

(1963) 03 CAL CK 0017
In the Calcutta High Court
Case No : Civil Rule No. 344 (W) of 1961

Dilip Kumar Mukherjee

APPELLANT

Vs

Commercial Tax Officer and Others

RESPONDENT

Date of Decision : 28-03-1963

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 7
Bengal Finance (Sales Tax) Act, 1941 — Section 11(1), 5(1)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 3(28)
Central Excises and Salt Act, 1944 — Section 15
Constitution (Amendment) Act, 1956 — Article 19(1), 286(3)
Constitution of India, 1950 — Article 226

Citation : AIR 1965 Cal 498

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Gopal Chakraborty, S.R. Sen and Gobinda Chandra Pal, for the Appellant; J. Majumdar, A.G.P. and Somendra Chandra Bose, for the Respondent

Final Decision : Allowed

Judgement

D. Basu, J.—This is an application under Article 226 for appropriate writs to quash the assessment order of Respondent 1, dated 10-5-59 (Ann. A), assessing sales tax upon the petitioner for the period from 1-4-57 to 31-3-58, rejecting the Petitioner's claim for exemption, as well as the order of the Appellate Authority (Respondent 2), dated 27-1-61 (Ann. C), and also for an order for refund and ancillary reliefs.

2. The Petitioner challenges the order of assessment on various grounds, namely,

I. That the assessment for the entire period is vitiated by a violation of the principles of natural justice inasmuch as Respondent 1 made the assessment u/s 11(1) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to in this judgment as the "Bengal Act"), arbitrarily and without disclosing any materials upon which such "best of judgment" assessment was made.

II. That the Petitioner is entitled to exemption from sales tax under the Bengal Act with respect to the period from 14-12-57 to 31-3-58 inasmuch as the goods in respect of which tie tax has been assessed, namely, "zarda", is "tobacco" (within the meaning of item 9 of the First Schedule to the Central Excises and Salt Act, 1944). which has been exempted by reason of Section 7 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 read with the Central Sales Tax Act, 1956.

III. That such exemption is also claimable under certain rules and notifications issued under the Bengal Act.

IV. That the impugned assessment constitutes double taxation" which has been prohibited by the Central Sales Tax Act, 1956.

V. That such assessment in violation of the statutory exemption violates the Petitioner's fundamental right under Article 19(1)(g).

3. The relevant facts will be stated under each of the above grounds.

4. As already stated, this ground relates to the entire period covered by the impugned order of assessment and is independent of the petitioner's claim for exemption under the relevant law, and if the petitioner succeeds on the present ground, the impugned orders will be liable to be quashed even though the petitioner's claim for exemption fails.

5. The facts relating to this ground will be evident from the assessment order of respondent 1 at Ann. A. Respondent 1 rejected the returns and books of accounts submitted by the petitioner on the ground that they were produced only at the hearing and that they were unreliable. Assuming that the Tax Officer was within his jurisdiction to apply Section 11(1) of the Bengal Act, in these circumstances, the terms of the statutory provision must yet be complied with. The sub-section requires that the Officer, "in making such assessment shall give the dealer a reasonable opportunity of being heard," But no opportunity of being heard can be said to be "reasonable" unless the authority discloses to the person aggrieved the materials upon which he proposes to decide (vide *R. v. Westminster Assessment Committee* (1940) 4 All ER 132 (141)). In the case before me, the petitioner stated his gross turnover as 39,261/- in his return. The Tax Officer, according to the best of his judgment, assessed it at as high a figure as 1,00,000/- and the tax due upon such assessment has since been recovered from the petitioner. The ground upon which he arrived at this figure was "the merits of the case and other collateral circumstances." So, nothing tangible is stated in his order as the basis of his assessment. The rejection of the return and the assessment took place by the same order (Ann. A). If the officer had disclosed to the petitioner the basis upon which he was going to make his assessment, the petitioner might have an opportunity of; adducing materials to rebut that assumption of the Tax Officer. As matters stand, it cannot be said that the petitioner was given any "reasonable opportunity as required by the statute.

6. Apart from the above express requirement of the statute, it must also be held that the impugned assessment is vitiated by a violation of the general principles of natural justice.

7. It is now established that a proceeding for assessment of tax is a quasi judicial proceeding, *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, ; *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, and that certiorari lies to quash an order of assessment which violates the principles of natural justice, *Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal*, .

8. It has also been laid down by the Supreme Court that in making the best of judgment assessment, the Officer must disclose the basis of his assessment or the materials upon which he relies. The question arose in *Raghubar v. State of Bihar*, (1958) SCA 852: ((S) 1957 SC 810) a case u/s 10 of the Bihar Sales Tax Act, 1944, which is substantially similar to Section 11 of the Bengal Act, though differing in matters of detail. There also the Sales Tax Officer rejected the return and books of account of the assessee and then made an assessment according to his best of judgment on certain figures of gross turnover, without disclosing any basis to justify the adoption of that figure. The Board of Revenue stated a case to the High Court on the very question of law now before me, namely:

"Whether the Sales Tax Officer is entitled u/s 10(2)(b) of the Act to make an assessment on any figures of gross turnover without giving any basis to justify the adoption of that figure."

9. Overruling the view taken by the High Court, the Supreme Court answered the question in the negative. The Supreme Court applied the principles evolved by it earlier in the case of the *Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal*, pointing out that the differences in the provisions of the Bihar Sales Tax Act and the Indian Income Tax Act were immaterial so far as the general principle involved in the present question was concerned and that principle was that the assessing authority was not entitled to "make an assessment without reference to any evidence or any material at all."

10. On behalf of the respondent, it was urged relying upon the observations of the Privy Council in AIR 1937 133 (Privy Council) that the "best of judgment assessment could not but be a guess work. Repelling this contention, the Supreme Court observed:

"No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate and to that extent he must make a guess: but the estimate must be AIR related to some evidence or material." (p. 859 (of SCA). (at p. 814 of AIR), (ibid),

11. Approving of the dicta of the Lahore High Court in (1944) 12 ITR 393 the Supreme Court observed that if the assessing officer "proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee,

he should in fairness disclose to the assessee the material on which he is going to found that estimate."

12. This principle has since been followed in the High Courts e.g., Balakrishna and Sons Vs. Sales Tax Officer and Another, ; K.M. Alikoya and Co. Vs. The State of Kerala, ; Jami Narasaya Prusty and Bros. Vs. State of Orissa, .

13. Of course, in the impugned assessment order before me, the assessing officer referred to "other collateral circumstances. But these words are vague and furnish no objective material which could be rebutted.

14. Scanning through the impugned order at Ann. A, the only tangible circumstance referred to appears to be that the petitioner had "many undisclosed selling centers. But this allegation is contradicted by the order itself. For the purpose of registration as a dealer, petitioner mentioned only 4 selling centres. "In course of inquiry", the Tax Officer found that "the workshop at 11, Akhil Mistry Lane, Calcutta and the primary address at 8/3, Chintamani Das Lane, Calcutta 9, were not disclosed by the dealer at any time." But the Tax Officer did not say that he had any reason to believe that sales arc made even at a premises which he himself describes as a workshop and a primary office and in a return for sales tax, there is no obligation to disclose a manufacturing workshop or an administrative office. Even then this discovery was not sufficient for the inference that the Petitioner had many undisclosed selling centres. Assuming that the workshop or the primary office was a selling centre, the Tax Officer could not multiply the petitioner's return of gross turnover nearly three times, by any rule of proportion. The truth appears to be disclosed in the Appellate Authority's observation (Ann. C) that the estimated assessment was justified on account of the "many defaults as observed by him in the assessment order". In short, the arbitrary figure was arrived at by way of penalty for the petitioners' past defaults in the matter of keeping accounts and their submission in due time. But that is not compliance with natural justice Provisions exist for the award of statutory penalties for offences under the Act and an arbitrary assessment cannot be resorted to as a substitute for such penalties.

15. In my opinion, the impugned assessment, on the face of it, shows violation of the principles of natural justice, and is liable to be quashed in toto on this ground alone.

16. In order to succeed on the ground of exemption, petitioner must first show that "zarda", in respect of the sale of which the impugned assessment has been made, is "tobacco" within the scope of the definition of item 9 of the First Schedule to the Central Excises and Salt Act, 1944. We shall deal with this question before entering into the law relied upon for the purpose of exemption.

17. The definition in item 9 of the First Schedule to the Central Excises and Salt Act, 1944 is as follows:

"Tobacco means any form of Tobacco--, whether cured or uncured and whether

manufactured or not, and includes the leaf, Stalks and Stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

18. In ordinary parlance, the word tobacco refers to the plant and, primarily, the dried leaves of that plant which are used for purposes of smoking and similar habits. The above definition, it is apparent, widens the ordinary meaning of the word to bring in every form of tobacco, whether cured or unsure, whether manufactured or not, to bring in a larger number of allied raw and finished products within the fold of the duty imposed by the Act of 1944. According to the petitioner, "zarda" is a variety of manufactured tobacco. What is manufacture is explained in Section 2(f) of the Act itself. This clause says-

" "Manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and (i) in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff"

19. In the petition (para 11), zarda is described as "scented chewing tobacco. It is common knowledge that "zarda" is taken with betal leaves by people in this country who are used to take narcotics in the process of chewing. It may be said that the act of taking zarda is analogous to that of taking snuff or hookah, though it may vary in form or degree of intensity, because of the transformation of the tobacco in the preparation of "zarda". In para 7 of the counter-affidavit it is contended that zarda cannot be included in the definition of "tobacco" because it contains other high-priced ingredients;

"I say that various high priced ingredients including essences and jaffrans are added to tobacco in preparation of Zarda for which Zarda of particular varieties are sold at very high price ranging even up to Rs. 50/- per tola. The price of tobacco is considerably low as compared with the price of Zarda."

20. It is not denied in the counter-affidavit that Zarda is used for the purpose of chewing. If the petitioner further succeeds in showing that this chewing stuff is "manufactured" tobacco, he succeeds in showing that Zarda is "tobacco" as defined by the Act of 1944. On this point, however, the order of Respondent in Ann. C definitely favours the Petitioner. He says (Ann. p. 8). -

"I am of opinion that tobacco and Zarda are not one and the same although I agree that Zarda is manufactured from tobacco and whose main ingredient is tobacco."

21. As I have just said, once it is admitted that Zarda, which is used for chewing, is "manufactured from tobacco," the purpose of the petitioner is served, because that is sufficient to attract the relevant item of the Act of 1944. It was argued by the learned Additional Government Pleader on behalf of the respondents that the expression "chewing tobacco, in the item, refers to what is known in North India as "Khaini" a crude form of hand-pounded dried tobacco. But the expression

"chewing tobacco" is used in a general sense, without any words of qualification. On the other hand, the condition that it is a "manufactured" product implies that it may include varieties other than the crude form or "khaini", for, the process of manufacture may involve not only manual or physical labour but also mechanical power. The fact that other ingredients are added to tobacco in the manufacture of Zarda, such as scent or colouring substance, does not seem to be material if it is admitted that "the main ingredient is tobacco", for, some additional ingredients are to be used even for the preparation of cigarettes, cheroots, hookah tobacco or snuff, which are specifically mentioned in the definition of "manufacture", quoted above. Even in the making of bidi, coloured thread, fried spices or sal leaf are required to be added. But, nevertheless, the product has been held to be covered by the definition of tobacco: The Singhbhum Tobacco and Biri Merchants' Association and Another Vs. Assistant Superintendent of Sales Tax and Another, .

22. On behalf of the respondents, reliance was placed upon the decision in State of M. P. v. Wasudeo (1954) 6 STC 30 (Nag), in support of the proposition that the process of "manufacture" involves only a transformation of the raw material, without the putting in of any additional ingredient. In that case, it was held that the cutting of wood into the transportable form of timber was "manufacture". But that case is no authority for the proposition that if any ingredient is added, it ceases to be manufacture. If that were so, cigarettes, cheroots etc, could not have come within the definition of manufacture in the Act of 1944. It is also to be noted that the definition of "manufacture" is inclusive and that the enumeration of cigarettes etc. does not exhaust the definition, so that there is no room for the argument that varieties manufactured in similar processes cannot come within the definition because they are not specifically enumerated. It is also worthwhile to remember that the relationship between the Excise Act of 1944 and the Bengal Act is complementary in the sense that if a tobacco product is taxable under the one Act it will be immune from taxation under the other, and vice versa. There is, therefore, no justification for being either too liberal or too stringent in our interpretation.

23. Nor is the price of these additional ingredients of crucial importance if the "main ingredient" be tobacco, for, the scent or other sweetening materials that may be used in hookah tobacco, as was used by the princes and aristocrats of not-yet-forgotten days, may be quite of a high value, and yet such tobacco would come within the definition.

24. On behalf of the respondents it was contended that the question whether Zarda is tobacco is a disputed question of fact which this Court should not decide in this proceeding. I do agree that the petitioner should have been more explicit in the petition itself as to the ingredients and process of manufacture of Zarda instead of waiting for the affidavit in reply to say that these additional ingredients are essence, "jafran" and "tabak" which are used for an attractive finish. But I do not think that the question is "disputed" when, according to the

finding of the respondent, who is the appellate authority in the matter of the impugned assessment, zarda is "manufactured" from "tobacco", having for its main ingredient "tobacco", for, these conditions satisfy the definition of "tobacco" as given in the Act of 1944.

25. Having arrived at the finding that Zarda is "tobacco", of the category of "chewing tobacco", within the meaning of item 9 of the First Schedule of the Central Excises and Salt Act, 1944, let us now turn to the law upon which the claim for exemption is based.

26. A. By the Constitution (Sixth Amendment) Act, 1956, which came into force on 11-9-56, Clause (3) of Article 286 of the Constitution was substituted as follows:

"Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard, to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

27. The plain meaning of this was that if, after 11-9-56, Parliament (a) declared any goods to be of special importance to interstate trade or commerce, and also (b) specified restrictions and conditions in regard to the imposition of sales tax on the sale or purchase of such goods, a State Legislature could, in exercise of its power to levy sales tax under Entry 54 of List II, impose sales tax on such declared goods only subject to such restrictions and conditions as Parliament may so specify.

28. Subsequent to the above Constitution Amendment, Parliament has fulfilled both conditions, with respect to tobacco.

29. B. The declaration that "tobacco" is a goods of special importance was made by the Additional Duties of Excise (Goods of Special Importance) Act (58 of 1957), Section 7 of which was as follows:

"It is hereby declared that the following goods, namely tobacco are of special importance in inter-State trade or commerce and every sales tax law of a State shall,, in so far as imposes or authorises the imposition of a tax on the sale or purchase of the declared goods, be subject as from the 1st day of April, 1958, to the restrictions and conditions specified in Section 15 of the Central Sales Tax Act, 1956."

Act 58 of 1957 gave no definition of its own of the declared goods and Section 2(c) of the Act provided that the word "tobacco" "shall have the meaning" assigned to it in item No. 9 of the Central Excises and Salt Act, 1944.

30. Subsequently, by the Central Sales Tax (Second Amendment) Act, 1958 (Act 31 of 1958), Section 7 of Act 58 of 1957 was repealed because the declaration of goods of special importance was now embodied in Section 14 of the Central Sales

Tax Act, 1956, itself, in order to make it a self-contained law. In short, Section 14 of the Act of 1956, by this Amendment, replaced Section 7 of Act, 1957, without any substantial change in respect of the matter before me. Thus tobacco became Clause (ix) of Section 14 of the Central Sales Tax Act and the definition of the word "tobacco" as given in the Central Excises and Salt Act, 1944, was also imported. Hence, these legislative changes are not material for the purposes of this proceeding.

31.C. The "restrictions and conditions referred to in Article 286(3) of the Constitution have been laid down in Section 15 of the Central Sales Tax Act, 1956. If, therefore, the petitioner succeeds in proving that the Bengal Act under which the impugned tax has been assessed on zarda, has not complied with the restrictions and conditions imposed by the Central Sales Tax Act, 1956, the imposition shall not only be ultra vires because of contravention of the statutory provision in Section 7 of Act 58 of 1957, read with Section 15 of the Central Sales Tax Act, but would also be unconstitutional and void, being in contravention of the constitutional provision in Article 286(3).

32. Such effect, would not, however, take place from 1-4-58 as contended by the petitioner, but only from 1-10-58, because Section 15 of the Central Sales Tax Act, 1956 did not come into force at all before 1-10-58. Section 1(3) of the Act provided that,

"It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different sections."

33. As to the coming into force of Section 15, it may be pointed out that the original notification No. S. R. O. 78 and 80 of 4-1-57, which fixed 5-1-57 as the date for coming into force of the Act, excepted Section 15. Several intermediate notifications were superseded by G. S. R. No. 897 of 23-9-57, which ultimately fixed 1-10-58 as the date for coming into force of Section 15 of the Act. The intermediate notifications could not come into operation before their supersession by G. S. R. 897 of 23-9-57. The result was that Section 15 of the Central Sales Tax Act, 1956, never came into force prior to 1-10-58, so that the prohibition contained in Section 7 of Act 58 of 1957 also remained a dead letter until 1-10-58. The reason is that the net effect of Section 7 of Act 58 of 1957 was to make the taxation of sales of the declared goods subject to such restrictions as were imposed by Section 15 of the Central Sales Tax Act. So long as Section 15 itself was not brought into force, there was no prohibition effectively introduced by Section 7 of the Act of 1957, and the fact that it specified the date 1-4-58 as the date of commencement of the prohibition was of no effect. It may be stated, with respect, that this aspect of the matter was not placed before the Court in the unreported case of Industrial Weavers v. Commissioner of Commercial Taxes, C. R. No. 1125 of 1959 (Cal) to which I shall presently advert. more fully.

34. It follows, therefore, that the plea of ultra vires and unconstitutionality, discussed above, if it succeeds, shall be of avail only with respect to the period subsequent to 1-10-58.

35. Section 15 of the Act of 1958, as amended by the Central Sales Tax (Second Amendment) Act of 1958 (referred to earlier), provides as follows:

""Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods be subject to the following restrictions and conditions, namely:

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall be levied in respect of the last sale or purchase inside the State and shall not exceed two per cent, of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State.

36. As stated above, the original form of Section 15 never came into force and it was the section, as amended above, which came into operation, for the first time, on 1-10-58. Clause (a) lays down three conditions subject to which sales tax may be levied by a State Legislature on the "declared" goods, namely:

(i) That such tax shall be levied only on the last sale or purchase inside the State.

(ii) That the levy of such tax shall not, exceed 2 per cent of the sale or purchase price thereof;

(iii) That such tax shall not be levied at more than one stage.

37. It was somewhat faintly contended by the learned Additional Government Pleader for the respondents that the only sanction for a violation of the condition imposed by Section 15(a) was that laid down by Clause (B) thereof, i.e., a refund of the tax so levied. This, however, proceeds on a misreading of the section. Clause (b) is independent of Clause (a) and imposes an additional condition. A violation of any of the three conditions of Clause (a) would render the taxation of a declared goods ultra vires whether, in fact, it is sold in the course of inter-State trade or not.

38. Clause (b) means that if, in any case, a tax has, in fact, been levied in violation of the above prohibitions, and the goods are actually sold in the course of inter-State trade or commerce, the tax must be refunded. It does not mean that the violation of any of the prohibitions, which are mandatory, shall not render the imposition ultra vires so as to enable an aggrieved assessee to seek relief from the Court to restrain the proceedings for any such assessment or to claim exemption where the proceedings have not yet been completed,

39. Of the three restrictions and conditions imposed by Section 15(a) of the Central Sales Tax Act, 1956, as enumerated above, it has been argued on behalf of the petitioner that the Bengal Act, as it stood at the relevant time, violated conditions (ii) and (iii). Since no materials have been placed with regard to condition (i), no opinion can be pronounced as to whether it has been violated or not in the present case.

40. Condition (ii) is that the State law must not impose a levy in excess of 2 per cent on the sale price of the "declared" goods. Now, at the relevant time, the general rate of sales tax imposed by Section 5(1) of the Bengal Act was 3/4 anna in the rupee, which was in excess of 2 per cent. It was only by the West Bengal Amendment Act XIII of 1959 that Section 5(1) was amended with effect from 28-10-59, introducing Clause (c), which fixed the levy of sales tax on the sale of goods referred to in Section 14 of the Central Sales Tax Act, 1956 at 2 per cent of the taxable turnover in respect of the sale of such goods. In the unreported decision of Bose J. (as he then was) in C. R. No. 1125 of 1959 (Cal) it has been held that no tax could be levied under the Bengal Act until Section 5(1) of that Act was amended with effect from 28-10-59, so as to incorporate the ceiling of 2 per cent as required by Section 15 of the Central Sales Tax Act, read with Act 58 of 1957. I am in respectful agreement with the decision in the aforesaid case with the only addition that the invalidity of the Bengal tax would present ground, commence from 1-10-58, the date when Section 15 of the Central Sales Tax Act itself was given effect to.

41. Condition (iii) prohibits levy of sales tax on the declared goods at more than one stage. This part of the Petitioner's case has not as much strength as the preceding one and has not been put with as much clarity. The relevant plea, as made out in para. 23 (g) of the Application, in short, is that since "tobacco" is subject to a duty of excise, he has to pay that duty on his purchases of tobacco and also to pay sales tax under the Bengal Act, if Zarda is not given an exemption under that Act, But, as the Supreme Court has held in several cases e.g., Endupuri Narasimham and Son Vs. The State of Orissa and Others, , Mohanlal Hargovind Das, Bidi Merchants, Jabalpur (M.P.) Vs. The State of Madhya Pradesh and Another, where a person purchases certain goods for the purpose of a resale whether in the identical form or in a different form, the transactions of purchase and of re-sale constitute two different transactions for the purposes of sales tax. What Section 15 of the Central Sales Tax Act (as it stands after the amendment in 1958) prohibits is the imposition of the sales tax at two stages of the same transaction and not the imposition of two different duties on two different transactions.

42. The Bengal Act, it is to be noted, imposes a tax on sales and not on purchases. It is also to be noted that some of the observations of the Taxation Enquiry Commission have become inappropriate after the amendment of Section 15 of the Central Sales Tax Act. The reference to Section 5(2)(ii) of the Bengal Act, in this case, is, accordingly inappropriate. The exemption under that

provision, if any, may be claimed by the dealer who sells tobacco to the petitioner and not by the latter.

43. On behalf of the petitioner, reliance was placed on the decision of the Supreme Court in *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, in support of the argument against double taxation. What was decided in that case was that the same sale could not be made liable to sales tax under a State tax after it has been taxed under the Central Sales Tax Act, because the Court held, on an interpretation of the provisions of the Central Sales Tax Act, that liability to pay tax on inter-State sales was a single one and that it could not be taxed twice by the same State or by different States. In the case before me, the two taxes are different, namely, an excise duty and a sales tax. Since they are not identical and the excise duty cannot be said to be a sales tax, the principle decided in the cited case would not apply.

44. An extreme case has, however, been pressed on behalf of the petitioner, namely, that the additional excise duty imposed by Act 58 of 1957 was in replacement of the State taxation of sales, so that as soon as the Act of 1957, came into operation, the States lost all their power to levy taxes on the sale of the declared goods, irrespective of Section 7 of the Act of 1957 and irrespective of whether Section 15 of the Central Sales Tax Act did come into operation or not. In support of this case, Mr. Chakravarty, learned advocate for the petitioner, has relied upon the statements in the statement of objects and reasons of the bill, published in the Gazette of India on 23-12-57. The relevant statements are:

"The object of the Bill is to impose additional duties of excise in replacement of the sales taxes levied by the Union and the States on sugar, tobacco and mill-made textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to Union territories, to the States Provision has been made that the States which levy a tax on the sale or purchase of these commodities after the 1st April, 1958 do not participate in the distribution of the net proceeds."

45. It is obvious that there is an apparent discrepancy as between the above statement and the contents of the Act inasmuch as there is no provision in the Act of 1957 which prohibits any of the States to impose sales tax on the goods on which the additional duty of excise was being imposed on their manufacture, by Section 3. Nor is there any provision in the Act to say that if any State levies a sales tax on the goods specified in Section 7, after 1-4-58 such State will forfeit its share of the levy of the additional excise duty, provided for by Section 4 of the Act. In fact, the statement of objects and reasons is somewhat cryptic and that is how this anomaly has been created. The riddle may be solved if we examine the new constitutional provisions which were introduced by the Constitution (Sixth Amendment) Act, 1956. which came into force on 1-9-56, i.e., shortly before the enactment of the Act of 1957.

46. Prior to the Constitution Amendment of 1956, the power of a State to impose

a sales tax under Entry 54 of List II was unfettered so that a State could tax even an inter-State sale. This power was taken away by the insertion of Entry 92A in List I by the Constitution Amendment of 1956, which made the power to tax inter-State sales an exclusive Union Power. All the States thus lost their power to inter-State sales. But they were sought to be compensated for the loss by Parliament levying additional duty of excise on certain goods and distributing the proceeds of such duty amongst the States, in exercise of its power under Article 272 of the Constitution. Sections 3-4 of Act 58 of 1957 is an instance of the legislation empowered by Article 272. The Act of 1957 did not, accordingly, lay down that after the levy of the additional excise duty, the States lost their power under Entry 54 of List II to tax the intra-State sales as well of the goods specified in Section 3 of the Act.

47. It is also to be noted that the sale of a thing "in the course of inter-State trade or commerce" and the intra-State sale of a thing which is of special importance to inter-State trade or commerce are not identical transactions. The States retained their power to tax sales of the latter category under Entry 54 of List II, even after the introduction of Entry 92A of List I. But because the goods were of special importance to inter-State trade or Commerce, even the taxation of intra-State sales of such goods by the States was subjected to the restrictions specified by Clause (3) of Article 286, which clause was also introduced by the Constitution Amendment of 1956. It is not the petitioner's case that the sales of Zarda which have been sought to be taxed by the impugned assessment took place in the course of inter-State trade or commerce. His case is that the sales are intra-State sales but because the goods have been declared u/s 7 of the Act of 1957, the States have lost their power to such sales in exercise of their power under Entry 54 of List II.

48. I am unable to hold that by the imposition of an additional excise duty on tobacco, Act 58 of 1957 took away the power of the States to levy sales tax on the intra-State sales of tobacco.

The petitioner's case on the present ground must, accordingly, be rejected.

49.III. Apart from relying on the provisions of the Central Acts referred to above, read with the provisions of Article 286(3), the petitioner urges that "tobacco" has been exempted also by certain notifications issued by the State of West Bengal in exercise of powers conferred by the Bengal Act and that he is entitled to exemption independently under those notifications, by which the Rules were amended.

49a. Section 5(2) of the Act says that from the gross turnover of a dealer shall be deducted, inter alia, "such sales as may be prescribed", in calculating his taxable turnover. Rule 3, framed, accordingly, enumerates the items which may be so deducted by a registered dealer from his gross turnover.

50. In the petition, the petitioner referred to notification Nos. 3112 and 3113 of 14-12-57. These have not been produced. But from the text of Notification No.

504 F. T. of 3-3-58. it appears that the previous Notifications of 1957 contained draft amendments which required previous publication, and that, after such publication the amendment of Rule 3 was adopted on 3-3-58, inserting Clause (28) in that rule, of which Sub-clause (a) is relevant. Sub-clause (a) of Clause (28) is as follows-

"Sales of ... tobacco other than cigarettes, on which duty has been paid under the Additional Duties of Excise (Goods of Special Importance) Act, 1957".

51. "Tobacco", it is to be noted, has been given, by an Explanation to this Clause, the same meaning as in the Central Excises and Salt Act, 1944. Hence, no difficulty arises on that score. This Sub-clause, however, inserted a new condition for the deduction or exemption, which was not to be found either in Section 7 of Act 58 of 1957 or the Central Sales Tax Act, 1956 and, as held by Bose J. (as he then was) in the unreported decision referred to earlier, this additional condition was inconsistent with the provisions of Act 58 of 1957 and was therefore ultra vires. Apparently, the ultra vires condition was introduced upon a misreading of the Act of 1957. In consideration of this, accordingly, the rule-making authority amended Rule 3(28) by notification No. 450 F. T. of 7-2-61, by taking out the ultra vires words "on which duty has been paid.... Act, 1957". In short, from 7-2-61, the exemption of tobacco as defined in the Central Excises and Salt Act, 1944, has become absolute, under the Bengal Act. Rule 3(28) as amended, clearly specifies:

"Sales of. tobacco other than cigarettes".

Hence, with effect from 7-2-61, a dealer under the Bengal Act can claim exemption solely under the statutory Rule in question, irrespective of anything in the Central Acts or the Constitution.

52. What is left is to determine the position under the Rule since 3-3-58. If we told that the additional condition must be deemed to have been invalid ab initio, being ultra vires, and that whether it was formally amended or not was immaterial, it would seem, prima facie, that the petitioner is entitled to the exemption with effect from 3-3-58, under Rule 3(28), short of the ultra vires condition, irrespective of the question when Act 58 of 1957 or the Central Sales Tax Act became effective.

53. The State of West Bengal has independent power to exempt any goods from the tax imposed by the Bengal Act. If, therefore, in exercise of such rule-making power, tobacco was exempted with effect from 3-3-58, there is no reason why the petitioner shall not be entitled to exemption or deduction by virtue of such rule, if the restriction or qualification added by the said rule is found to be ultra vires.

54. I, therefore, hold that the impugned assessment is ultra vires with respect to the period commencing "from 3-3-58, because of the contravention of the Rule under the Bengal Act, just referred to, which exempted tobacco from any

taxation under the Bengal Tax.

55. IV. It has been reiterated by the Supreme Court in cases more than one that an ultra vires or illegal imposition on sales constitute an infringement of the seller's fundamental right guaranteed by Article 19(1)(g) e.g., *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, ; *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, ; *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, .

56. Hence, the impugned assessment has infringed the petitioner's fundamental right in so far as such assessment relates to a period subsequent to 3-3-58.

57. In my opinion, the impugned orders are also liable to be quashed on the ground of violation of the principles of natural justice, in respect of the entire period covered by them. On behalf of the respondents it has been contended that the petitioner should have resorted to the further remedies under the Statute. But, as has been explained by the Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, , the existence of an alternative remedy is no bar where the principles of natural justice have been violated by the impugned order. In fact, this position was conceded on behalf of the State in that case.

58. In the premises, the impugned orders of 10-2-59 and 27-1-61 should be quashed by an appropriate order in the nature of certiorari and the respondents should be restrained by an order in the nature of mandamus from proceeding further against the petitioner in respect of the period included in this application except according to law, and subject to the exemption for the period from 3-3-58 to 31-3-58 as indicated above. No relief by way of refund can, however, be given in the present proceeding. It will await the fresh proceedings for assessment in respect of the period from 1-4-57 to 2-3-58. No opinion as to the quantum of the fresh assessment is expressed herein. In view of my finding that under Rule 3(28), the State of West Bengal has provided for absolute exemption in respect of tobacco since 8-3-58, respondents cannot proceed with the assessment for any period subsequent to 3-3-58. Hence, the interim injunction issued in respect of the subsequent years 1958-60 cannot be discharged.

59. The Application is allowed accordingly and the Rule and the interim injunction be made absolute.

60. There will be no order as to costs.