

**(1962) 01 MAD CK 0014**

**In the Madras High Court**

**Case No :** Tax Case No"s. 196 to 198 of 1959 (Rev. 130 to 132 of 1959) and  
W.P. No"s. 589, 817, 818, 1067 and 1213 to 1215 of 1959

Indian Aluminium Co. Ltd.

APPELLANT

Vs

The State of Madras

RESPONDENT

**Date of Decision :** 16-01-1962

**Acts Referred:**

Constitution of India, 1950 — Article 245, 246, 286(1)  
Madras General Sales Tax (Turnover and Assessment) Rules, 1939 — Rule 18, 5A, 8  
Madras General Sales Tax Act, 1939 — Section 22, 3, 8B(2)

**Citation :** AIR 1963 Mad 116 : (1962) 13 STC 967

**Hon'ble Judges :** Srinivasan, J; Jagadisan, J

**Bench :** Division Bench

**Advocate :** M. Ranganatha Sastry, S. Bhaskaran, R. Mathrubhutham, K.V. Venkatasubramania Iyer and S. Padmanabhan, for the Appellant; A.G., Addl. Govt. Pleader, G. Ramanujam and Natanasabapathi, for the Respondent

**Final Decision :** Dismissed

## Judgement

Jagadisan, J.—These tax revision cases and the writ petitions raise a common question of law, challenging the validity of the amendment to

Section 8-B(2) of the Madras General Sales-tax Act introduced by Madras Act I of 1957. It will be convenient to deal with this point first before

setting out the facts of each case and considering the contentions turning upon them.

2. Section 8-B, as it stood before its amendment by Madras Act I of 1957, reads:--

8-B (1). No person who is not a registered dealer shall collect any amount by way of tax under this Act; nor shall a registered dealer make any

such collection except in accordance with such conditions and restrictions, if any, as may be prescribed.

Provided that the (State) Government may exempt persons who are not registered dealers from the provisions of this sub-section until such date, not being later than the 1st day of April 1948, as the (State) Government may direct.

2. Every person who has collected or collects any amount by way of tax under this Act, on or after the 1st day of April 1947, shall pay over to the State Government within such time and in such manner as may be prescribed, all amounts so collected by him if they are in excess of the tax, if any, paid by him for the period during which the collections were made.

The words in Section 8-B(2),--""and in default of such payment, the amounts may be recovered as if they were arrears of land revenue"" were

deleted by Section 7 of the Madras Act 15 of 1956. In *Tata Iron and Steel Co Ltd. v. State of Madras*, 1954 5 STC 382 a Division Bench of this

Court (Satyanarayana Rao and Rajagopalan JJ.) held that what a registered dealer was empowered to collect from purchasers u/s 8-B (1) of the

Madras General Sales-tax Act was only what was lawfully leviable as tax and that a collection by a registered dealer from his purchasers under a

mistaken conception of the liability of his transaction to be assessed under the Act was not liable to be paid over to the State Government as the

collection was not a realisation by way of tax. At page 393, Rajagopalan J. observed thus:

What Section 8-B (2) requires of every person is that he should pay over to the State Government "all amounts so collected by him", that is, all

amounts collected by way of tax. That in the case of a registered dealer, should apply only to what he could collect by way of tax within the

meaning of Section 8-B (1). In the case of the unregistered dealer, though he lacks the authority conferred on the registered dealer by Section 8-

B(1), to make any collections, the expression ""so collected by him"" would only apply to the collection referred to in the earlier part of Section 8-B

(2), the collection of any amount "by way of tax under this Act" In both cases, the interpretation "by way of tax lawfully leviable under this Act"

would fit in with the obligations imposed by Section 8-B(2) though we realise the anomalous position of an unregistered dealer on whom no rights

were conferred but on whom only obligations were imposed"".

3. This decision opened the eyes of the State, and Madras Act 1 of 1957, which

took effect from 14-1957, was the result. Section 8-B(1) and the proviso was not in any way modified or amended by this later Act. Section 8-B(2) was re-enacted in the following terms:

Every person who has collected or collects any amount purporting to be by way of tax under this Act on or after the 1st day of April 1947,

whether or not any tax is due from him under this Act in respect of the transaction in which he has collected or collects such amount, shall pay over

to the (State) Government within such time and in such manner as may be prescribed, all amounts so collected by him if they are in excess of the

tax, if any, paid by him for the period during which the collections were made.

The newly introduced words are ""any amount purporting to be by way of tax""; instead of the words (as they were prior to the amendment) ""any

amount by way of tax under this Act."" The further addition brought in by the amendment is the following:

Whether or not any tax is due from him under this Act in respect of the transaction in which he has collected or collects such amount.

The meaning of this amendment is quite plain and un-mistakable. Any person, whether he is a registered dealer or not, who collects amounts from

others transacting with him, is obliged to pay the collection to the State Government irrespective of the question whether such collection could have

been lawfully made by him or not and whether he, the collector, is liable to be assessed under the Act or not. By reason of the decision in 1954 5

STC 382 referred to above, persons who had illegally and unauthorisedly collected amounts under the guise of tax from their purchasers obtained

immunity from payment to the State Government. It is quite obvious that the amendment was brought in to do away with the effect of that decision.

The intendment of the legislation is that any amount collected in the name of tax should be paid over to the State Government by the person

collecting the amount independently of his liability to be assessed to tax. Does the legislative competence of the State extend to enact such a

measure--is the question that is mooted now.

4. Mr. K.V. Venkatasubramania Uyer, learned counsel appearing for some of the aggrieved assesseees, submits that Entry 54, List II, Schedule

VII of the Constitution--""Taxes on the sale or purchase of goods other than newspapers""--claimed to be the root of the State's power to legislate

the impugned provision, cannot permit the State to collect any amount, which is not tax under the Act, from any person. Learned counsel contends

that the statutory right empowering the State to collect from an assessee an amount, which is *ex concessis* not a tax levied under the Act, cannot, of

course, be called a right to levy a tax on sale or purchase, and cannot therefore be a subject matter of the topic within the State's taxing power.

The argument is developed in the following manner. If it is not permissible for the State to make any illegal levy of tax outside the scope of the Act,

it is not equally permissible for the State to enrich itself by appropriating the illegal collection made by the assessee under the pretext of the Act, as

the State cannot do indirectly what it cannot do directly. It is impossible to sustain the validity of the amendment by invoking the doctrine of

incidents or ancillary power, which State legislature has to effectuate and enforce legislation within its ambit and power, as what is rendered

effective is improper and *ultra vires* acts and not legitimate activities within the sphere of the Act. This, in substance, is the argument of the eminent

counsel, which is quite fascinating and plausible, and which therefore requires, and merits, deep consideration.

5. The learned Advocate General, appearing for the State, urges in a very succinct and able argument, that the provisions of the amended Section

8-B(2) of the Act are *intra vires*, being within the competence of the State legislature. His argument runs thus. The working of the Act manifested at

least four evils consequent upon the abuse of the provisions of the Act by dealers and other persons: (1) registered dealers collected taxes from

their purchasers properly leviable under the Act; but some of them failed to pass on the collections to the State as they were not within the charging

section, being persons with less than the minimum turnover of Rs. 10,000; (2) dealers collected tax from their purchasers at a higher rate than that

prescribed by the Act and paid to the State only at the proper rate and pocketed the difference; (3) dealers collected amounts from their

purchasers under the guise of tax when their transactions were not within the Act and appropriated the amounts for themselves, as they could not

be, and were not, assessed by the State; and (4) persons who were not dealers at all and who were only commission agents and brokers,

collected tax from others who transacted with them and got the benefit themselves as they were not inside the Act.

This situation was anomalous, and, indeed, called for stern action, lest persons should exploit the public--the consumers in general--who bear the brunt of the taxation. To suffer illegal payments in the name of tax is nothing but detestable extortion. The State, therefore, stepped in particularly after the decision in the 1954 5 STC 382 to remedy the baneful consequences resulting from the Act and enacted the impugned measure, not with a view to improve the resources of its exchequer by transgressing its limits of taxing power, but to interdict unscrupulous persons from abusing the statute to serve their ends and purposes. The exercise of power in introducing the amendment is well within the topic of "Tax on sale and purchase in Entry 54, list II, Schedule 7 of the Constitution, as it is a power necessary, incidental and ancillary to the primary and main power. The amendment is in the nature of a penal provision to curb the illegal activities under cover of the Act, and is essential to the effectiveness of the power to legislate on tax on sale and purchase.

6. The proper interpretation of the enumerated powers of the legislature has been the subject matter of decisions by the Federal Court and the Supreme Court and other Courts in other countries having legislative bodies with defined and specified powers. The well-accepted canon of construction is that the words describing the legislative powers should receive a wide and liberal meaning, and blind adherence to a strictly verbal interpretation must be avoided. The enumerated powers must be effectively put in operation lay legislation. An impotent piece of legislation, while it may adorn the Statute book, is as good as not having been enacted at all. The doctrine of incidental and ancillary power has necessarily to be invoked to prevent a statute becoming ineffective, in *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, the Supreme Court observed

It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power.

This observation is approved and affirmed by a later decision of the Supreme Court reported in *Chaturbhai M. Patel Vs. Union of India (UOI)* and

*Others*, . The following observation in *Small v. Smith*, (1884) 10 AC 119 emphasises the usefulness of incidental and ancillary power:

When you have got a main purpose expressed and ample authority given to

effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought prima facie to follow from the authority for effectuating the main purpose by proper and general means.

We may also refer to a passage from the judgment of the Australian court, bringing out the same idea, in *Skemp v. Australian Glass Manufacturing Co., Ltd.*, 23 CLR 226, which runs thus:

The Constitution marks the outlines of the powers of the national legislature, but does not undertake, as a code of laws would, to enumerate the sub-divisions of those powers as to specify all the means of executing them. Laws, which, in the language of the American Constitution are necessary and proper, or, in the language of the Australian Constitution, incidental to the execution of the power, are alike constitutional.

In *United Provinces v. Atiqua Begum*, AIR 1941 FC 18, Sir Maurice Gwyer, C. J. laid down the same doctrine in the following words:

None of the items in the List is to be read in a narrow or pedantic sense and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it.

This observation is quoted with approval by Kapur, J, in the recent decision of the Supreme Court already referred to, namely, *Chaturbhai M.*

*Patel Vs. Union of India (UOI) and Others*, .

7. In a statute falling, within the enumerated topic of legislation, provisions enacted to ensure and achieve the effectiveness of the Act should not be treated as alien to the subject-matter of the legislation. The competency of the legislature to make such provisions cannot be tested as if they stand apart and are severable from the main enactment. A matter not otherwise within the enumerated powers may be legislated upon as an incident to the exercise of an enumerated power.

7a. "What is "incidental" in any given case depends upon the main legislation and the circumstances of the particular case--the question of

"incidentally"--must of course, as Griffith, C. J. observed in *Australian Steamships Ltd. v. Malcolm*, (1914) 19 CLR 298, be determined ab extra,

irrespective of Parliamentary assumption on the matter." (Wynes, *Legislative, Executive and Judicial Powers*, 2nd Edn., pages 493, 494.)

8. In *Burton v. Honan*, 86 CLR 169, it was held by the High Court of Australia that the forfeiture imposed by the Customs Act was incidental for

the purpose of vindicating the Customs Laws and was not an acquisition of property in respect of which the Parliament was empowered to make

laws. Dixon, C. J. observed at page 177:

Everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary

for the reasonable fulfilment of the legislative power over the subject-matter ..... These matters of incidental powers are largely questions

of degree, but in considering them, we must not lose sight of the fact that once the subject-matter is fairly within the province of the Federal

legislature, the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject-matter are matters entirely for the

Legislature and not for the Judiciary.

We have to consider the question whether the conferment of right in favour of the State Government to compel payments of amounts collected by

persons taking advantage of the machinery of the Act is the result of the exercise of ancillary power of the State Legislature attached to the power

to enact a law in respect of tax on sale and purchase. The State has undoubtedly no power, by which it can enact a law to connive at or be a party

to, illegal collection of amount purporting to be tax. But, in order to ensure the proper working of a law relating to tax on sale and purchase and to

prevent the law from being abused, it can introduce measures interdicting such abuses, or enact provisions to prevent any mischief from being done

under colour of the Act. The assumption of such a power to legislate can only be regarded as an incidental or ancillary power to effectuate the

undoubted proper power to enact a tax-law. The competency of the State's power to legislate should not be adjudged merely from the result of

the State Government appropriating to itself the proceeds of illegal exaction made by persons taking shelter under the Act.

Surely, the State has not empowered any person, whether a registered dealer or not, to collect amounts not leviable as tax under the Act The

object of the amendment to Section 8-B (2) under Madras Act I of 1957 as revealed, by the plain words of the amendment, is only to put a check

upon persons misusing the Act to their own advantage, we can use a familiar

expression and say that the pith and substance of the amendment is not to levy an ad hoc tax on transactions which are not sales or purchases, but to introduce a measure in the nature of forfeiture or confiscation of the unlawful gains made by persons who found themselves in a position to take undue advantage of the Act.

9. We shall now refer to the decisions cited on behalf of the petitioners. In *The State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills*

and *Another*, , the validity of the proviso to Section 11-A of the Bihar Sales-tax Act, 1947 was in issue. The proviso reads thus:

Provided that if any dealer collects any amount by way of tax in contravention of the provisions of this section or the conditions and restrictions

prescribed thereunder, the amount so collected shall, without prejudice to any punishment to which the dealer may be ..... liable for an offence

under this Act, be forfeited to the State Government, and such dealer shall pay such amount into the Government treasury in accordance with a

direction issued to him by the Commissioner or any officer appointed u/s 3 to assist him, and, in default of such payment, the amount shall be

recovered as an arrear of land revenue.

The Patna High Court held that this provision was unconstitutional and invalid. The Supreme Court, however, did not find it necessary to consider

the validity of the provision, as it was of opinion, that the proviso could not be invoked against the assessee on the particular facts of the case. The

decision of the High Court was therefore affirmed on other grounds. Gajendragadkar, J. observed that courts should be reluctant to decide

constitutional points merely as matters of academic importance. This decision cannot therefore help us in solving the problem now before us.

10. In *George Oakes (P.) Ltd. Vs. State of Madras*, , the validity of the Madras General Sales-tax (Definition of Turnover and Validation of

Assessments) Act, 1954, came in for consideration. The headnote correctly sets out the ratio of the decision :

The true effect of Section 8-B of the Madras General Sales-tax Act, 1939 and the Madras General Sales-tax (Turnover and Assessment) Rules

1939 is that (a) a registered dealer is enabled to pass on the tax, (b) an unregistered dealer cannot do so, and (c) the amount collected by way of

tax is to be shown separately, for it has to be paid over to Government. This

does not mean that it is incompetent to the legislature enacting legislation pursuant to Entry 54 in List II by suitable provision to make the tax paid by the purchaser to the dealer together with the sale-price in consideration of the goods sold, a part of the turnover of the dealer; nor does it mean that the tax, as imposed by Government, is a tax on the buyer, making the dealer a mere collecting agency, so that tax must always remain outside the sale price. When the seller passes on the tax and the buyer agrees to pay sales tax in addition to the price, the tax is really part of the entire consideration and the distinction between the two amounts--tax and price--loses all significance from the point of view of legislative competence.

Mr. K.V. Venkatasubramania Aiyar, learned counsel for the petitioners, relied on this case mainly to emphasise the fact, that the dealer who

collects the tax from his purchaser and upon which a liability is fastened to pay over the proceeds to the State, is not the agent ex contracts or

statutory of the State. According to the learned counsel, the registered dealer, who is clothed with the right u/s 8-B (1) to collect the tax from his

purchased, has a statutory right inhering in himself and the amount that may be collected by him represents his own moneys, in respect of which he

is not liable to account to the State, though, If he were to be assessed under the Act, the transaction in respect of which he had collected the tax

would also be included in the taxable turnover. The learned Advocate General, however, contends that the person who is authorised to collect the

tax payable by him to the State from other persons occupies a fiduciary position not far different from that of an agent.

In support of this contention, he referred us to the decision in *Reading v. Attorney-General*, 1951 AC 507. In that case, one Reading was a

sergeant in the British Army on active service in Egypt. Wearing military uniform, he accompanied civilian lorries transporting illicit spirits to

specified destinations. By his accompanying the convoy of illicit transport, he avoided inspection of the goods conveyed under the lorries. For

these services, he received in all  $\text{Rs. } 20,000$ . The military authorities took possession of this amount from his hands, tried him by Court-Martial,

and convicted him. After his release from prison, he claimed, by Petition of Right, from the Crown the return of the amount seized. The House of

Lords held that he was not entitled to recover the money. One of the grounds of the decision was that Reading occupied a fiduciary relationship, as

he was a soldier under the Crown. At page 516, Lord Porter observed:

I agree with Asquith, L. J. in thinking that the words "fiduciary relationship" in this setting are used in a wide and loose sense and include inter alia

a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.

This decision of the House of Lords was referred to by the Division Bench in 1954 5 STC 382, Rajagopalan, J. observed,

Weighty though these observations are and entitled to the profoundest respect, they cannot apply to the determination of the limited issue before

us. We are not concerned now with the question--what are the rights and liabilities of the State and a registered dealer in an action at common law

for the recovery of the collections made under colour of Section 8-B (1), but in excess of the authority, and subsequently paid over to the

Government. The limited issue before us is, what is the extent of the statutory obligation created by Section 8-B (2) of the Act. As we have already

pointed out, Section 8-B(2) applies to both the collections made by a registered dealer who is authorised to collect, and by an unregistered dealer

who is forbidden to collect by Section 8-B (1). It applies to "every person who collects any amounts by way of tax under this Act." That aspect

should not be lost sight of in construing the scope of the obligation cast alike by Section 8-B (2) on the registered dealer and on the unregistered

dealer. Neither of them is in the position of a servant vis-a-vis the State.

It is not necessary for us to go into the question as to the jural relationship between the State and an unregistered or a registered dealer in respect

of transactions where such dealers have collected amounts from other persons purporting to be by way of tax, but not really tax due and payable,

as the question of the competency of the legislature cannot depend upon that relationship. If the position of the State were held to be that of a

principal and the position of the dealer that of an agent, the legislature cannot permit either the principal or the agent to collect taxes by an illegal

levy. If the relationship between the State and the dealer is not that of a principal and an agent, even then, the legislature cannot, in exercise of its

power to enact a tax-law on sale and purchase, permit an illegal levy. We are

therefore of opinion that the position of the State vis-a-vis the dealer is not a relevant criterion to be taken into account to comprehend the State's power of legislation to enact the amendment.

11. The learned Advocate-General referred us to the following decisions of the Supreme Court of the United States. In *United States v. Jafferson*

*Electric Manufacturing Co.*, (1933) 78 Law Ed 859, it was held that a federal statute conditioning the right to a tax-refund on a showing by a

claimant that he alone had borne the burden of the tax did not infringe the due process clause of the Fifth Amendment. In 93 American Law

Reports (Annotated), *Jafferson Electric Manufacturing Co.*'s case, (1933) 78 Law Ed 859, is referred to, and it is observed that that case puts at

rest the conflict in the decisions of the various lower federal courts as to the interpretation of the statute concerned. In 119 American Law

Reports (Annotated), the following observation occurs at page 549:

To prevent the unjust enrichment of a manufacturer who had collected from the purchasers the tax assessed under the Agricultural Adjustment

Act, but who, because of the subsequent invalidation of that Act, had either not paid such tax to the Government of the United States, or, having

paid it, had recovered it back, but had not turned it over to the persons upon whom the burden of tax had ultimately fallen. Congress enacted in

the Revenue Act of 1936 a provision, in effect imposing an Income Tax upon such manufacturer in respect of such amounts held or collected the

constitutionality of the Act was sustained in *Union Packing Company v. Rogan*, 1957 D.C. 17 F. Suppl. 934. The Court said that, even if it were

conceded that its object was to recapture excess taxes already assessed and which had been returned but the tax payers are not paid, it could not

be said to be arbitrary, further observing: The tax-payer is made to turnover to the Government not something which belongs to him, but a tax

which he had added to his cost and collected from others, but which was not collected from him ..... Truly, the tax is, as named, a tax on unjust

enrichment, and enrichment not at the expense of an individual, but at the expense of a buying public and the Government which imposed the tax.

A tax so conceived has none of the earmarks of the arbitrariness which would bring it under interdict of the fifth amendment.

We must observe that these American decisions are really concerned with the

question whether a particular enactment was offensive of the due process clause of the American Constitution. In the United States of America, taxing statutes are not outside the due process clause. In India, the doctrine of due process does not apply and the Constitution only lays down that a tax cannot be imposed except under the authority of the law (Article 265 of the Constitution).

12. We need refer only to one more decision, and that is the decision of the Supreme Court in *The Orient Paper Mills Ltd. Vs. The State of Orissa*

and *Others*, . In our opinion, this decision clinches the issue in favour of the State. The facts of that case are as follows. The Orient Paper Mills

Limited was an assessee under the Orissa Sales-tax Act. They were manufacturers of paper and paper boards, and were registered as dealers

under the Act. They used to collect tax from the purchasers on all sales effected by them including sales to dealers in other States. For the quarters

ending 31-3-1950, 30-6-1950, 30-9-1950 etc., they paid sales-tax on their turnover, which included outside sales.

After the decision of the Supreme Court in the *United Motors*" case, *The State of Bombay and Another Vs. The United Motors (India) Ltd. and*

*Others*, , they applied for refund, u/s 14 of the Act, of tax paid in respect of goods despatched for consumption outside the State of Orissa,

contending that, according to the law expounded by the Supreme Court, the transactions of sales outside the State were not taxable under the

Act. Refund was refused by the Assistant Sales tax Officer and the order was confirmed by the Board of Revenue. In the view of the taxing

authorities, the orders of assessment had become final on the dates on which they are made and were not liable to be reopened, merely on the

ground that the law applicable to the transactions was not correctly appreciated by the taxing authorities. The assessee filed petitions for the issue

of writs of certiorari and mandamus against the orders of the Board of Revenue in the High Court of Orissa. The High Court held that, the only

restriction upon the right of a dealer to apply for refund being the law of limitation prescribed by the proviso to Section 14 of the Orissa Act and

the transactions in question not being liable to tax as they were Inter-State transactions, the tax collected must be refunded on applications

submitted within the prescribed period.

Accordingly, the High Court negated relief to the assessee for the refund of tax paid for the first two quarters as being barred by limitation, but

granted relief for the remaining three quarters. Both the State of Orissa and the assessee preferred appeals to Supreme Court against the said

decision of the High Court. The Orissa Legislature brought an amendment to the Orissa Sales-tax by Act 27 of 1958. The amendment is in these

terms:

Notwithstanding anything contained in this Act, where any amount is either deposited by any person under Sub-section 3 of Section 9-B or paid

as tax by a dealer and where such amount or any part thereof is not payable by such person or dealer, a refund of such amount or any part thereof,

can be claimed only by the person from whom such person or dealer has actually realised such amounts whether by way of sales-tax or otherwise

and the period of limitation in the proviso to Section 14 shall apply to the aforesaid claims.

13. It was not disputed before the Supreme Court that the amending provision barred the assessee's right to obtain refund of tax. It was, however,

contended that the Act was beyond the competence of the State Legislature, and that, in any event, it was void, because it imposed an

unreasonable restriction upon the assessee's fundamental right guaranteed under Article 19(1)(f) of the Constitution. Dealing with the question of

competency of the legislature, Shah, J. observed thus at page 612 (of SCJ) : (at p. 1440 of AIR):

The power to legislate with respect to a tax comprehends the power to impose the tax, to prescribe machinery for collecting the tax, to designate

the officers by whom the liability may be enforced and to prescribe the authority, obligations and indemnity of those officers. The diverse heads of

legislation in the Schedule to the Constitution demarcate the periphery of legislative competence and include all matters which are ancillary or

subsidiary to the primary head. The legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or

ancillary matter of granting refund of tax improperly or illegally collected, and the competence of the legislature in this behalf is not canvassed by

counsel for the assessee. If competence to legislate for granting refund of sales-tax improperly collected be granted, is there any reason to exclude

the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales-tax

or otherwise? We see none. The question is one of legislative competence and there is no restriction, either express or implied, imposed upon the

power of the legislature in that behalf.

We are aware of the fact that, to some extent, a concession was made in that case in urging the contention regarding the competency of the

legislature. But this, in our view, does not really affect the ratio of the decision.

14. There is another decision of the Supreme Court, *Burmah Construction Co. Vs. The State of Orissa and Others*, in which the decision just

cited, *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, has been followed. The assessee in that case was a firm carrying on

business as building and works contractors. The Sales-tax Officers administering the Orissa Sales-tax ACT, 1947 treated the transfer of the

materials used in the construction of the buildings, roads and bridges as sale of goods and assessed the firm to tax. The assessee relying upon the

judgment of this court in *Gannon Dunkerley and Company (Madras) Limited v. State of Madras*, 1954 5 STC 216 : AIR 1954 Mad 1130,

moved a writ petition in the High Court of Orissa for the issue of directions directing the State of Orissa and its Sales-tax Officers to refund the

amount of tax and penalties realised from them. During the pendency of the writ petition, the Supreme Court affirmed the decision of the Madras

High Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,* .

The High Court declared that the assessment of sales tax was not in accordance with law and directed that no steps should be taken to realise the

arrears of sales-tax in respect of the works contracts. The High Court also directed refund of tax paid if recovery thereof was not barred u/s 14 of

the Orissa Sales-tax Act of 1947 on the date of the filing of the application. In the appeal filed by the assessee against the order of the High Court

holding that a portion of refund claimed was barred by limitation u/s 14 of the Act the provisions of Section 14 of the Act were challenged as ultra

vires of the State Legislature. Section 14 of that Act reads :

The Collector shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax paid by such dealer in excess of the

amount due from him under this Act, either by cash payment or, at the option of

the dealer, by deduction of such excess from the amount of tax due in respect of any other period:

Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within 24 months, from the date on which the order of assessment was passed or within 12 months of the final order passed on appeal, revision, review or reference in respect of the order of assessment, whichever period is later.

The contention urged on behalf of the assessee was that the State Legislature had no power to restrict We right to obtain refund of tax illegally collected by imposing a period of limitation. The Orissa Act was enacted by the Orissa, Legislature in exercise of legislative authority conferred upon it by item 48 of List II of the Schedule VII of the Government of India Act, 1935. The Supreme Court quoted the passage extracted above from their decision in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , and observed thus:

If the power to legislate in respect of tax comprehends the power to legislate in respect of refund of tax improperly or illegally collected, imposition of restrictions on the exercise of the right to claim refund will not be beyond, the competence of the legislature. Granting refund of tax improperly or illegally collected and the restriction on the exercise of that right are both ancillary or subsidiary matters relating to the primary head of tax on sale of goods. The provisions of Section 14 of the Act are therefore not ultra vires the State legislature.

The principle of this decision can properly be invoked to decide the vires of the impugned provision under the Madras General Sales-tax Act.

15. There is another view of the matter tending to uphold the legislative competence. A registered dealer gets a right to collect the tax only under the Act and his obligation to pay over the collected amount to the State is part of that very right. He cannot enjoy that right free from the duty imposed as a necessary fetter upon that right. It is within the province of the Legislature to create such a right coupled with a duty in favour of a dealer within the Act. An unregistered dealer is prohibited from collecting the tax leviable and the necessary consequence of such a dealer violating the prohibition should be that he is accountable to the State. The liability to pay over the collections to the State is imposed on the unregistered

dealer only to render effective the statutory interdiction against him. Surely, both the interdiction and the obligation to pay are within the province of the State's power to legislate.

16. We are clearly of opinion that the impugned legislation does not transgress the limits of the State's power under Entry 54, List II, Schedule 7

of the Constitution. The State has not in substance, enacted any measure of law unrelated to tax on sales and purchases, but has only exercised its

undoubted subsidiary and ancillary power to effectuate the existing piece of legislation in regard to that subject matter. We hold that the

amendment introduced to Section 8-B(2) by reason of Madras Act I of 1957 is intra vires and valid.

T. C. Nos. 196 to 198 of 1959:

16a. The petitioner in these three tax revision cases is an incorporated company carrying on business in aluminium metal and its alloys at Calcutta.

The company consigned goods to Madras by rail and obtained railway receipts in its name. After receipt of the price, the railway receipts were

endorsed in favour of the consignees at Madras. The goods despatched from Calcutta were delivered at Madras for consumption in the Madras

State. These sales clearly fell within Section 22 of the Madras General Sales-tax Act. The following table gives the particulars regarding the sales-

tax due by the company in respect of these transactions and the amount of tax which the company had collected from its purchasers:

| App. No. | Asst. Year. | Sales- tax due. | Sales-tax demanded. |
|----------|-------------|-----------------|---------------------|
|----------|-------------|-----------------|---------------------|

|        |         |           |           |
|--------|---------|-----------|-----------|
| 480/58 | 1953-54 | 8,538-2 0 | 4,213-9.9 |
|--------|---------|-----------|-----------|

|        |         |            |             |
|--------|---------|------------|-------------|
| 427/58 | 1954-55 | 9,981-13-9 | 10,476 11-9 |
|--------|---------|------------|-------------|

|        |              |  |  |
|--------|--------------|--|--|
| 481/58 | 1955-56 upto |  |  |
|--------|--------------|--|--|

|          |           |           |  |
|----------|-----------|-----------|--|
| 6-9-1955 | 8,630-1-3 | 7,837-6-3 |  |
|----------|-----------|-----------|--|

The contention raised by the assessee-company before the taxing authorities, as also before the Appellate Tribunal, was that these transactions

were inter-State sales not liable to be taxed by the Madras State. It was also contended that, in any event, the property in the goods passed at

Calcutta under the terms of the contract between the company and its purchasers and that the mere fact of delivery of the goods inside the State

would not entitle the State to levy a tax on the sales. It was further contended that, though tax had been collected by the company, the State was

not entitled to have the collected amounts u/s 8-B(2) of the Act, as amended by Madras Act I of 1957, as the said provision is ultra vires. The

Tribunal quite properly declined to go into the question of the vires of the legislation and held that, irrespective of the fact that the property in the

goods passed at Calcutta, the sales were within the ambit of Section 22 of the Madras General Sales-tax Act, as delivery of the goods was for

purposes of consumption inside the State.

17. We have already held that Section 8-B(2) is valid and intra vires. There is really no substance in the contention that the property in the goods

passed outside the State and that therefore the transactions were not taxable events under the Madras General Sales-tax Act. Section 22 of the

Madras General Sales-tax Act is, practically, the same as explanation to Article 286(1) of the Constitution, and these sales can be described as

"explanation sales". It has been held by the Supreme Court in *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*,

that, in sales in which goods are delivered for consumption in a particular State, the property therein shall be deemed to have passed inside that

State alone, which may be called the ""Delivery"" State. At p. 317 of STC): (at p. 481 of AIR), Venkatarama Iyer J. observed thus:

The sales in which- property passes outside the State of Madras, but delivery for consumption is inside Madras, are at once inside sales for

Madras and outside sales for the other States.

In view of this decision, it is really unnecessary for us to consider whether the petitioner is well founded in its contention that the property in the

goods passed only at Calcutta and not at Madras at the time and place of the delivery.

18. In respect of assessment years 1953-54 and 1955-56, the tax due by the company is more than the tax collected by the company from its

purchasers. The question of this applicability of Section 8-B(2) of the Act does not come in for consideration in respect of these two assessment

years. For the assessment year 1954-55, the tax collected by the company is Rs. 10476-11-9 while the tax due by it is Rs. 9981-13-9. It is only

the difference between these two amounts which falls within the scope of Section

8-B(2). As we have already held that the said provision is valid

and enforceable, the decision of the Tribunal is correct. These revision petitions fail and are dismissed with costs in T. C. No. 196 of 1959.

Counsel's to Rs. 150.

W. P. No. 589 of 1959:

19. The petitioner prays for the issue of a writ of prohibition or other appropriate writ under Article 226 of the Constitution to forbear the

respondent, the Deputy Commercial Tax Officer, Adyar, from collecting the sum of Rs. 2622-21 u/s 8-B(2) of the Madras General Sales-tax Act.

20. The petitioner is a firm of partnership carrying on business as publishers and sellers of law books. The firm is a registered dealer under the

Madras General Sales-tax Act. During the period 14-1957 to 30-6-1957, the inter-State sales effected by the petitioner were not liable to sales-

tax either under the Madras General Sales-tax Act, 1939, or under the Central Sales-tax Act, 1956, as the sales of the books were completely

exempted, from tax under the Madras Act. The firm, however had collected sales-tax from its purchasers in respect of inter-State sales effected

during that period. The amount so collected was Rs. 2622-21. While assessing the turnover of the firm for the year 1957-58, the taxing authorities

claimed to recover this sum of Rs. 2622-21 u/s 8-B-(2). A demand having been made for payment over, the present writ petition has been filed.

21. We have already held that Section 8-B(2) is intra vires and it is therefore clear that the petitioner must submit to the demand of the State to pay

over this sum of Rs. 2622-21. Learned counsel for the petitioner argued that there was no separate demand under Form B-2 in respect of this

amount and that therefore the amount could not be recovered. Even as a technical ground of objection, this plea is wholly without substance. The

claim of the State to compel the petitioner to pay over this amount squarely falls within the specific provisions of Section 8-B (2) and there are

certainly no grounds for resisting the claim. The petition fails and is dismissed with costs. This Rule nisi is discharged. Counsel's fee Rs. 150.

W. P. No. 1067 of 1959:

22. The petitioner prays for the issue of a writ of certiorari or other appropriate writ under Article 226 of the Constitution to quash the order of the

Assistant Commercial Tax Officer, Triplicane, Madras, dated 10-10-1958 in A.

2/598/53-54 under the following circumstances.

23. The petitioner is a firm of partnership carrying on business as building contractors at Madras. In the assessment year 1953-54 the taxing

authorities under the Madras General Sales-tax Act assessed the net value of the building contracts in the sum of Rs. 11,69,369/-0. The petitioner

contended that building contracts were not within the Act and that the taxing authorities had no jurisdiction to levy tax under the Madras General

Sales-tax Act. In 1954 5 STC 216 : AIR 1954 Mad 1130, this court held that building contracts fell outside the scope of the Act. This decision

was affirmed by the Supreme Court in its decision reported in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., . In view of

this decision, the taxing authorities held that the petitioner was not liable to pay any tax under the Act. But it must be mentioned that the petitioner

had collected the sum of Rs. 9442 from the owners of the buildings, for whom the contracts were executed. Subsequently, the Assistant

Commercial Tax Officer, Triplicane, by his order, dated 10-10-1958, revised the previous order of assessment holding the petitioner immune from

tax, and held that the petitioner was liable to pay the sum of Rs. 9442 u/s 8-B(2) of the Act.

This revision was made by the taxing authorities, acting under Rule 18 of the Madras General Sales-tax Rules, which enables the authorities to

rectify an error apparent on the face of the record. The petitioner's attempt to have the said order set aside by way of appeal and revision having

failed, this writ petition has been preferred.

24. In view of our decision that Section 8-B(2) of the Act is intra vires and valid, the petitioner can no longer resist the action of the State under

that provision. It cannot be said that there was no case for the authorities to act under Rule 18 of the Madras General Sales-tax Rules. The

Assistant Commercial Tax Officer, in his original order of assessment dated 4-5-1956, held that the taxable turnover of the petitioner was nil, and

he also stated in that order of assessment that there was no demand u/s 8-B(2) of the Act, clearly overlooking the fact that the petitioner had

collected a sum of Rs. 9442 by way of sales-tax from its constituents. This was clearly a mistake apparent on the record. We are of opinion that

Rule 18 of the Madras General Sales-tax Rules applies and the Assistant

Commercial Tax Officer had jurisdiction to rectify the mistake.

25. It is urged on behalf of the petitioner that the original assessment order became final and could not be reopened, if there are grounds for the authorities to act under Rule 18--and we have held that there are grounds for so acting--the previous order of assessment cannot be said to have become indefeasibly final.

26. Another argument is pressed upon us, and that is that an action by the State u/s 8-B(2) of the Act can only be part of the assessment proceedings and cannot be a proceeding independent of such assessment. We are unable to agree. Rule 5-A of the Turnover and Assessment rules indicates that a recovery by the State of the amount collected by a dealer u/s 8-B(2) is not part and parcel of the assessment based upon the charging section, namely, Section 3 of the Act. Rule 5-A, in so far as it is material, may be set out:

5-A(7). A registered dealer may collect amounts by way of tax or taxes under the Act, subject to the following conditions:

1. He shall not collect any amount or amounts by way of tax or taxes under the Act at a rate or rates exceeding the rate or rates specified in Section 3(5) or 5-A or notified u/s 6(1);

2. He shall pay in full the amount or amounts collected by him by way of tax or taxes to the State Government on or before the 30th April of the year succeeding in which such collection is made; .....

9. If the assessing authority is satisfied that any amount or amounts collected, by the dealer by way of tax or taxes have not been paid by him to the

State Government in any year as required by condition 2 in Sub-rule 7, the assessing authority shall issue a notice to the dealer in form B. 2

specifying therein the total sum so withheld by the dealer and the dealer shall pay such sum at the time and in the manner specified therein.

It may be noted that the form of demand in pursuance of an order of assessment is form B. 1(A). Apart from the fact that different forms have

been prescribed, one for recovery of demand resulting from regular assessment and the other for collection of the amount due and payable u/s 8-

B(2) of the Act, there is enough indication even in the language of Section 8-B(2) to show that the liability of the dealer is independent of his

liability under the charging section of the Act. The words

whether or not any tax is due from him under this Act in respect of the transaction in which he has collected or collects such amount

in Section 8-B(2) quite clearly make out that the liability to pay over the collected amount is de hors the liability as dealer under the other

provisions of the Act.

27. The petitioner cannot lawfully resist the claim of the State to pay over the sum of Rs. 9442 collected by it, purporting to be by way of sales-tax

from its constituents. The writ petition fails and is dismissed with costs. Rule nisi is discharged. Counsel's fee Rs. 100.

W. P. Nos. 817 and 818 of 1959:

28. The petitioner in these two writ petitions prays for the issue of a writ of certiorari or other appropriate writ under Article 226 of the

Constitution to quash the order of the Deputy Commercial Tax Officer, Mylapore, dated 3-6-1958 in A. 2/227/54-55 relating to the assessment

year 1954-55.

29. The petitioner is a firm of partnership carrying on business as building contractors. For the year 1953-54, the firm filed monthly returns in A. 3

form and paid in all the sum of Rs. 7014-1-0. In the bills submitted by the firm to its customers, sales-tax was included and claimed. In this

manner, a sum of Rs. 4578-44 was collected by the firm from its constituents. Similarly, for the year 1954-55 the firm paid tax to the Department,

amounting to Rs. 1752, out of which the collection made by it from its constituents was the sum of Rupees 543-15-0. Following the decision of

this court in Cannon Dunkerley's case 1954 5 STC 216 : AIR 1954 Mad 1130, the Deputy Commercial Tax Officer, by his orders dated 29-9-

1956 for the year 1953-54, and 21-1-1957 for the year 1954-55, excluded the entire turnover of the petitioner in respect of the building contracts

and ordered refund of the tax paid.

Subsequently, the Deputy Commercial Tax Officer demanded the sum of Rs. 4578-44 and the sum of Rupees 543-15-0 for the two years from

the petitioner on We ground that the petitioner was liable to pay the amount to the Slate u/s 8-B(2) of the Act. The petitioner challenged the vires

of the provision and resisted the collection. After some abortive proceedings by way of appeal and revision, the petitioner has approached this

court under Article 226 of the Constitution.

30. Section 8-B(2) of the Act has been held valid by us. The petitioner's contention challenging the vires of the provision has therefore to be negatived. The petitioner also raised the contention that the previous order of assessment had become final, that it could not be reopened and that there could not be a claim u/s 8-B(2) of the Act, apart from assessment proceedings. We have held that the proceedings u/s 8-B(2) of the Act are independent of assessment proceedings and that such proceedings need not necessarily and always form part of the assessment proceedings. The right of the State to collect the amount from the dealer, if the requisites of Sub-section (2) of Section 8-B are complied with, cannot be defeated I merely on the ground that the assessment proceeding against the dealer had become complete and final. This contention also fails.

31. In the result, these writ petitions are dismissed. Rule nisi is discharged. The petitioner will pay the respondent's costs in W. P. No. 817 of 1959. Counsel's fee Rs. 150. There will be no order as to costs in W. P. No. 81S of 1959.

W. P. Nos. 1213, 1214 and 1215 of 1959:

32. The petitioner in all these three writ petitions is a private limited company, carrying on business as building contractors in the City of Madras.

The petitioner was assessed for the year 1949-50 under the Madras General Sales-tax Act by the Deputy Commercial Tax Officer,

Thyagarayanagar, on a turnover of Rs. 35,08,153-5-0. This assessment was disputed on the ground that the receipts comprised in the turnover

were in respect of building contracts and the supply of food grains to the start and workmen of the company and were therefore beyond the scope

of the Act. The petitioner's contention in this behalf was accepted by this Court in the decision reported in 1954 5 STC 216 : AIR 1954 Mad

1130. The State went up on appeal to the Supreme Court but the decision of this court was affirmed and the judgment of the Supreme Court is

reported in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., .

In consequence of the judgment of the Supreme Court, there was a revised assessment by the Deputy Commercial Tax Officer. The petitioner had

collected sales-tax in respect of these work contracts from its constituents and the amount so collected was Rs. 13080-6-9. The tax due and

payable by the petitioner in respect of the assessable turnover was Rs. 5222-2-1.

The excess of tax, collected over the tax payable by the petitioner was Rupees 7858-4-8. After making the revised assessment the taxing authorities withheld this sum of Rs. 7858-4-8 and directed a refund of the balance due as the petitioner had already paid a total tax of Rs. 56950. W. P. No. 1213 of 1959 is directed against this order of the Deputy Commercial Tax Officer.

33. For the year 1950-51, the petitioner had collected tax from, its constituents the sum of Rs. 179/9-14-6. But the tax payable by it to the Department was only Rs. 3594-6-0. The taxing authorities demanded from the petitioner the sum of Rs. 16969-91 nPs. representnig not merely the tax payable by the petitioner but also the excess of amounts collected by it from its constituents over the amount due and payable by it to the department. This order forms the subject-matter of W. P. No. 1214 of 1959.

34. For the year 1951-52 the petitioner had collected the sum of Rs. 26127-3-1 from its constituents, while the tax due by it to the department was only Rs. 3848-14-3. The excess of the amount of tax due by the petitioner namely the sum of Rs. 22278-4-10 is claimed by the department and this is disputed in W. P. No. 1215 of 1959.

35. The following tabular statement gives the particulars in regard to the three years in question. (Herewitn annexed) (Omitted here since it is not material for purposes of this report.--Ed.)

36. The claim of the Department against the petitioner in all these three years, 1949-50, 1950-51 and 1951-52 is really based on Section 8B(2) of the Madras General Sales-tax Act. The vires of this provision was challenged by learned counsel for the petitioner, but we have held that the said provision is valid and intra vires. It was further contended on behalf of the petitioner that there is really no excess available in the hands of the petitioner which can enable the State to claim the right of payment u/s 8-B(2) of the Act. In all these years the petitioner paw the tax which certainly included the amount collected from the constituents.

The petitioner's claim for the refund of the amount on the basis that the turnover in respect of the works contracts was not assessable was met with the counter claim of the State, that the collected amounts should be paid over to the State u/s 8-B(2) of the Act. The figures given above

unmistakably show that the petitioner had collected amounts from its constituents which were not lawfully payable by way of tax under the Act. If

the petitioner had not handed over the amounts so collected to the State the claim u/s 8-B(2) cannot be resisted. It follows that the collections

having been made over to the State Government, the petitioner will not be entitled to any refund, as it is open to the State to retain the amounts in

its hands in view of the provisions of Section 8-B(2) of the Act. There is really no substance in the plea urged on behalf of the petitioner that the

ingredients of Section 8-B(2) are not present to warrant the action taken by the taxing authorities.

37. These writ petitions therefore fail and are dismissed. Rule nisi is discharged. The petitioner will pay the costs of the respondent in W. P. No.

1213 of 1959. Counsel's fee Rs. 150.