

(1961) 08 KL CK 0001

In the High Court Of Kerala

Case No : O.P. No's. 184, 195, 319; 320, 723 and 724 of 1959 and T.R.C. No's. 52 and 53 of 1960.

Ravjee Anant Goray and Sons

APPELLANT

Vs

Sales Tax Officer, Kozhikode and Others

RESPONDENT

Date of Decision : 17-08-1961

Acts Referred:

Constitution of India, 1950 — Article 213, 226, 265

Citation : (1961) KLJ 931

Hon'ble Judges : M.A. Ansari, C.J.;C.A. Vaidialingam, J

Bench : Division Bench

Advocate : V. Rama Shenoi and K.P.G. Menon in O. Ps. 184 and 195 of 1959, Memana Raman in O. Ps. 319 and 320 of 1959, T.L. Viswanatha Iyer in O. Ps. 723 and 724 of 1959 and K.N. Karunakaran and K.G. Devarajan in T.R.C. Nos. 52 and 53 of 1960, for the Appellant;

Final Decision : Allowed

Judgement

Ansari, C.J.—These six writ petitions and two tax revision cases together challenge the legality of all and individually the correctness of each petitioner's being after November 1, 1956, assessed to sales-tax under the Madras General Sales-tax Act, NO. IX of 1939, hereafter referred to as the Act. All the petitioners had been assessed to sales-tax for the two assessment years 1955-"56 and 1956-"57, after the Travancore-Cochin General Sales-tax (Amendment) Act, NO. XII of 1957, had, on October 1, 1957, become operative in the Malabar area of this State. u/s 15(2) of the latter Act, the former Act was, along with other enactments of the Madras State till then operative in the area, were repealed, and the Travancore-Cochin General Sales-tax Act, 1125, to be called the General Sales-tax Act, was u/s 3(ii), extended to the whole of the State of Kerala. The petitioners' challenges to their being assessed under the Act would best be understood after the facts in the several petitions are briefly narrated; and, for this purpose, the petitions can be put into four groups:

- (1) O. P. Nos. 319/59, 320/59, and T. R. C. Nos. 52/60 and 53/60;
- (2) O. P. Nos. 195/59 and 184/59;
- (3) O. P. NO. 724/59 and
- (4) O. P. NO. 723/59.

All the four petitions of the first group are by one C. Velukutty, who is the proprietor of C. C. Brothers, Provision Stores, Kozhikode. The petitioner's Head Office is at Court Road, branch office at Big Bazaar, and the Head Office at the Court Road is only a retail shop where goods are sold mostly to consumers. The wholesale business is done at the Branch Office at Big Bazaar, and two separate accounts are kept for each shop. The goods required for the retail shop are mostly supplied by the Branch Office, and the remaining goods are directly purchased. Further the goods sent from the Branch shop are treated as transfers, and what be purchased from the wholesalers at Kozhikode and supplied to the Head Office, are also entered in the same account, the bills being passed on to the Head office. Separate folio is kept for this purpose, one for goods received from the Branch Office, and the other for goods sent to the Head Office. In the ledger account maintained at the Head Office in the name of the Branch Office, the goods transferred by the Branch and the goods purchased locally and transferred by the Branch are exhibited as such.

2. The Deputy Commercial Tax Officer, Kozhikode, had, by order of April 15, 1957, assessed under the Act the petitioner's business on the net turnover of Rs. 9,30,565-10-5 for the assessment year 1955-"56. But on November 14, 1957, the Intelligence Officer, North Zone, Kozhikode, made a surprise inspection of the petitioners' Head Office shop at Court Road, and recovered from that shop four books of account and other records. A scrutiny of these books disclosed large-scale suppression of accounts from the regular books of account, on the basis of which the assessment was made. The Intelligence Officer reported the matter to the Sales-tax Officer, who issued a notice dated October 27, 1958, proposing to determine to the best of his judgment the turnover, which had escaped assessment, and the tax payable thereof. The aforesaid notice was served on the petitioner; who on November 4, 1958, requested two weeks' time to prepare his objections. Time was allowed till November 14, 1958, on which date objection was filed, which shows the petitioner's having no objection to the turnover of his Head Office shop at Court Road being determined, on the basis of the secret books recovered from that shop; but objecting to the turnover of his branch office shop at Big Bazaar being estimated, on the basis of suppression disclosed by the books recovered from the Head Office shop. The objection was rejected, and accordingly the petitioner's escaped turnover was determined. Leaving the best judgment assessment of the Head Office about which the petitioner had offered no objection, the Branch Office at Big Bazaar was assessed as follows:-

Turnover as per regular book already assessed. Add: Commission Sales

Rs. 7,72,482

Rs. 31,402

9

4

9

6

Suppression at the branch estimated $7,72,482 - 9 - 9 \times 135\%$

Rs. 8,03,884

Rs. 10,42,850

14

13

3

0

Total

Less transfer to Head office as per private book.

Rs. 18,46,735

Rs. 1,26,907

11

2

3

10

Rs. 17,19,828

8

5

Total taxable turnover estimated:

Head office.

Branch.

Rs. 2,51,977

Rs. 17,19,828

5

8

0

5

Total taxable turnover

Rs. 19,71,805

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It will be seen that the percentage of suppression for the branch shop has been worked at 135%, which had been found by the officer to be the percentage of suppression for the other shop at the Court Road, the regular accounts of transfer of goods to the latter having shown only Rs. 93,973-7-2, whereas the books recovered disclosed their value to be Rs. 1,26,911-2-10. The petitioner having been assessed to the sales tax of Rs. 16,269.37nP., appealed before the Appellate Assistant Commissioner, who, in his order of February 13, 1959, found that he was unable to enforce the data adopted by the Sales Tax Officer in fixing the turnover, but agreed with that Officer on the quantum of turnover fixed. The appeal was, in these circumstances, dismissed. The dealer preferred appeal to the Sales Tax Appellate Tribunal, and also prayed for the tax collection being stayed. The Tribunal, on March 3, 1959, passed stay order, on the petitioner remitting one-half of the disputed tax on or before March 26, 1959, and the balance in three equal monthly installments commencing from April 27, 1959. The petitioner found such concession for payment of the sales tax for the two years, which had amounted to Rs. 1,18,769.49 and surcharge of Rs. 2,703.16, inadequate, on account of the largeness of the amount involved, and filed O. P. NO. 319/59, seeking writ of prohibition against the tax being collected.

3. Thereafter, the Tribunal on March 26, 1960, dismissed the appeal by the order, in which it had found that had the appellant produced the secret books maintained in the Branch shop, the turnover as per those books might certainly

be higher than the turnover fixed by the Officer. The Tribunal also held that the Officer had adopted a proper and reasonable data in arriving at the turnover of suppression, in the absence of the secret books of the Branch shop. It, therefore, upheld the assessment, against which T. R. C. 52/60 been filed. Therefore, O. P. 319/59 and T. R. C. 52/60 are against the sales tax on escaped turnover for the assessment year 1955-56.

4. The facts in the other two petitions in the 1st group, which includes all cases by the same dealer are that he had been assessed to sales tax on a turnover of Rs. 12,28,698-7-0 in respect of both of his business at the Head Office and the Branch office on March 27, 1958. But earlier, the Intelligence Officer had, on November 14, 1957, made the surprise inspection of the Head office shop and recovered certain books. After notice, the petitioner filed objections, which shows his having for this assessment year as well, no objection to determining the turnover of his Head office shop at Court Road on the basis of the secret books of account recovered from that shop, but objecting to the turnover of his Branch shop at Big Bazaar being estimated on the basis of the suppression disclosed by the books recovered. The Sales Tax Officer determined the escaped turnover of the branch office in the following way:-

General goods

Add Suppression estimated at 200%

Rs. 7,99,02819

Rs. 15,98,05636

Sugar Account.

(a) Sale of sugar purchased within the State 19,15800

(b) first sale of sugar on commission for foreign principals 1,10,78616

(c) first sale of sugar purchased from outside State 2,90,13653

Rs. 3,39,08069

Add suppression estimated at 500% on item (a)

Rs. 95,79000

Add suppression estimated at 500% on item (c)

Rs. 10,45,881103

Total taxable turnover estimated

Less goods transferred to H. O. as per private account

Rs. 38,77,83663

Rs. 1,32,71122

Taxable at 0%3

Addl. tax at 0%0

Item (b) above

Item (c) above

500% of the above towards suppression

Rs. 37,45,12541

Rs. 1,01,78616

Rs. 2,09,13653

Rs. 10,45,881103

Total

Less additional tax goods at head office

Rs. 13,65,80410

Rs. 38,05404

Addl. tax at 0%0

Rs. 13,27,75008

Total taxable turnover.

Head Office

Branch

Rs. 2,21,251145Rs. 37,45,12541

Rs. 39,66,37726

Branch at 0%3

Head office

Rs. 38,05404Rs. 13,27,75008

Additional tax at 0%0

Rs. 13,65,80410?

Evidently the escaped turnover of the branch shop for this assessment year has been again determined on what was found the percentage of suppression for the head office shop, from the recovered books. But it is not clear how the suppression could be treated at 200% when the taxing officer had found the sale in the discovered books for this shop to be Rs. 1,24,033-5-1, in the regular books to be Rs. 94,224-6-6, and the percentage of suppression on that basis to be 135%. Nor it is clear how for item (c) in the sugar account the percentage of

suppression could be 500%. The petitioner, however on the turnover determined as shown above was assessed Rs. 1,08,143-13-9 as the sales tax, and Rs. 2,703.60 as the surcharge under the Kerala Surcharge on Taxes Act, 1957, that had come into operation on August 7, 1957. The notice to pay the tax was issued on December 16, 1958, and the petitioner filed appeal to the Appellate Assistant Commissioner, which was dismissed on February 14, 1959, on the ground that as the appellant had got the reputation of being a leading merchant in the town, he should have a high turnover than others in the locality, and the estimate in the case was not too high, it being reasonable and consistent with the volume of business transacted. The appellant appealed to the Appellate Tribunal; and, on his stay application in this appeal as well, the order of stay was on terms already stated earlier. He therefore filed O. P. 320/59.

5. The Tribunal, by its order of March 26, 1960, dismissed the appeal as well with these words:

The officer is seen to have adopted reasonable and proper data in finding out the turnover suppressed in the case of the 1955-56 assessment. We do not find anything in the assessment order or in the records to show that the turnover estimated is vindictive or capricious. The turnover of suppression estimated is, in our opinion, fair.

The appeal against the assessment order for 1956-57 having been so dismissed; and T. R. C. 53/60 is against that order. Therefore O. P. 320/59 and T. R. C. 53/60 are against the sales tax on escaped turnover for 1956-57. The petitioner's learned advocate in this group of cases has raised the following grounds for the assessments being set aside:

(1) The demand notices for both the assessment years purport to be for the sales tax under the General Sales Tax Act, that was in October, 1957, extended to the Malabar area, where the petitioner does business; and therefore, the writ of prohibition would lie against the demands for tax, under a statute, which was not operative during the assessment years, evidence explaining any mistake of reference not being admissible in this Court;

(2) The authority to assess the sales tax till November 1, 1956, having been vested in the Madras State; and, not having devolved on the State of Kerala, under the States Reorganization Act, cannot be exercised by this State for the period the Malabar area was not part of the new State;

(3) The authority to assess escaped turnover having been conferred by Rule 17 of the Madras General Sales-tax Rules, 1939, the saving section of the Travancore-Cochin Interpretation and General Clauses (Amendment) Act, 1957, would not extend to the aforesaid Rules, which would not after October, 1957, be operative to authorize the petitioner's escaped turnovers being assessed;

(4) Rule 17 is contrary to the provisions of the Act, which makes the assessment of sales-tax final, and the authority u/s 19(2)(f) of the Act to frame such rules,

amounts to excessive delegation to legislate; and

(5) The estimated turnovers of the petitioner's Branch office shop are arbitrary, based on surmises and conjectures; and, liable to be set aside in exercise of revisory powers.

6. Before dealing with these grounds we would give facts of the petitions in the next group, where similar grounds been taken. Ravjee Anant Goray & Sons, a partnership, are the petitioners in this group, which consists of O. P. Nos. 195/59 and 184/59. The firm had been registered under the Indian Partnership Act, and had been assessed to sales tax for the assessment year 1955-"56 on the basis of the return submitted on the account books produced by them. The return showed a gross turnover of Rs. 14,46,307-1-6 with net turnover of Rs. 12,748-15-9 the dealer claiming exemption for a turnover of Rs. 14,33,588-1-9 u/s 8 of the Act. On March 29, 1957, the Sales-tax Officer assessed the petitioner firm on a net turnover of Rs. 18,225-1-6, on which the tax has also been paid. Subsequently, the Intelligence staff, along with the Special Assistant Sales-tax Officer, inspected their business premises on February 13, 1958, when eleven secret account books written in the Marathi language were taken into custody. These books were got examined by an officer of the Department, with the assistance of an employee of the firm. As regards the year 1955-"56, only accounts from April 22, 1955, to September 16, 1955, and from January 2, 1956 to March 31, 1956, were recovered; the partners of the petitioner firm were questioned with regard to these entries, and their statements were not found to be satisfactory. The Sales-tax Officer, after notice, found the escaped turnover for the assessment year 1955-"56 to be Rs. 14,76,244 -8-0 ordered the petitioners to pay Rs. 23,066-5-3 as tax and also cancelled the license, u/s 8 of the Act. The demand notice of January 2, 1959, asked for payment of the tax within 21 days; and, the petitioner, on January 15, 1959, preferred an appeal against the assessment order. The second respondent in the writ petition, on February 6, 1959, rejected the application for stay of collection of the tax, which along with the tax on the escaped turnover for the following assessment year, come to Rs. 63,001.27. The firm, claiming the aforesaid rejection to be ultra vires, filed on February 13, 1959, O. P. 195/59 that challenges the assessment as well.

7. The other O. P. 184/59, seeks to set aside the tax on escaped turnover for the assessment year 1956-"57. The petitioner had for this year submitted earlier returns for a gross turnover of Rs. 10,36,277-15-9 with net turnover of Rs. 6,444-14-0, claiming exemption on a turnover of Rs. 10,29,833-1-9 u/s 8 of the Act. The Assistant Sales-tax Officer, Trichur, had then checked the returns; and on January 25, 1958, found the net turnover to be Rs. 6,445-7-0. Then came the inspection by the Intelligence staff along with the Special Assistant Sales-tax Officer, of the business premises of the petitioner, when eleven books written in Marathi were taken into custody which were examined by the Assistant Sales-tax Officer. The petitioner's complaint in this as well as another petition is that the

Officer, who examined the books, did not possess knowledge of the Marathi language, and had misunderstood the true effect of the entries. The officer had also recorded statements of the partners who are alleged not to be well acquainted with Malayalam. By notice of December 4, 1958, the petitioner was asked to show cause why the taxable turnover should not be fixed at Rs. 25,05,487-5-9 for the assessment year 1956-"57. Reply was submitted, but the taxable turnover for this year was fixed as mentioned above, the license u/s 8 was cancelled, Rs. 38,956-3-9 was fixed as the amount of tax and Rs. 978.71 as the surcharge and the order was served on the writ petitioner on January 2, 1959. Both the assessments purport to be under Rule 18 of the General Sales Tax Rules, 1950, promulgated under the General Sales Tax Act, 1125; and the notice of demand for the sales tax so assessed was served on the petitioner on January 2, 1959. The petitioner appealed, and the Appellate Assistant Commissioner, as stated earlier, rejected the stay application. Thereafter, the petitioner came to this Court on February 13, 1959, and O. P. 184/59 challenges the aforesaid assessment on grounds similar to those already stated in connection with the cases of the first group. There is, however, this difference between this and the other groups that the petitioners' appeals are still pending before the Appellate Assistant Commissioner. In these circumstances, the complaint of the estimates of escaped turnovers for both the assessment years being arbitrary, based on surmises and conjectures, may well be left to be decided by the appellate authorities under the Act, which would not deprive the petitioner of his right of second appeal as well as of final revision petition. We, therefore, do not propose to adjudicate the fifth ground in these petitions.

8. Coming to the next case, Imbichi, the petitioner in O. P. 724/59 is a merchant in Big Bazaar, Kozhikode, and had been finally assessed for 1955-56 on a turnover of Rs. 14,84,434-0-6. But on March 19, 1959, the merchant was informed that from a secret account book detected from the business premises of Messrs. C. C. Brothers, Provision Stores, Kozhikode, the petitioner been shown to have purchased goods for Rs. 1,256-4-9 during the assessment year 1955-56, which transaction had not been found in the account books, and therefore, would be assessed on the amount as escaped turnover. On March 20, 1959, objection was filed. The person, whose accounts were found to contain the entry, was not made available for purposes of the cross-examination, and the first respondent assessed the petitioner on that turnover of Rs. 1,256-4-9 to the tax of Rs. 19.62. The petitioner had filed an appeal and his learned Advocate has adopted the arguments raised against the assessments in the earlier batch of cases. It is obvious that the fifth ground in this case as well should be left to the statutory appellate authorities for reasons already stated in connection with the second group.

9. As regards the remaining O. P., 723/59, Pattiyeri Raru, the petitioner, is a dealer in grocery in Big Bazaar, Kozhikode, and had been assessed finally for the assessment year 1955-56 on a turnover of Rs. 5,63,678-6-4. But from a secret account book detected in the shop of Messrs. C. C. Brothers, Provision Stores,

Kozhikode purchase of goods worth Rs. 6,105-12-0 was found. The relevant entry was shown to the petitioner, who denied it. The Taxing Officer treated that as sufficient evidence to levy the sales tax on the petitioner for the escaped turnover of Rs. 6,105-12-0 for the assessment year 1955-56, the tax being Rs. 95.40 nP. Against such assessment, the petitioner has filed O. P. 723/59, challenging the levy on grounds, four of which are common to the other petitions before us. One ground is peculiar to this case, which is that he was not afforded sufficient opportunity to cross-examine the person on the basis of whose accounts he has been assessed, and as the petitioner has filed no appeal, this complaint we would adjudicate in this judgment.

10. Coming to the four grounds common to all the cases, the learned advocate of the petitioners in O. Ps. 319/59 and 320/59 had firstly argued that the demand notices for the sales tax on the escaped turnovers show the assessment having been made under the General Sales Tax Act, which was extended to the Malabar area on the date subsequent to the assessment years, that under Article 265 no tax could be levied or collected except by authority of law, and that as the demands for the collection purport to be under law not operative in the relevant period, the demands must be stopped by writ of prohibition. He has relied on AIR 1931 248 (Privy Council) where Lord Atkin has observed that no member of the executive can interfere with the property of a subject except on the condition that he can support the legality of his action before a court of justice. He has further urged that the action impugned must appear to be legally proper; otherwise it would not be sustained on what the authority intended by the order when the order itself does not disclose it; and in support of the argument the advocate has referred to Commissioner of Police, Bombay Vs. Gordhandas Bhanji, . He has, therefore, urged that the assessments being quasi-judicial proceedings and the writ of prohibition being available against such proceedings, where something still remain to be done, it should be issued; and for purposes of the writ, the records of the Court below alone need be looked into, the affidavit by the respondent not being acceptable to show what do not appear from the record. In other words, his argument is that the writ of prohibition should be issued as the order appears to be without any legal authority. The proposition is well-settled that for purposes of determining the legality of the order and issuing the writ of certiorari, the records of the lower tribunal need alone be looked into; and, as the writ of prohibition lies only where similar proceedings be still not concluded, the same rule would apply, where the latter writ is being asked. Another rule, however, is equally well-settled, which is that exercise of power would be referable to the jurisdiction, which confers validity and not to a jurisdiction under which it would be nugatory. That principle has been acted upon in L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., , where the Commissioner of income tax, transferring a case from Patiala to Ambala, purported to act u/s 5(5) and 7-A of the Indian income tax Act, while he should have acted u/s 5(5) of the Paliala Act. The assessee firm moved the High Court under Article 226 for a writ of prohibition or certiorari against the

income tax Officer in respect of re-assessment of the income of the firm, and the High Court had dismissed the petition. The Supreme Court dismissed the appeal relied on the principle, and referring to *Pitamber Vajrishet v. Dhondu Navlapa* (I. L. R. 12 Bom. 486). In the case referred to, West J. had observed at p. 489:-

Having the Small Cause Court jurisdiction, the Subordinate Judge must have dealt with this case under that jurisdiction, even if he was not quite alive to it at the time..... We must ascribe his acts to an actual existing authority under which they would have validity, rather than to one under which they would be void.....

It is obvious that the aforesaid principle would apply when ascertaining the correctness of the assessment proceedings before us as well, because their being quasi-judicial is accepted due to a writ of prohibition being asked for and the demands must therefore be ascribed to the law, under which they would have validity, rather than to one, under which they would be void. It follows that the escaped turnovers, being of the period when the Act was operative they would be attributed to have been made under the Act alone, and not under a different Act subsequently extended to the area.

11. The next objection is against the right to assess the sales tax after November 1, 1956 when the power to assess such a tax for the earlier period had not been under the States Reorganization Act, 1956, expressly conferred on the Kerala State. The advocate of another petitioner has relied on Part VII of the aforesaid Act and argued that out of the several Sections dealing with the apportionment of assets and liabilities, Section 78 alone confers the right to recover arrears of any tax or duty on property, including arrears of land revenue, on the successor State, in which the property be situated, which right would not be available where no tax had been assessed prior to November 1, 1956. He has urged that the right to assess such a tax, if any, would be governed by the residuary Section 91, but the benefit under it would not be claimed by this State. The same learned Advocate has then argued that the Kerala State, not being u/s 91, authorized to exercise powers of levying the sales tax on escaped assessment for the period prior to November 1, 1956, and the turnovers in the cases have been wrongly assessed, the effort to collect the tax being thus illegal. According to this argument the Madras General Sales-tax Act having been saved by the States Reorganization Act, would be subject to the aforesaid Part VII, and being a temporary measure as well, would not confer the authority to levy the tax on escaped assessment for the period when the State had no territorial nexus. There are difficulties in accepting this argument; for, the States Reorganization Act, by having continued the Act in the area, does not intend the liability to pay the tax on escaped turnover for the period prior to November 1956, to lapse, and the question is which State is authorized to levy and collect. By accepting some State other than Kerala being authorized to assess, the difficulty of such other State having no territorial nexus at the time, when such assessment is to be made, would arise for such other State, would then have to appoint Officer to

assess the tax in the area beyond its boundaries, and exercise of such powers under our Constitution is hardly possible. Therefore, the continuance of the Madras General Sales-tax Act, 1939, in the Malabar area, must be given its full legal consequence; and it results in escaped turnover of the area being assessed by the State having then territorial authority. For these reasons one of us had in *Associated Agency, Kottayam v. State of Kerala* (O. P. NO. 164/57 decided on March 6, 1961) rejected similar argument, where it was stated:-

It is conceded that the Madras General Sales Tax Act, 1939, was allowed to be operative in the area under the States Reorganization Act, and if some enactment be so continued, we do not think any special authorization is required to do what the enactment permits to be done. The inevitable consequences of the enactment being continued is "after-acts under it are permitted in the area

Having considered the question afresh, we find no reason to vary the view then taken, nor the Act's being continued till competent Legislature otherwise directs or changes the situation; for, even under such temporary measure the assessment on escaped turnover for the preceding years would be legal. Therefore, the second ground for allowing the petition also fails.

12. Coming to the third, it was urged that Section 4 of the Travancore-Cochin Interpretation and General Clauses. Act, 1125, NO. VII of 1125, would not save the authority to levy tax on escaped assessment under the Rule after the Act been repealed, because the aforesaid Section covers repealment of enactments and not Rules. The Interpretation Act was amended by Act NO. III of 1957, whereby the word "Act" been defined by Section 2(3) to mean, among other things, Proclamation or Act of Travancore or Cochin, an Act or Ordinance of Travancore-Cochin, an Act passed by the Legislature of the State of Kerala, an Ordinance promulgated by the Governor under Article 213 of the Constitution. Old Section 4 of the Interpretation Act, NO. VII of 1125, reads thus:

Where any Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

It is clear that the repealment of the Act by Section 15(2) of the Travancore-Cochin General Sales-tax (Amendment) Act, XII of 1957, would attract Section 4

of the Interpretation Act, because even if the Act be not an Act under the Interpretation Act, it is an enactment, and its repealment would have the consequences stated in Section 4 of the Interpretation Act, the Legislature which is the repealing authority not having expressed a different intention. One of the writ petitioners" learned advocates has, however, urged that in the absence of any provision saving the Rules, which are not enactments, the authority under Rule 17 of the Madras General Sales Tax Rules, which stands repealed because the Act been repealed, cannot be exercised after October 1, 1957. It is true that on an enactment"s being repealed, its provisions are wiped out, unless their operation be saved even for the limited purpose of enforcing the liability that had already arisen. But in the cases before us, the operation of the Act is saved so far as liabilities, which had already arisen, are concerned, by Section 4 of the Interpretation Act; and, should the Rules under the Act be treated to be part of the Act, they would also be covered by Section 4. We feel that in determining whether the Rules be part of the Act, due weight should be given to Section 19(5) of the Act, which provides as follows:

All Rules made under this Section shall be published in the Fort St. George Gazette, and upon such publication shall have effect as if enacted in this Act.

In view of such clear direction, we fail to understand how Rule 17, which had not been framed in excess of authority cannot be treated as part of the Act.

Therefore, its repealment would attract Section 4 and consequences similar to the repealment of the Act would follow. The result is that the power to levy the tax on escaped turnover for the period when the Act was operative, would still exist, because it had been saved by Section 4 of the Interpretation Act, and would be legally exercisable in proper cases.

13. Even on the assumption of Rule 17 being bare instrument, we do not see how the argument of its not being available can be accepted; for, on the right to assess ceasing to be operative it would become obsolete. It follows that being framed to serve the power, it would serve so long as the right to levy be preserved, even where it be alive for the limited purpose of Section 4 of the Interpretation Act. In other words, the service continues so long as the authority, for which the Rules been framed to serve, continues. Indeed, if rules under a repealed enactment can be used for a new Act till new rules be framed under the latter, we do not see how they can be held not available to the power of the enactment, under which they had been framed, where such power be still preserved. On these reasons, the third ground of attack is without substance.

14. We now come to the complaint of Rule 17 of the Madras General Sales Tax Rules being in conflict with the Act, and the authorization u/s 19(2)(f) being in excess of permissible delegation to legislate. One of the writ petitioners" learned Advocates has, after referring us to several provisions of the Act, argued that the assessment under it can be corrected by way of appeal or review, but the same taxing authority is not expressly authorized to again assess on ground of

concealment, with the result of the Rule vesting the taxing authority with the power to re-open its own assessment on grounds of materials recovered later being contrary to the Act itself. He has further argued that Section 19, having conferred power to frame Rules alone for the purposes of the Act, cannot be treated as authorizing Rules for assessment being opened by the assessing authority. We think that any Rule guarding against the evasion of the obligation u/s 3 of the Act, which authorizes the levy of the sales tax on total turnover of a dealer at the rate specified in Section 3(b), would serve the purposes of the Act, and Rule 17 provides against a dealer's not being allowed to escape the liability by his own wrongful act of concealment. That such safeguards serve the Act, is amplified by Section 19(2)(f) which expressly authorizes Rules providing for the assessment to tax of any turnover, which has escaped, and the period for such assessment not exceeding 3 years. Nor Rule 17 can be in conflict with any provision of the Act, which does neither contain any specific statutory provision for the officer, who should assess or the conditions under which it can be assessed. We, therefore, think that Rule 17 is not in clash with the other provisions of the Act and so void.

15. We now come to the question whether the authority of delegation to legislate is improper. In this connection, we would refer to *V. J. Joseph v. State of Travancore-Cochin* (A. S. 268/56 decided on September 21, 1960) where one of us, after dealing with the authorities, has stated the rule in these words:

Therefore, should the Act lay down the principle or fix the standard, the delegation to frame Rules would be constitutional

That position is further strengthened by *Unichoyi v. State of Kerala* (1961-1 L. L. J. 631 = 1961 K. L. J. 565) where part of the Minimum Wages Act was again attacked as amounting to excessive delegation; but the argument was not upheld in view of the clear policy of the Act to prevent exploitation of labor, and for that purpose the Government being authorized to prescribe minimum rates of wages in the scheduled industries. That position has not been varied by *Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others*, , and the proposition is still maintained that where the Legislature has in an enactment fixed the standard, the details may be filled in by the Rules under the enactment. Applying the aforesaid test to the impugned Section 19(2) (f), it is clear that the liability is fixed by the Act, the rate is fixed by it, and along with these, the authority is conferred to frame rules for the levy of tax on what has eluded assessment within the limitation of three years. In these circumstances, the authorization to frame Rules is not bad, and the fourth ground for allowing the writ petitions has not been established.

16. Before dealing with the remaining objection against each assessment of the escaped turnovers, it would be of advantage to recall that the limits of judicial review of administrative actions have been fixed by the application of the rules, that determine the limits of appellate review in the ordinary field. The courts had

fully developed rules of appellate review as well as those governing the respective roles of Judge and Jury; and when they came to be confronted with the challenges to the legality of administrative acts, they but applied those rules to such reviews as well. It follows that though the judicial review of the administrative decisions is dominated by the distinction between law and fact, what would be a question of law for purposes of appellate review, would also be the question of law for issuance of the proper writ, as well as for exercise of the revisory powers. In this connection, we would begin by referring to *Florida East Coast Railway Company v. United States* (58 Law. Ed. 1267) where the Interstate Commerce Commission had considered in the same proceeding the question of reducing the rates on three railroads running through the State of Florida; and, although the evidence showed reduced costs on only two of the lines, the Commission included all the three in its rate-reducing order. In such circumstances, the Court set aside the order in so far as it affected the third line, saying that there was no evidence justifying that part of the order, and testimony as to the condition of traffic on certain lines did not necessarily tend to establish similar conditions on another railroad, in respect of which no testimony was given. In the course of its judgment, White J. declared:

While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the Courts, it is undoubted that where it is contended that an order, whose enforcement is resisted, was rendered without any evidence, whatever to support it, the consideration of such a question involves not an issue of fact, but one of law. which it is the duty of the Courts to examine and decide

The observations of Lord Greene, M. R., in *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (1947 A. C. 109) are not dissimilar. The appellant in the case disallowed under the Income-war Tax Act part of certain sums paid by the respondent company to an English Company by way of commission on the ground that they were in excess of what was reasonable for the business of the respondents, who had claimed that the sums were properly deductible in computing the amount of their taxable income. The Supreme Court had allowed the respondents' appeal, and the Privy Council advised the appeal against it being dismissed. Lord Greene, M. R., at page 123, lays the limits of the court's power of review, in these words:

The Court is, in their Lordships' opinion, always entitled to examine the facts, which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination, the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the subsection made the sole judge of the fact of

reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision.

The same rule has been laid down by our Supreme Court in *Jiyajeerao Cotton Mills Ltd. Vs. Commissioner of Income Tax and Excess Profits Tax, Bombay*, where Venkitarama Iyer J. has held that the Supreme Court should examine the record not with a view to decide whether the Tribunal has properly appreciated the evidence, or whether its conclusion is a right one to come to on that evidence, but with a view to see whether there is evidence to support its finding and whether that finding is one, which could, on that evidence, be reasonably reached. Bhagwathi J. has in *Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras*, emphasized the same rule in connection with the duty of the Income Tax Appellate Tribunal, where he has said that the conclusions reached by the Tribunal should not be clouded by any irrelevant considerations or matters of prejudice; and on no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises, nor should it act on no evidence at all, or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures, or surmises; and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by the Supreme Court. The rule in *Raghubar Mandal Harihar Mandal v. State of Bihar (8 S. T. C. 770)* is similarly worded, where the duty u/s 10(2)(b) of the Bihar Sales Tax Act, 1947, came to be considered. The learned Judges had said:-

In making an assessment u/s 10 (2) (b) the Sales Tax Officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material, which may not be accepted as evidence in a court of law; but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment. 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 related to some evidence or material, and it must be something more than mere suspicion. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns, and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate.

Finally, one of us in *K.M. Alikoya and Co. Vs. The State of Kerala*, has followed the same principles in directing remand of best judgment assessment u/s 12(2) (b) of the General Sales Tax Act, 1125. It follows that should the assessments in the cases now before us be vitiated by there being no evidence to support them, or without substantial evidence, they would be liable to be set aside on grounds of errors of law having been committed. We wish to further emphasize the rule to be common to the exercise of all powers, be they extraordinary, or revisory

under a statute.

17. Coming to the cases before us, the complaints in T. R. C. Nos. 52/60 and 53/60 is against parts of the assessments being based on surmises and conjectures, and we feel the complaints had not been properly adjudicated by the appellate statutory authorities. We would, therefore, decide the revision petitions, the writ petitions being rejected, because the decision in the revision petitions will afford sufficient relief to the dealer. Extracts from the orders of the Sales Tax Officer had already been given, which had been merely affirmed in appeals, and it is clear that for determining the escaped turnovers of the branch shop of the revision petitioner in the two assessment years, there is no discovered material. What the Sales Tax Officer has done is to rely on the material discovered in the retail shop for estimating the escaped turnover of the branch shop as well. It would be recalled that the retail and the branch shops belong to the same person, and suppression of sales in the former, under such circumstances, is easier than in the latter, where the petitioner does wholesale business. In the case of the branch shop, had the petitioner been foolish to exclude large sales to others from the account books, the purchasers' account books would be available to show the concealment; and no such books been relied upon. Moreover, a steep rise in the turnover of any year would be possible only by increased financial expenditure, and absence of such data as it happens in this case, falsifies such rise. Further, the conclusion of sales to other customers of another shop being similarly suppressed, becomes arbitrary in absence of any evidence in the discovered material disclosing any sale to others from branch shop being suppressed. Nor is there any evidence on record to justify such quantity of sales from the branch shop being suppressed, nor of opportunities for affecting so many. Adverse conclusions from the failure to produce books is permissible; but books must be shown to have been kept, and in any case, the inference must be reasonable. The cases before us, therefore, are like the Florida case (58 Law. Ed. 1267), and the finding of the escaped assessment so far as the branch shop is concerned amounts to error of law, because the finding is based on conjecture, and should be vacated. The assessee has admitted his liability for the escaped turnover of the other shop, and therefore, the assessments for the two years on the escaped turnovers for the branch shop at Big Bazaar alone are vacated.

18. The learned Government Pleader had requested us to remand the cases for a fresh assessment, but we are afraid that any fresh assessment would be open to the criticism of depriving the petitioner the fruits of his success. Therefore, the best order in these cases would be to allow the revision petitions and send back the cases to the Tribunal for adjustment of the figures consequential on the allowance of the revision petitions by this Court. The aforesaid revision petitions are accordingly allowed, but O. P. 319/59 and O. P. 320/59 are dismissed, and the parties will bear their costs.

19. Coming to O. P. 723/59, where no appeal has been filed, the complaint by

the petitioner's learned Advocate is of the dealer not having been allowed fair opportunity of cross-examining the person, on whose account book part of the dealer's turnover has been held to have escaped assessment. It is true that the petitioner had again asked the other person being brought for cross-examination, who had failed to appear. But on going through the record of the case, we find the petitioner's agent having been given the opportunity earlier to cross-examine the person, which he declined. In such circumstances, we see no force in the complaint of the assessment being in violation of rules of natural justice, and accordingly this writ petition, O. P. 723/59, is dismissed with costs-Advocate's fee fixed at Rs. 100/-.

20. So is O. P. 724/59, because the petitioner had appealed, and has availed of an equally efficacious remedy. He will pay Rs. 100/- as costs.

21. As petitioners in O. Ps. 184/59 and 195/59 have also filed appeals, the merits of the complaint against the assessment in these petitions should be decided by the appellate authority. But we feel that the orders rejecting the stay applications should be vacated, so that the appellate authority, before whom the appeals are pending, may adjudicate on the applications to stay the collection of the taxes afresh; for, power to stay is coupled with a duty to properly exercise it; and, where the rejection amounts to no exercise of discretion at all, as has happened here, the Officer should be directed to properly exercise the power. We, therefore, vacate the rejection orders on the stay applications, and direct the appellate authority in these two petitions to properly decide the stay applications and the appeals. These two petitions are, therefore, allowed only to that extent, the parties bearing their costs. Accordingly, O. P. 184/59 and 195/59 are partly allowed. O. P. Nos. 319/59, 320/59, 723/59 and 724/59 are rejected., T. R. C. Nos. 52/60 and 53/60 are allowed partly, and the cases being remanded to the Tribunal to proceed as directed earlier, and this order will govern all the cases.