would not normally amount to 'business' unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is established by the revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not 'business' and the onus of proof of an independent intention to do 'business' in these connected, incidental and ancillary sales will rest on the Department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier.

We shall now refer to a few decided cases where such questions have arisen and which have been cited for the respondent, Port Trust.

One of the earliest of the cases where the 'object or purpose' of the main activities fell for consideration was the case decided by the Chagla, CJ in the Bombay High Court in *State of Bombay vs. Ahmedabad Education Society* [(1956) 7 STC 497 (Bom)]. In that case, an Educational society was entrusted with the task of founding a College and for that purpose to construct buildings therefor.

It was held that it could not be said to be 'carrying on business' merely because for the above purposes, it established a brick kiln and sold surplus brick and scrap at cost price without intending to make profit or gain. Having regard to its principal activities and its objects, it was held that the Educational Society was not established to 'carry on business' and the sale of bricks were held not exigible to sales tax. Chagla, C.J. pointed out that it was not merely the act of selling or buying etc. that constituted a person a 'dealer', but that the 'object' of the person who carried on the activities was important. The learned Chief Justice said that it was not every activity or any repeated activity seriously undertaken which resulted in sale or supply of goods that could attract sales tax. If it was the intention of the Legislature to tax every sale or purchase - irrespective of the object of the activities out of which the transactions arose - then it was unnecessary to state that the person must 'carry on the business' of selling, buying etc. No doubt, when this case was decided, the statute did not include the connected, incidental and ancillary activities in the definition of 'business'. But, even so the principles enunciated are, with respect, correctly stated and support the case of the respondent, Port Trust.

In *Girdhari Lal Jiwanlal vs. Assistant Commissioner of Sales Tax (Appeals), Nagpur* [1957 Vol.8 STC 732(Bom)], relied on for the respondent- Port Trust, the Bombay High Court held that an agriculturist did not necessarily fall within the definition of a 'dealer' under section 2(c) of the CP & Berar Sales Tax Act (Act 21 of 1967), merely because he sold or supplied commodities. It must be shown that he was carrying on a business. It was held that it must be established that his primary intention in engaging himself in such activities must be to carry on the business of sale or supply of agricultural produce. The High Court held that there was "nothing to show that the petitioner acquired these lands with a view to doing the business of selling or supplying agricultural product. According to the assessee, he was principally an agriculturist who also deals in cotton, coal, oil-seeds and groundnuts". He was having agriculture for the purpose of earning income from the fields but there was nothing to show that he acquired the lands with the primary intention of doing business of selling or buying agricultural produce. This decision was approved by this Court in *Dy. Commissioner of Agricultural Income-tax & Sales-tax vs. Travancore Rubber & Tea Co.* [1967 vol.20 STC 520(SC)] and it was held that where the only facts established were that the assessee converted latex tapped from rubber trees into sheets and effected a sale of those sheets to its customers, the conversion of latex into sheets being a process essential for transport and marketing of the produce, the department had failed to prove that "the assessee was formed" with a commercial purpose. The Allahabad High Court in *Swadeshi Cotton Mills Co.Ltd. vs. Sales Tax Officer* [(1964) 15 STC 505 (All.)] was dealing with a batch of cases where different bodies were running canteens. One of the cases concerned the Aligarh Muslim University which was maintaining dining halls where it was serving food and refreshments to its residents-students. It was held, referring to observations of this Court in *University of Delhi & Another vs. Ram Nath & Others* [AIR 1963 SC 1873] that it was incongruous to call educational activities of the University as amounting to 'carrying on business'. The activity of serving food in the dining hall was a minor part of the overall activity of the University. Education was more a mission and avocation rather than a profession or trade or business. The aim of education was the creation of a well-educated, healthy, young generation imbued with a rational and progressive outlook of life. On this reasoning, it was held that the Aligarh University was not 'carrying on business' and the sale of food at the dining halls was not liable to tax. Likewise after the amendment of definition of 'business' question arose in *India Institute of Technology vs. State of UP* [(1976) 38 STC 428(All)], with respect to the visitor's hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that, the statutory obligation of maintenance of hostel which involved supply and sale of food was an integral part of the objects of the Institute. Nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Similarly, in the case of a Research organisation, in *Dy. Commissioner (C.T), Coimbatore vs. South India Textile Research Association* [(1978) 41 STC 197 (Mad)], which was purchasing cotton and selling the cotton- yarn/cotton waste resulting from the research activities, it was held that the Institute was solely and exclusively constituted for the purposes of research and was not carrying on 'business' and these sales and purchases above-mentioned could not be subjected to sales-tax. Likewise, in *State of Tamil Nadu vs. Cement Research Institute of India* [(1992) 86 STC 124(Mad)], it was held that the Institute was an organization the objects of which were to promote research and other scientific work, that the laboratories and workshops were maintained by the organization for conducting experiments, and that though the cement

manufactured as a result of research was sold, it could not be considered to be a trading activity within section 2(d) of the Tamil Nadu General Sales Tax Act, 1959. Again in Tirumala Tirupati Devasthanam vs. State of Madras [(1972) 29 STC 266(Mad)] the dispute arose with regard to the sales of silverware etc. which are customarily deposited in the Hundis by devotees. It was held by the Madras High Court that the Devasthanam's main activities were religious in nature and these sales were not liable to tax. (No doubt, the case related to a period where the profit motive was not excluded by statute). We are of the view that all these decisions involve the general principle that the main activity must be 'business' and these rulings do support the case of the respondent-Port Trust.

Finally, we come to the Naval Dockyard Case in Base Repair Organisation, (Now Naval Dockyard), Visakhapatnam vs. The State of A.P. [(1983) 53 STC 223(AP)]. Here the Naval Dockyard was established for repairing and servicing ships of the Navy. It was obliged by section 46 of the Factories Act to run a canteen to cater to the needs of its employees and the canteen was run on no-profit no loss basis. It was held that the sales in the canteen were not liable to sales tax. It was held as follows:

"It should be noticed that the canteen is not only being run in discharge of a statutory obligation, but that it constitutes an infinitesimal and insignificant part of the entire activity of the assessee. Having regard to the nature of the functions and the purpose for which the Naval Dock yard is established, and also because of the fact that the canteen subserves the main object and purpose of the assessee and is an integral and inseparable part of it, it would be unrealistic to separate the said activity and treat it as a business."

We are in entire agreement with the above elucidation of the law and the conclusion and these observations support the case of the respondent - Port Trust.

Learned senior counsel for the appellant, State of Tamil Nadu, however, relied upon the certain other observations in the above case. The observations relied upon are as follows:

"Sub-clause (ii) is in the nature of an explanation. It says that any transaction in connection with or incidental or ancillary to trade, commerce, manufacture, adventure or concern, referred to in sub-clause (i), shall equally be a business. The contention of Mr.Venkatarama Reddy is that, on the same parity of reasoning, inasmuch as the main activity of the petitioner does not amount to trade, commerce or manufacture, the ancillary or incidental activity of running a canteen cannot equally amount to business. It is not possible to agree with this submission."

Thereafter, the High Court observed:

"According to the definition, if the main activity is in the nature of trade, commerce or manufacture, any ancillary or incidental transaction, be it per se in the nature of trade, commerce or manufacture or not, is also treated as 'business'. But the converse is not true. In other words, if the main activity is not business, but if an

ancillary or incidental activity is per se business, the incidental or ancillary activity does not cease to be business, merely because it is ancillary or incidental to the main activity, which itself is not business. The definition is not capable of being read in such a manner."

We agree with the above observations subject to the following clarification or modification. If the main activities are 'business' then the sales in connection with or incidental or ancillary thereto need not have been intended as a business or commercial activity. Their mere connection with or being incidental or ancillary to something else which was 'business' was sufficient to include such sales in the main business. The second part of the last extract starting with the words 'But the converse is not true', are to be modified to mean that if the main activity falling under sub-clause

(i) did not amount to business, normally these sales made in connection with or were incidental or ancillary to the main activity would not be 'business' but there could still be an exception where the sales so connected or incidental or ancillary to the main "non-business" activity were proved to have been made with an independent intention to do business and the burden of proof to prove the exception would fall on the revenue. In our view, the Andhra Pradesh High Court did not, in the above passage, imply that even where the main activities were not business, the assessee must prove want of an intention to carry on business in the connected, incidental or ancillary activity which involved sales. It is possible, in exceptional cases that such latter sales could per se be business having been proved by the revenue to have been carried in with such an explicit intention. The burden, as already stated, would here lie on the revenue.

Then the learned senior counsel for the appellant-State relied upon yet another passage from the above judgment of the Andhra Pradesh High Court which reads as follows:

"We must make it clear that there is a definite distinction between an activity which is ancillary or incidental to the main activity and an activity which is an integral part of the main activity. In the first case, the incidental or ancillary activity is a distinct activity, though it is incidental or ancillary to the main activity."

On the facts of the case before the Andhra Pradesh High Court, the canteen activity was treated as a requirement of statute and also as an integral part of the main activity and was, therefore, not business. If the Andhra Pradesh High Court meant that incidental or ancillary sales or sales made in connection with a main activity, (which main activity was not in itself business), in order to escape liability should always be proved by the assessee to be an integral part of the main "non-business" activity, we are not inclined to agree. In our view, that would erase the distinction between sales which were integral with the main "non-business" activity and those which were incidental or ancillary or connected. In the first place, if these sales were an integral part of the main "non-business" activity, they were not incidental or ancillary and would present no difficulty in leading to the conclusion that they were not taxable. But if the sales were connected or incidental or ancillary to the "non-business"

activity then, as stated earlier, there would be a presumption that they were not intended to be 'business'. It would then be for the revenue, in any exceptional case to prove that, in respect of a "non-business" activity the ancillary or incidental sales were independently intended to be carried on as a separate business. To this extent, we modify the principle stated in the Andhra Pradesh High Court in the Naval Dockyard case.

That brings us finally to the question whether the Port Trust was established under the Major Port Trusts Act, 1963 for 'carrying on business'?

The observations of this Court in Trustees of Port of Madras vs. M/s Aminchand Pyarelal & Others [1976 (1) SCR 721] in connection with the earlier Madras Port Trust Act were strongly relied upon by the learned senior counsel for the respondent - Port Trust. In that case Chandrachud, J.(as he then was) observed (at p.735) as follows:

"Port Trusts do not do the business of warehousing goods and the rates which the Board charges for storage of goods are not levied as a means of collecting revenues. The Board is under a statutory obligation to render services of various kinds and those services have to be rendered not for the personal benefit of this or that importer but in the larger national interests."

The above observations clearly show that Port Trusts are not established for carrying on business.

Coming to the Major Port Trusts Act, 1963 (before amendment by Act 15/97), Chapter V refers to "works and services to be provided by ports"

(sections 35 to 47) while Chapter VI deals with 'Imposition and Recovery of Rates at Ports' (sections 48 to 65). Section 35(a) refers to various works and appliances to be provided by the Ports, namely, wharves, quays, docks, stage, jetties, piers etc. within the port or port approaches or on the foreshore of the port or port approaches, with all convenient articles, drains, landing places, stains, fences, roads, railways, bridges, tunnels and approaches and buildings required for the residence of the employees of the Board as the Board may consider necessary; section 35(b) refers to providing buses, railways, locomotives, rolling stock, sheds, hotels, warehouses and other accommodation for passengers and goods. The port is required to provide appliances for carrying passengers and for conveying, receiving and storing goods, landed or to be shipped etc.; section 35(c) requires the port to provide moorings and cranes, scales and all other necessary means; appliances for loading and unloading vessels; section 35(d) requires the Port to take up work for reclamation, excavation, enclosing and raising any part of the foreshore of the port or port approaches which may be necessary for the execution of the works authorised by the Act, or otherwise for the purposes of the Act; section 35(e) requires the port to provide such breakwaters and other works as may be expedient for the protection of the port; section 35(f) requires it to provide dredges and other machines for clearing, deepening and improving any

portion of the port or port approaches or of the foreshore of the port or port approaches; section 35(g) requires to provide light hours, lightships, beacons, buoys, pilot boats etc; section 35(h) requires it to provide vessels, tugs or other boards for use or for towing vessels or for protecting life or property and for purposes of landing, shipping or transshipping passengers or goods under section 42; section 35(i) requires it to provide tubewells and equipment, maintenance and use of boats, bongs and other appliances for extinguishing fires; section 35(k) requires it to provide construction models and plans for carrying out hydraulic studies; section 35(l) requires it to provide dry docks, slipways, boat basins and workshops for carrying out repairs or overhauling of vessels, tugs boats, machinery etc. Section 35-A, 36 also refer to other works.

We have referred to the Port Trust's activities and services in some detail only with a view to show that the port trust was not constituted by Parliament to 'carry on business' as stated in *M/s Aminchand Pyarelal's case* [1976 (1) SCR 721]. We have given the long list of its activities and services only to show how infinitesimal are the sales of unserviceable or unclaimed goods as compared to the very large range of the activities and services it is supposed to render.

In view of the requirements of sections 37, 39 and 42 ships come to the ports and carry goods outside or bring goods inside our country. Under section 43, the Board is liable for the loss, destruction or deterioration of goods of which it has taken charge in the manner provided in the sections. Under section 44, accommodation is to be provided for customs officers in the wharves etc. Chapter VI deals with imposition and recovery of rates at ports. Sections 48 to 57 deal with the rates.

The more important provisions for the present purpose are those in Sections 58 to 65 in Chapter VI. They deal with the Board's lien for rates on the goods which, in enforcement of the lien could be seized & detained till such rates and rents are fully paid. Section 61 refers to sale of goods after 2 months if rates or rent are not paid or lien for freight is not discharged. Section 62 refers to disposal of goods not removed from premises of Board. Section 63 mentions how the sale proceeds are to be dealt with - in payment of liens, claims, other charges, demurrages, penalties etc. From the above provisions, in our opinion, it is clear that the Port Trust is not involved in any activity of 'carrying on business' as has been clearly held in *Aminchand Pyarelal's case* (supra) and that unclaimed and unserviceable goods are sold in discharge of various statutory charges, items etc. and the sales of these items are also an infinitesimal part of the Port Trust's main activities or services. No doubt, the sales of goods are in connection with, or incidental or ancillary to the main "non-business" activities, but they cannot be treated as 'business' without any plea by the State of Tamil Nadu that the Port Trust had an independent intention to carry on business in the sale of unserviceable/unclaimed goods. That is not the case of the Department in the show cause notice. Further from the counter- affidavits filed in the High Court it is clear that it is not the case of the State that there is any separate intention on the

part of the Port-Trust, to carry on business in the unserviceable & unclaimed goods. Its contention has been that the main activities of the Port Trust amounted to 'carrying on business' and that these sales, even if they were incidental, fell within the meaning of the word 'business'. The argument fails in view of our finding that the main activity is not one amounting to 'carrying on business'.

In our view, the conclusions arrived at by the Madras High Court in State of Madras vs. Trustees of Port Trust of Madras [(1974) 34 STC 135(Mad)] which ruling was followed by the Andhra Pradesh High Court in Board of Trustees of the Visakhapatnam Port Trust vs. Commercial Tax Officer & Another [(1979) 43 STC 36(AP)] and the conclusions arrived at in the judgment under appeal by the Madras High Court holding that such sales are not exigible to tax, are correct, though for the reasons given by us in this judgment. We do not accept the contention of the appellants that at this stage the respondent should be directed to file its reply before the department and go by the alternative remedies under the Act. In view of the case set up by the State in the show cause notice, it is not necessary to drive the respondent - Port Trust to the remedy under the Sales Tax Act. The submission for the appellants that the Port Trust was a local authority need not also be gone into for, even then, the question will be whether it was carrying on business. Nor does the amending Act 31 of 1992 have any bearing on this question.

The intervention applications are dismissed.

For the aforesaid reasons, the appeal is dismissed but in the circumstances, without costs.