

THE INDIAN LAW REPORTS

PUNJAB SERIES

CIVIL REFERENCE

Before Bhandari, C. J., and Dulat, J.

MESSRS. KRISHNA ROLLER FLOUR MILLS,—
Petitioner

vs.

THE STATE OF PUNJAB,—*Respondent.*

Civil Reference 19 of 1955.

1957

Nov., 27th

*East Punjab General Sales Tax Act (XLVI of 1948)—
Section 2 (b)—Sale—Supply of gunny bags by a flour
mill containing wheat flour to depholders under in-
structions of the Government at the price at which
the flour mill buys them from the Government—
Whether constitutes sale—Whether a transaction con-
stitutes sale or not—Principles for determining, stated—
Construction of statutes in such cases—Mode of—
Section 4—Price of gunny bags applied as packing
material to non-taxable commodities—Whether to be
included in the taxable turnover of the dealer—Section
21(3)—Ex parte rejection of revision petition under—
Whether an adverse order—Adverse order—Meaning of.*

The state Government agreed to appoint the petitioners as authorised wholesale distributors on certain terms and conditions, according to one of which the petitioners were to pay the price of the bags to Government at the rate fixed by Government and to transfer these bags to depholders at the same price. This term of the agreement involved the petitioners in two separate and distinct transactions (a) a purchase by the petitioners of a number of bags from Government at a fixed price, and (b) a sale by the petitioners of a number of bags to depholders at the same

price. On the completion of the first transaction the petitioners acquired the rights of ownership over the bags in question and on the completion of the second transaction they divested themselves of those rights for a monetary consideration and vested them in depholders. The second transaction involved both the elements mentioned in the definition of the expression "sale", namely, the transfer of property and the payment of price.

Held, that the sale of gunny bags containing wheat flour to depholders under instructions of the Government is a sale under the East Punjab General Sales Tax Act, 1948.

Held, that the facts which constitute a sale must be determined from the evidence on record and the intention of the parties. If it is manifest from the contract that it was intended that title should pass and price be paid, the transaction constitutes a sale. Whether a transaction is a sale or not does not depend upon the motive of the transferor but upon the nature of the transaction. If the two factors, namely, the transfer of property and the payment of price are present, the transaction must be deemed to be a sale within the meaning of the expression as used in the East Punjab General Sales Tax Act, 1948.

Held, that in determining whether a particular transaction is taxable as a sale, the Court should endeavour to ascertain the intention of the Legislature by applying the usual rules of statutory construction. If the words of the statute leave room for doubt or ambiguity, the legislative intent should be gathered from a consideration of the entire statute, the Court giving effect to every word the statute contains by giving it a rational, sensible and liberal construction, reconciling the terms employed therein as far as possible but without resorting to settled or forced construction for the purpose of either limiting or extending their operation. Although doubts or ambiguities should ordinarily be resolved in favour of the tax-payer and against Government, the evident policy of the law-makers should not be defeated. The consideration, however, that if the seller is not subjected to a tax the transaction will escape taxation altogether will be no ground for bringing him within the ambit of the statute if a rational consideration of its terms discloses that he cannot be so brought.

Held, that as the petitioners sell flour for one price and the bags for another and as the title in the bags passes to the depholders at the same time as the merchandise contained therein, the authorities were justified in including the price of the gunny bags, in which wheat flour was packed and sold, in the taxable turnover of the petitioners and levying sales tax thereon even though the wheat flour is itself exempt from the payment of sales tax.

Held, that section 21 of the East Punjab General Sales Tax Act, 1948, empowers the Financial Commissioner to entertain revision petitions *suo motu* or at the instance of a party to the litigation. If the Financial Commissioner entertains the petition of his own accord it is not necessary for him to send for the opposite party unless, he wishes to make an order adverse to the party concerned. If, however, the petition is entertained at the instance of a party aggrieved by an order, the Financial Commissioner is not under an obligation to hear the party concerned unless he wishes to pass an adverse order. Subsection (4) imposes an obligation on the Financial Commissioner to hear a party only when he proposes to make an order which is likely to affect any person adversely. An order can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order in review. No person has a vested right to be heard before an order refusing to exercise discretionary jurisdiction is passed. The *ex parte* rejection of a revision petition cannot, therefore, be said to be an adverse order to the petitioner.

Case Law discussed.

Case referred under section 22 of the East Punjab General Sales Tax Act, 1948, by Shri A. L. Fletcher, Financial Commissioner, Punjab,—vide his order, dated the 26th July, 1955, for decision of legal points involved in the case.

N. N. GOSWAMY, for Petitioner.

S. M. SIKRI, Advocate-General, for Respondent.

ORDER

BHANDARI, C. J. This is a reference under section 22 of the East Punjab General Sales Tax Act, 1948.

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Messrs Krishna Roller Flour Mills of Ludhiana, hereinafter referred to as petitioners, were appointed authorised wholesale distributors under the East Punjab Rationing Order, 1948. They undertook the work as authorised millers for the milling of foodgrains and distribution of *atta* within a certain rationed area on certain terms and conditions which were embodied in a written agreement. They were to purchase wheat, gram and barley from Government at a fixed price, to transport the same to mill premises, clean the same, mill the grain into wholesale *atta*, bag it into standard weight bags, and to sell the bags to authorised depontholders at a fixed rate plus a milling margin of annas 0-12-6 per maund. In regard to the price of bags the agreement ran as follows:—

“The price of bags shall be paid at the rate fixed by Government from time to time. No classification of bags will be made and the mill will issue bags to retailers at the price paid by them. The bags will be marked by the Provincial Reserve staff and the same bags shall be utilised by the miller for filling *atta* with the exception that the additional bags required (as bag of wheat will contain 2 maunds 28 seers and 14 *chhatanks* of grain and a bag of *atta* will contain 2 maund of *atta* some additional bags will be required to accommodate the extra quantity of *atta*) shall be provided by the authorised wholesale distributors from his own stock should the retail distributors not bring their own bags for exchange and charged for at the same rate as for Provincial Reserve bags.”

In pursuance of the terms of the agreement the petitioners transferred large quantities of flour to

depotholders, recovering the price of the flour as well as of the bags from the depotholders concerned.

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On the 28th August, 1953, the Excise and Taxation Commissioner held, (1) that as the petitioners had purchased both the wheat and bags from Government they had become the owners thereof; and (2) that as they had recovered the price of the wheat and bags plus their profits (denominated as milling margin) from depotholders there was a transfer of property and a sale. He accordingly directed them to pay sales tax on the sale of gunny bags purchased by them from the local market or from Government, the sale of wheat being exempt from payment of the said tax.

The petitioners were dissatisfied with the order of the Excise and Taxation Commissioner and presented a petition to the Financial Commissioner under the provisions of subsection (3) of section 21 of the Act of 1948, in which they alleged that the supply of wheat *atta* in gunny bags to depotholders in accordance with the terms of the agreement with Government is not a "sale" as defined in the Act and that the price of gunny bags in which the tax-free goods are supplied to depotholders should not be included in the taxable turnover of the petitioners. The Financial Commissioner rejected this petition *in limine* and without affording the petitioners an opportunity of being heard.

At the request of the petitioners the Financial Commissioner has referred the following questions of law to this Court under the provisions of section 22 of the Act of 1948, namely:—

- (1) Whether under the facts and circumstances of the case the supply of gunny

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bags containing wheat *atta* to depot-holders under instructions of Government is sale under the East Punjab General Sales Tax Act, 1948 ?

- (2) Whether under the facts and circumstances of the case, the price of gunny bags applied as packing material to non-taxable commodities should be included in the taxable turnover of the dealer ?
- (3) Whether the *ex parte* rejection of a revision petition under section 21(3) of the East Punjab General Sales Tax Act, 1948, is not an adverse order ?

We are confronted at the very outset with the question whether under the facts and circumstances of the case the supply of gunny bags containing wheat flour to depontholders under instructions of Government is a "sale" within the East Punjab General Sales Tax Act, 1948. To constitute a valid sale under the ordinary law there must be concurrence of the following elements, namely, mutual agreement, competent parties, money consideration, and transfer of absolute or general property from seller to buyer. The expression "sale of goods" appearing in Item 54 of List II of Schedule VII of the Constitution of India postulates the existence of the payment or promise of payment of price; the delivery of goods and the actual passing of title. The expression "sale" as defined in the Act of 1948 means "any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract." The legislative definition of the expression "sale" as embodied in the Act of 1948, must take precedence over definitions which may be

found in dictionaries or other legal enactments, and it seems to me therefore that if the Court entertains the view that there has been a transfer of property for a price the requirements of the Sales Tax Act are satisfied even though the transaction on which the tax is levied may not meet the technical requisites of a sale under other enactments.

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The learned counsel for the petitioners frankly admits that although his clients are liable to pay the sales tax on the sale of gunny bags purchased by them from the open market and sold by them to depontholders in pursuance of the provisions of the contract, they are not liable to pay any sales tax on the gunny bags supplied to them by Government at a fixed price and transferred by them to depontholders at the same price. It is argued that the petitioners could have had no object in purchasing bags from Government at a fixed price and selling them to depontholders at the same price, for carrying on business in a particular commodity presupposes the existence of a profit motive. A number of authorities have been cited in support of the proposition that the transaction which resulted in the transfer of bags from the petitioners to the depontholders cannot be regarded as a sale as defined in the Act of 1948, but all those cases are clearly distinguishable. In *The State of Madras v. North Madras Firewood Trading Co.* (1), the respondents who were a registered firm carrying on business in firewood had obtained a licence as commission agents under section 8 of the Madras General Sales Tax Act, 1939. They undertook to supply during the period of rationing of firewood in the city of Madras such quantity of firewood as the Commissioner of Civil Supplies, Madras, might from

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time to time require from certain districts. The respondents who were described as the suppliers were given exclusive monopoly to transport the firewood from these areas to the city and the firewood was to be supplied at prices which were fixed from time to time by Government. The respondents transported the firewood from the areas and collected from the dealers to whom the firewood was eventually consigned, the cost of firewood supplied by them, and after retaining a certain sum as their commission which was fixed by Government and agreed to by the sellers paid over the balance to the sellers. The Department held that the respondents were dealers and, therefore, liable to be taxed on their turnover under the Act. A Division Bench of the Madras High Court held that the application of section 8 to the respondents depended upon the question whether the respondents were buying and selling for an agreed commission on behalf of known principals. If from the course of dealings it was clear that the respondents were buying and selling on their own behalf, then they would not be entitled to the benefit of the provisions of section 8. On the facts of the case the only conclusion that was possible was that the respondents were acting merely as commission agents of the owners of the firewood who were the known seller principals and their dealings, therefore, came within the meaning of section 8 and they were not liable to pay the tax. This authority can, in my opinion, be of no assistance in the decision of the controversy which has arisen before us, for the Punjab Act contains no provision analogous to section 8 of the Madras Act. In *Nimar Cotton Press, Khandwa v. The Sales Tax Officer, Khandwa* (1), the petitioners carried on business of pressing ginned cotton. They pressed the cotton supplied by customers for a fixed payment per bale and delivered it in pressed bales covered

(1) (1954) 5 S.T.C. 428.

with hessian and tied with iron hoops which kept the pressed cotton in position. A question arose whether the hessian and iron hoops used for packing the bales were sold by the assessee. The Nagpur High Court held that if hessian and iron hoops were supplied by the owners of cotton there was no transfer of ownership of hessian and iron hoops from the petitioner to his clients, but if this material was supplied by the petitioner a question might arise whether there was any sale of this material. This case brings out clearly the distinction between a case where the material is supplied by the owner and the case where it is supplied by the assessee. In *Shee Meena Kohi Mills Ltd., v. State of Madras* (1), the assessees were under a duty under section 46 of the Factories Act to maintain canteens for the benefit of their employees. The prices for the foodstuffs sold in the canteens were fixed by the managing committee constituted under the Madras Factories Rules and the sales of food and refreshments in the canteens were to be on non-profit basis. The Madras High Court held that the turnovers relating to sales effected in the canteens were not liable to be taxed under the Madras General Sales Tax Act as the assessees were not dealers. The question whether the petitioner in the present case can or cannot be said to be dealers has not been referred to us for decision. In *Sri Dasarathi Mohapatra v. The State of Orissa* (2), the petitioner was an agent of Government for the purchase of paddy and rice in a certain district. A question arose whether the petitioner was liable to pay sales tax on the cost of gunny bags in which he supplied the foodgrains to Government. The High Court of Orissa held that under section 188 of the Contract Act an agent having an authority to carry on a business has also implied authority to do every lawful thing which is

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(1) (1954) 5 S.T.C. 291.

(2) (1957) 8 S.T.C. 720.

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necessary for that business including those things which are usually done in the course of conducting such business. Paddy and rice are ordinarily collected and supplied in gunny bags and consequently the purchase of gunny bags would come within the scope of section 188 of the Contract Act. Therefore, the relationship of principal and agent which existed between Government and the petitioner for the primary purpose of procuring paddy and rice would by implication subsist for the ancillary purpose of purchasing gunny bags for storage and supply of such foodgrains. The petitioner was, therefore, not liable to sales tax in respect of the supply of gunny bags. This ruling is clearly distinguishable, for here the petitioner was an agent of Government for the purchase of paddy and rice and this relationship of principal and agent continued to exist for the ancillary purpose of purchasing bags for storage and supply of such foodgrains. In *P. Vaidyanatha Iyer v. The State of Madras* (1), under a scheme of distribution of cotton piecegoods brought into effect in 1945 the plaintiff was appointed a distributing retail consignee for which he was not given any remuneration but was allowed railway freight, cartage and interest at 6 per cent on the money advanced by him. It was contended on behalf of the State that the plaintiff was purchasing goods from the import dealers and then effecting sales to retailers and he was, therefore, a dealer under the Madras General Sales Tax Act, 1939. The Madra High Court held that the plaintiff acted only as an agent and could not, therefore, be treated as a dealer within the definition of the Act. If he was not a dealer, it is obvious that the transactions to which he was a party could not be taxed as sales. We have been called upon to decide whether the supply of gunny bags is a sale : not whether the petitioners are dealers.

(1) (1957) 8 S.T.C. 268.

In determining whether a particular transaction is taxable as a sale, the Court should endeavour to ascertain the intention of the Legislature by applying the usual rules of statutory construction. If the words of the statute are clear and unambiguous nothing more needs to be done than to construe them in their usual and popular sense. If, however, the words leave room for doubt or ambiguity, the legislative intent should be gathered from a consideration of the entire statute, the Court giving effect to every word the statute contains by giving it a rational, sensible and liberal construction, reconciling the terms employed therein as far as possible but without resorting to settled or forced construction for the purpose of either limiting or extending their operation. Although doubts or ambiguities should ordinarily be resolved in favour of the tax-payer and against Government, the evident policy of the law-makers should not be defeated. The mere fact, however, that if the seller is not subjected to a tax the transaction will escape taxation altogether will be no ground for bringing him within the ambit of the statute if a rational consideration of its terms discloses that he cannot be so brought.

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The Act of 1948 was designed to provide for the levy of a general tax on the sale of goods in the Punjab. Section 4 declares that subject to the provisions of sections 5 and 6, every dealer, except one dealing exclusively in goods declared tax-free under section 6, whose gross turnover during the year immediately preceding the commencement of this Act exceeded the taxable quantum, shall be liable to pay tax under the Act on all sales effected after the coming into force of the Act. The expression "sale" has been defined as "a transfer of property in goods for cash or deferred payment." A sale as defined in the statute consists of two separate and distinct elements: first, the transfer of

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property and, second, the payment of price. The facts which constitute a sale must be determined from the evidence on record and the intention of the parties. If it is manifest from the contract that it was intended that title should pass and price be paid, the transaction constitutes the sale. The Court is not concerned with the motive which actuates a person to part with his property for a monetary consideration and a transaction which falls within the ambit of the expression "sale" will not cease to be a sale by the mere circumstance that the profit motive was wholly or partially absent. Whether a transaction is a sale or not does not depend upon the motive of the transferor, but upon the nature of the transaction. If the two factors mentioned above, namely, the transfer of property and the payment of price are present the transaction must be deemed to be a sale within the meaning of the expression as used in the Act of 1948.

Now, were these two elements present in the transactions on which the tax is sought to be imposed? The answer is clearly in the affirmative. The essence of a contract under the East Punjab Rationing Order, like any other contract, is agreement. In deciding whether there has been an agreement and what its terms are, the Court looks for an offer to do or forbear from doing something by one party and acceptance of that offer by the other party turning the offer into a promise. If this promise is supported by a consideration the contract is complete. There is consideration where "an act or forbearance of one party or the promise thereof is the price for which the promise of the other is bought." (*Dunlop v. Selfridge* (1)).

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(1) 1915 A.C. 847—855 H.L.

The State Government in the present case offered to appoint the petitioners as authorised wholesale distributors on certain terms and conditions and the petitioners accepted those terms. According to clause 8 of the agreement the petitioners were to pay the price of the bags to Government at the rate fixed by Government from time to time and were to transfer these bags to depontholders at the same price. The execution of this term of the agreement involved the petitioners in two separate and distinct transactions (a) a purchase by the petitioners of a number of bags from Government at a fixed price, and (b) a sale by the petitioners of a number of bags to depontholders at the same price. On the completion of the first transaction the petitioners acquired the rights of ownership over the bags in question and on the completion of the second transaction they divested themselves of those rights for a monetary consideration and vested them in depontholders. The second transaction involved both the elements mentioned in the definition of the expression "sale", namely, the transfer of property and the payment of price. There can thus be little doubt that the sale of gunny bags containing wheat *atta* to depontholders under instructions of Government is a sale under the East Punjab General Sales Tax Act, 1948. In *Mohammad Amin Brothers, Ltd. v. Province of Bihar* (1), according to the terms of the contract the plant and machineries were provided by Government, dressed goat-meat was supplied to the assessee by another contractor at a fixed price on certain terms agreed to between the Government of India and that contractor, but the assessee himself paid for the dressed meat at a price fixed by Government and the assessee was entitled to receive payment from the Government of India according to a fixed scale for the dehydrated meat including the cost of containers and packing.

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(1) A.I.R. 1951 Patna 197.

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The Patna High Court held that there was a transfer of property for valuable consideration and therefore, a sale. In dealing with this aspect of the question the learned Judges observed as follows:—

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“It is important to notice that the assessee himself paid for the dressed meat at a price fixed by the Government and that the assessee was entitled to receive payment from the Government of India according to a fixed scale for the dehydrated meat including the cost of containers and packing. The Board of Revenue has found that according to the stipulation of the contract an inclusive price was fixed for process meant to be packed in sealed containers at a prescribed rate. To my mind there is no doubt that there was a transfer of property for valuable consideration and therefore a sale.”

The second question which arises for decision in the present case is whether the price of gunny bags applied as packing material to non-taxable commodities should be included in the taxable turnover of the dealer. The petitioners contend that they are not engaged in the sale of gunny bags, that they do not sell gunny bags as such, that the depotholders are at liberty to buy flour alone and that they are under no obligation to buy the bags. According to them it is as necessary to keep flour in bags when transported in considerable quantities as to keep a liquid in a container if it is to be available for use. It is accordingly contended that the price of gunny bags used for the transport or storage of flour should be deemed to form part of the price of the *atta* in the same way as the cost of purchasing, milling, transporting and all other expenses incurred in placing wheat flour in the

market enter into the ultimate price of this non-taxable commodity.

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This argument appears to me to be wholly devoid of force. It may be that the petitioners are not engaged in the sale of gunny bags and that they do not sell gunny bags as such, but it must be remembered that they sell flour for one price and the bags for another. They claim and state a separate rate for bags which is equivalent to the price specified by Government. Moreover, the bags remain tangible personal property after they are filled by the petitioners and resold as an incident of the sale of the contents, and the title in the bags passes to the depholders at the same time as the merchandise contained therein. It seems to me, therefore, that the Sale Tax authorities were fully justified in levying sales tax on gunny bags in which wheat flour was packed and sold. It has been held repeatedly that sales tax can be levied on bags in which salt is packed [*Varasuki and Co. v. The Province of Madras* (1)]; on bags in which rice is packed [*Mohanlal Jogani Rice and Atta Mills v. The State of Assam* (2)]; and on packing material in which dried tobacco is packed [*A. S. Krishna and Co. Co., Ltd., Guntur v. The State of Andhra* (3), *Indian Leaf Tobacco Development Company, Ltd., v. The State of Madras* (4)]. The second question propounded by the Financial Commissioner must be answered in the affirmative.

The third question is whether the *ex parte* rejection of a revision petition under section 21(3) of the East Punjab General Sales Tax Act, 1948, is

(1) (1950) 2 M.L.J. 449.

(2) (1953) 4 S.T.C. 129.

(3) (1956) 7 S.T.C. 28.

(4) (1954) 2 M.L.J. 588.

Messrs. Krishna an adverse order. Subsections (3) and (4) of section 21 are in the following terms:—
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“(3) The Financial Commissioner may, at any time, call for the record of any case decided under the preceding subsections and if, in his opinion, the final order contains an erroneous decision on an important question of law he may pass such order on the case as he may think fit.

(4) No order shall be made under this section, which adversely affects the rights of an assessee or other person upon whom an obligation is imposed by or under this Act, without giving such assessee or other person a reasonable opportunity of being heard.”

This section empowers the Financial Commissioner to entertain revision petitions *suo motu* or at the instance of a party to the litigation. If the petition is entertained by the Financial Commissioner of his own accord it is obviously not necessary to send for the opposite party unless, of course, it becomes necessary for him to make an order adverse to the party concerned. If, however, the petition is entertained at the instance of a party aggrieved by an order, the Financial Commissioner is not under an obligation to hear the party concerned unless he wishes to pass an adverse order. Subsection (4) imposes an obligation on the Financial Commissioner to hear a party only when he proposes to make an order which is likely to affect any person adversely. The expression “adverse” is defined as “opposite, hurtful, unfavourable” and the expression “prejudicial” means “harmful”, “hurtful”, “injurious”, “disadvantageous”. An order made by the Commissioner under section 33 of the

Income-tax Act can only be said to be prejudicial to the assessee when he is as a result of it in a different and worse position than that in which he was placed by the order in review [*Albert West Meads v. The King* (1)]. No person has a vested right to be heard before an order refusing to exercise discretionary jurisdiction is passed [*Bhagwan Das v. the Province of Bihar* (2)]. This question must be answered in the negative.

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A subsidiary question has also been raised, namely, that even though the particular transactions in respect of which the tax is sought to be imposed fall within the ambit of the expression "sale" the petitioners cannot be required to pay the tax as they do not fall within the purview of the expression "dealer". Mr. Goswami contends that the petitioners' firm was buying and selling on behalf of Government and is not liable to taxation in respect of the sales effected by it on behalf of the principal and at his instance. In support of this contention he submits—(1) that the firm is required to maintain form, register, returns and account-books as required by the appropriate authorities (clause 6); (2) that it is required to allow all facilities to the Rationing and Food Controllers' staff to enter the mill premises (clause 7); (3) that it is required to use bags marked and supplied by Government and is unable to make any profits on the sale of bags (clause 8); (4) that if Government increases the price of gunny bags the petitioner is under an obligation to make a corresponding increase in the price of bags. The question whether the petitioner is or is not a dealer has not been referred to us and it is not within the competence of this Court to raise or decide this question (*Kanga on Income-tax, page 93*).

(1) 1948 P.C. 102.

(2) Misc. Judicial Case No. 260 of 1947.

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For these reasons, I would answer the questions which have been referred to us as follows:—

(1) It is a sale.

(2) Price of gunny bags should be included in the taxable turnover.

(3) It is not an adverse order.

Let appropriate answers be returned to the reference. The petitioner will pay costs to Government which we assess at Rs. 200.

Dulat, J.

Dulat, J.—I agree.