
(1956) 02 MAD CK 0018
In the Madras High Court

The State of Madras

APPELLANT

Vs

Louis Dreyfus and Company Ltd.

RESPONDENT

Date of Decision : 16-02-1956

Acts Referred:

Madras General Sales Tax Rules, 1939 — Rule 14, 14(2), 17, 17(1)

Citation : (1956) 2 MLJ 327

Judgement

1. The question of law which has been referred for consideration of the Full Bench is:

Whether Rule 14 of the Madras General Sales Tax Rules is valid and if so, whether the powers, of revision thereunder can be exercised in cases to

which Rule 17 relating to escaped assessment is applicable?

2. In view of the fact that the appeals themselves will be posted for final disposal after the receipt of the opinion of the Full Bench on the question

of law formulated by the referring Judges we do not propose to deal in any detail with the facts of either of these cases but merely answer the legal

question propounded in the order of reference.

3. The following facts, however, have to be set out to understand the complaint of the assesseees. Both the suits out of which these appeals arise

were filed by the assesseees for the refund of sales tax paid by them as a result of re-assessment in the exercise of revisional powers and in each of

them the assesseees have succeeded. O.S.A. No. 62 of 1951 relates to an assessment for the year 1944-45. The Deputy Commercial Tax Officer,

Harbour Division who was the assessing authority, by his order dated 27th March, 1946, determined the total turnover of the respondents at Rs.

2,53,72,488-14-11 and tax on this basis was paid by them. Subsequently on

28th March, 1947 the Commercial Tax Officer, North Madras, issued a notice to them to show cause why the assessment should not be revised under Rule 14(2) of the Madras General Sales Tax Rules and by his proceedings dated 31st March, 1947, he revised it by the inclusion in the turnover of a further sum of Rs. 30,03,650-12-6 and levied tax accordingly. The amount thus demanded was paid and the suit C.S. No. 446 of 1947 was filed by the assesseees for the refund of the tax on the ground that the revision and reassessment were invalid.

4. In the assessment proceedings which are the subject-matter of C.C.C.A. No. 137 of 1951 the Deputy Commercial Tax Officer, Harbour

Division, by his order dated 26th March, 1946, determined the turnover of the assessee at Rs. 2,02,26,736, the assessment in this case also

related to 1944-45. The assessee preferred an appeal to the Commercial Tax Officer and the appeal was dismissed on 25th March, 1947, by this

appellate authority. On 5th March, 1948, the Commercial Tax Officer issued notice to the assessee to show cause why the assessment should not

be revised by including in the turnover a sum of Rs. 7,45,593-11-0. The assessee appeared and denied the jurisdiction of the revising authority.

The Commercial Tax Officer, however, by his proceedings dated 1st December, 1948, increased the turnover by the addition of the sum

mentioned earlier and the assessee was required to pay the tax due according to the revised assessment which he did and filed the suit for the

refund of the sum involved in the revised assessment.

5. To appreciate the points raised, it will be necessary to set out the relevant, provisions of the Madras General Sales-tax Act and the rules framed

thereunder which deal with the assessment of the tax and the provisions relating to appeal and revision at the time when the assessment orders

were made and when the orders-under revision were passed. Section 3(1) of the Act is the main charging provision under which every dealer has

to pay in each year a tax on his total turnover to be calculated at the rate of three pies per every rupee on such turnover subject to exceptions not

relevant for our purposes. Sub-section (4) of this section provides for the turnover being determined in accordance with such rules as may be

prescribed and the sub-section following provides for the tax under the main provision being assessed levied and collected in such manner and in

such instalments if any as may be prescribed. Section 9 which relates to assessment enacts:

9. (1) Every dealer whose turnover is ten thousand rupees or more in a year shall submit such return or returns of his turnover in such manner, and within such periods as may be prescribed.

(2)(a) If the assessing authority is satisfied that any return submitted under Sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof.

(b) If no return is submitted by the dealer under Sub-section (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall assess the dealer to the best of his judgment:

Provided that before taking action under this clause, the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

6. Appeals from these orders are provided by Section 11 which runs:

Section 11(1): Any assessee objecting to an assessment made on him u/s 9, Sub-section (2) may, within thirty days from the date on which he was served with notice of the assessment, appeal to such authority as may be prescribed:

Provided that no appeal shall be entertained under this sub-section unless it is accompanied-by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be.

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) The Appellate authority may, after giving the appellant an opportunity of being heard, pass such orders on the appeal as such authority may think fit.

(4) Every order passed in appeal under this section, shall, subject to the powers of revision conferred by Section 12 to 12-C be final.

7. Before an amendment effected by Madras Act XXV of 1947 which came into force on 1st January, 1948, Section 12 referred to in Section 11 was in these terms:

Section 12: The Board of Revenue may in its discretion at any time either suo motu or on application, call for and examine the record of any order

passed by or any proceedings recorded by, any officer or person under this Act for the purpose of satisfying itself as to the legality or propriety of

such order, or as to the regularity of such proceedings, and may pass such order in reference thereto as it thinks fit.

8. The amended section which has been in force since then runs:

Section 12(1): The Board of Revenue may in its discretion call for and examine the record of any order passed or proceeding recorded by any

authority, officer or person under the provisions of this Act, including Sub-section (2), for the purpose of satisfying itself as to the legality or

propriety of such order, or as to the regularity of such proceeding and may pass such order in reference thereto as it thinks fit.

(2) Powers of the nature referred to in Sub-section (1) may also be exercised by such authority or officer and in such class of cases as may be

prescribed, including cases where an inferior authority or officer has exercised its or his powers under this sub-section.

(3) The powers conferred by Sub-sections (1) and (2) may be exercised by the Board of Revenue or by the authority or officer concerned, as the

case may be, suo motu at any time or on application preferred within six months of the passing or recording of the order or proceeding in question.

9. Section 19(1) empowers the Provincial Government to make rules to carry out the purposes of the Act. By Sub-section (2) ""without prejudice

to the generality of the foregoing power"" it is enacted that such rules may provide for, among others.

(a) all matters expressly required or allowed by this Act to be prescribed:

* * * * *

(f) the assessment to tax under this Act of any turnover which has escaped assessment, and the period within which such assessment may be made,

not exceeding three years;

(g) the rectification of mistakes apparent from the record of any assessment, appeal or revision and the period within which such rectification may

be made;

* * * * *

(j) the duties and powers of officers appointed for the purpose of enforcing the provisions of this Act;

* * * * *

(l) any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial

Government, necessary for giving effect to the purposes of this Act.

10. The Act itself does not prescribe the assessing authority, nor the other authorities to whom appeals lie u/s 11 and in fact the only specific

authority named in the Act is the Board of Revenue in Section 12. The hierarchy of officers who are to assess and exercise appellate jurisdiction

over orders of the assessing authorities are left, to be prescribed by rules as Section 2(a) of the Act defines an "assessing authority" as meaning any

person authorised by the Provincial Government to make any assessment under the Act, and Section 11 leaves it to the Provincial Government to

name and constitute the appellate authorities to hear appeals from assessment orders. In exercise of these powers confined to them, the Provincial

Government framed the Madras General Sales Tax Rules after satisfying the formalities prescribed for their promulgation. The gradation of officers

is set out in Rule 3, viz., Assistant Commercial Tax Officer, Deputy Commercial Officer and Commercial Tax Officer. The Assistant and Deputy

Commercial Tax Officers are the assessing authorities under the rules. Under Rule 13 of the Madras General Sales Tax Rules the Commercial Tax

Officer is prescribed as the appellate authority to whom appeals may be preferred from original orders of an assessing authority. Sub-rule (6)

provides that the appellate authority shall, after giving the appellant a reasonable opportunity of being heard, pass such orders on the appeal as

such authority thinks fit. As the rules numbered 14 and 17 are the main provisions whose interpretation arises on this reference they have to be set

out in full.

11. Rule 14 as it stood before 7th February, 1948, ran in these terms:

Rule 14 (1): Every order passed on appeal under Rule 13 shall, subject to the powers of revision conferred by Section 12 and Sub-rule (2), be

final.

(2) The Commercial Tax Officer may, in his discretion, at any time, either suo motu or on an application, call for and examine the record of any order

passed or any proceedings recorded under the Act by an Assistant or Deputy Commercial Tax Officer working under him, for the purpose of

satisfying himself as to the legality or propriety of such order or as to the regularity of such proceedings and may pass such order in reference as he thinks fit.

12. This rule was amended as and from 7th February, 1948, by Government Notification so as to read:

14 The following authorities may exercise the powers of the nature referred to in Section 12(i):

- (1) The Deputy Commissioner of Commercial Taxes, and
- (2) The Commercial Tax Officer.

Provided that the Deputy Commissioner of Commercial Taxes shall not revise an appellate order of a Commercial Tax Officer acting u/s 11 in

respect of cases involving a turnover exceeding Rs. 20,000.

14-A: Where the tax as determined by the initial assessing authority appears to the appellate or revising authority to be less than the correct

amount of the tax payable by the dealer, the appellate or revising authority shall, before passing orders, determine the correct amount of tax

payable by the dealer after issuing a notice to the dealer and after making such enquiry as such appellate or revising authority considers necessary.

13. Rule 17 as it stood before 7th February, 1948, was in these terms:

17 (1): If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to the tax in any year or if

the licence fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, may, at any time within the year or

the year next succeeding that to which the tax or licence fee relates, assess the tax payable on the turnover which has escaped assessment or levy

the licence fee, after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary.

(2) If for any reason any tax or licence fee has been assessed at too low a rate in any year the assessing authority or the licensing authority, as the

case may be, may, at any time within the year or the year next succeeding that to which the tax or licence fee relates, revise the assessment or the

license fee after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary.

14. This rule also underwent a change as and from 7th February, 1948, from whence it ran:

17(1): If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to the tax in any year or if

the license fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, may, at any time within the year or

the two years next succeeding that to which the tax or licence fee relates, assess the tax payable on the turnover which has escaped assessment or

levy the licence fee, after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary.

(2) If for any reason any tax or licence fee has been assessed at too low a rate in any year, the assessing authority or the licensing authority, as the

case may be, may, at any time within the year or the two years next succeeding that to which the tax or licence fee relates, revise the assessment or

the licence fee after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary.

(3) Notwithstanding anything contained in Sub-rules (1) and (2).

(a) The whole or any part of the turnover of a dealer or licensee which has escaped assessment to tax in the year 1945-46 shall not be assessed to

tax after the 31st March, 1947.

(b) any licence fee which has escaped levy in the year 1945-46 shall not be levied after the 31st March, 1947; and

(c) any tax or licence fee which has been assessed or levied at too low a rate in the year 1945-46 shall not be enhanced after the 31st March,

1947.

15. The contentions raised by learned Counsel for the assessee respondents in the two appeals are two: (1) On a proper construction of the

provisions of the Act which we have set out above the Board of Revenue was intended to be the sole and, exclusive revising authority and Rule

14(2) which authorises the Commercial Tax Officer to exercise powers of revision is beyond the rule-making power vested in the Provincial

Government. (2) Section 19(f) specifically provides for rules being made for the assessment of the escaped turnover of an assessee with a time-

limit of three years within which such reassessment proceedings could be started and as Rule 17 framed for this purpose vests the jurisdiction to

assess the escaped turnover in the assessing authority, namely, the Deputy Commercial Tax Officer and has also prescribed a time-limit of

originally one and subsequently two years from the assessment order, within which that power is to be exercised, it would be contrary to all sound

rules of construction to read Rule 14(2) as conferring upon the Commercial Tax Officer an unfettered jurisdiction to reopen assessments and effect

a reassessment even after the lapse of the periods prescribed by Rule 17(f). We shall deal with these two points in that order.

16. The arguments advanced in support of the challenge of the validity of Rule 14(2) fall under two heads: (1) that the rule was contrary to an

express provision in the Act and (2) that the rule was not authorised by the rule-making power conferred by Section 19. The first head of argument

was formulated thus. Section 11(4) has enacted that

every order passed in appeal under this section shall subject to the power of revision conferred by Section 12 be final.

17. This sub-section imparts finality to an order of the Commercial Tax Officer subject only to one specified exception viz., revision by the Board

of Revenue. It was not therefore competent to the rule-making authority to enact a provision whereby this finality was impaired by the action of

some other revisional authority. Stated in this broad form the argument is unexceptionable. But this has no application to the facts of the cases

before us. In O.S.A. No. 62 of 1951 the order that was revised by the Commercial Tax Officer was. an order of the Deputy Commercial Tax

Officer from which no appeal had been brought and to which therefore the finality pointed by Section 11(4) was not attracted. This argument

therefore cannot avail the assessee in O.S.A. No. 62 of 1951. No doubt the assessee in C.C.C.A. No. 137 of 1931 had preferred an appeal from

the assessment order passed by the Deputy Commercial Tax officer to the Commercial Tax Officer and his appeal had been dismissed so that it

was after an appellate order that the Commercial Tax Officer revised the assessment. But as and from 1st January, 1948, Section 12 had been

amended so as to confer not merely upon the Board of Revenue as under the enactment as it originally stood but also on the Commercial Tax

Officer, the same powers of revision as had been conferred on the Board of Revenue, so that in this case also, though for a different reason the

objection has no force. We have therefore no hesitation in rejecting it.

18. The second head of argument on this aspect of the case turns upon the scope of the rule-making power u/s 19. Reliance was placed in this

connection principally on the decision of the Full Bench of this Court in A.S. Nagappa Chettiar and Another Vs. Annapoorani Achi alias

Karuppayi Achi and Another, , where this Court held that Rule 8 of the rules framed under the Madras Agriculturists Relief Act providing for

appeals from orders of trial Courts was ultra vires the rule-making power u/s 28 of the Madras Agriculturists Relief Act IV of 1938. That case

arose in the following circumstances. An application filed u/s 19 of the Madras Agriculturists Relief Act was dismissed by a Subordinate Judge and

an appeal was preferred therefrom to this Court.

19. On the date of the order there was no specific rule authorising appeals from such orders. Subsequently a notification was issued u/s 28 of the

Agriculturists Relief Act promulgating a new Rule 8 which enabled appeals to be filed from orders u/s 19:

amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree as if the order related to the execution,

discharge or satisfaction of the decree within the meaning of Section 47, Civil Procedure Code.

20. A preliminary objection was raised to the appeal filed to this Court and one of the points urged was that Rule 8 was ultra vires, and this

question was referred to a Full Bench. The learned Judges held this rule ultra vires for the reason that a right of appeal could exist only by statute

and could not be implied and that Section 28 of the Agriculturists Relief Act which conferred authority on the Provincial Government to make rules

could not reasonably be read as authorising Rule 8.

21. Section 28 was in these terms:

(1) The Provincial Government may make rules for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Provincial Government may make rules.

(a) in regard to any matter which is required to be prescribed by this Act;

(b) prescribing the form of and the fees to be paid in respect of applications under this Act and

(c) for removing any difficulty in giving effect to the provisions of this Act.

22. The learned Judges said:

Only Sub-section (i) and Clause (e) of Sub-section (2) are relied upon in support of the contention that Rule 8 is intra vires the Provincial

Government. Sub-section (1) merely says that the Provincial Government may make rules for carrying into effect the purposes of this Act. In

making a rule providing for appeals the Provincial Government is not making a rule for carrying into effect the purposes of the Act. It is adding

something to the Act. The object of the Act is to grant relief to agriculturists by providing machinery for the scaling down of their debts. The Court

of first instance decides whether a case falls within or without the Act. If a case falls within the Act the Court must scale down the debt in

accordance with the directions embodied in the Act. An order of the Court must be taken to be a correct order unless it is shown to be wrong by

an appellate tribunal which has power to entertain an appeal. Clause (e) of Sub-section (2) does not carry the matter any further. By providing for

an appeal the Provincial Government is not removing any difficulty in giving effect to the provisions of the Act.... To read either into Sub-section (1)

or into Clause (c) of Sub-section (2) a power for the Provincial Government to constitute an appellate Tribunal would be to read something which

is not there, and incidentally be ignoring a well-settled principle.

23. The decision referred to only lays down a familiar principle. But we are unable to see its application to the present case where the language of

the rule-making power is couched in quite different terms. In particular we might refer to Section 19(2)(j) which enables rules to be made

prescribing the duties and powers of officers appointed for the purpose of enforcing the provisions of the Act particularly in the context of the Act

leaving it to the rules to constitute the hierarchy of officials to exercise powers under the Act and secondly Sub-clause (1) where power is

conferred upon the Provincial Government to frame rules in respect of

any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial

Government, necessary for giving effect to the purposes of this Act.

24. These words are of the widest amplitude and, in the absence of any prohibitions or restrictions inferable from the Act itself, are apt to confer

upon the Government power to constitute revisional authorities and invest them with powers in that behalf. This contention also fails and has to be

rejected. We therefore hold that it was open to the Provincial Government to have framed Rule 14(2) conferring upon the Commercial Tax

Officers the revisional powers that were vested in them by that provision.

25. The other question that has to be considered is thus formulated in the order of reference:

whether the powers of revision thereunder (under Rule 14(2)) can be exercised in cases to which Rule 17 relating to escaped assessment is

applicable.

26. In the form in which it has been stated above, it is capable of only one answer namely that the two rules are mutually exclusive and that in cases

which fall within Rule 17(1) and where the jurisdiction to reopen the assessment is vested in the assessing authority, the Commercial Tax Officer

would not have power to pass such an order under Rule 14(2) And this was in fact conceded by the learned Advocate-General who appeared for

the State. The point however debated before us - and we consider rightly - was the relative scope of Rules 14(2) and 17(1). The argument

addressed to us by the learned Advocate-General was that the two Rules 14(2) and 17(1) have to be read together to define the precise content

of each and so read Rule 17(1) would be applicable only to cases where the turnover of a dealer has been omitted to be taken into account by an

assessing authority either because there was a deliberate concealment of such transactions by the assessee or because of any inadvertent omission

on his part or on the part of the assessing officer. Only such cases could with propriety be termed cases where the turnover has escaped

assessment. On the other hand, in cases where the entire turnover of an assessee is before the assessing authority and is considered by it but such

authority by error of fact or law treats the turnover or any part thereof as not assessable or grants a deduction or exemption to which the assessee

is not entitled under the Act, the case, is not one of escaped turnover but of an improper or illegal assessment order which is revisable under Rule

14(2).

27. The contention however raised on behalf of the assessee's respondents was that Rule 17 should be understood as applicable not merely to

cases of escaped turnover as set out above but also to every case where by reason of some error or omission on the part of the assessing authority

the assessee has been directed to pay a lesser amount of tax than was properly payable by him. In this connection the analogy of Section 34 of the

Income Tax Act and certain decisions interpreting the scope of that section were strenuously pressed upon us. Reliance was particularly placed on

the decisions of this Court reported in *The Commissioner of Income Tax Madras v. Raja of Parlakimedi* (1925) 50 M.L.J. 63 : ILR Mad. 22, *The*

Commissioner of Income-tax, Madras v. Sheikh Abdul Kadir Marakaya & Co. (1927) 54 M.L.J. 298 , and of the Privy Council in *Commissioner*

of Income Tax, Bombay v. Khemchand Ramdas (1938) 2 M.L.J. 115 : 1938 L.R. 65 IndAp 236 : ILR (1938) Bom. 487 (P.C.). We do not

propose to discuss the facts of these cases or refer to the observations in them as regards the proper construction of Section 34 of the Income Tax

Act because in our opinion there is no real analogy between Rule 17(1) of the Madras General Sales Tax Rules and the provisions contained in

Section 34 of the Income Tax Act. The scheme of the two enactments is wholly different.

28. The language employed in Section 34 of the Income Tax Act which has undergone serious changes from time to time is not identical with that

in Rule 17 of the Madras General Sales Tax Rules and the mere fact that both these provisions are designed to achieve a somewhat similar

purpose is too slender a foundation for the application of the cases construing one provision for determining the scope of the other. We therefore

propose to confine our attention to the language used in the two Rules 14(2) and 17(1) and gather the intention of the rule-making authority as-

expressed by the words employed.

29. No doubt in a general sense both Rule 14(2) as well as Rule 17(1) serve a common purpose, viz., to gather revenue which has improperly

escaped but while Rule 14(2) is directed to the correction of improper or illegal assessment orders which have levied less or more tax than

justified, Rule 17(1) lays emphasis on escaped turnover. The distinction between the two provisions might be expressed by saying that Rule 14(2)

deals with escaped assessments and Rule 17(1) with escaped turnovers, notwithstanding that the latter also would mean that a lesser amount of tax

has been levied. So understood the two provisions would be completely reconcilable and the two jurisdictions to revise assessments and to reopen them would each be assigned to the proper authority.

30. The language of Rule 17(1) is consistent with this construction. The "escape" that serves as the foundation of the jurisdiction to reopen an assessment is that of "turnover" and not, be it noted, an assessment. "Turnover" escapes when it is not noticed by the officer either because it is not before him by reason of an inadvertence, omission or deliberate concealment on the part of the assessee or because of want of care on the part of the officer the turnover though in the books has not been taken notice of. This would be the natural and normal meaning of the expression turnover which has escaped" in Rule 17(1).

31. A close examination of Rule 14(2) also supports this view of the scope of the two rules which are intended to be mutually exclusive. This rule empowers the Commercial Tax Officer "to call for and examine the record of any order passed or any proceedings recorded by the Deputy Commercial Tax Officer." Now what exactly is the meaning to be attached to the expression "the record of any order passed". The records which the revising authority calls for are the records of the assessment. They would include the assessment order as well as the other files of the assessing authority which would furnish the basis upon which the assessment order is passed. If in the assessment order the turnover which a dealer has returned or which has been gathered from his books is treated as not taxable or subject to any exemption and the revising authority is of the opinion that the order in this behalf is erroneous, the Commercial Tax Officer "would have satisfied himself that such an order was not legal or proper". Up to this there could not be any room for controversy as regards the competency of the revising authority to revise an assessment order which in its opinion is "not legal or proper". If the argument advanced on behalf of the assessee invoking the analogy of Section 34 of the Income Tax Act is applied, even an error of this sort would give rise to proceedings for assessing the escaped turnover and be covered by Rule 17(1). We have already indicated that we are unable to accept this as the proper interpretation of the Rule 17(1). In fact if this argument were accepted learned Counsel for the assessee was unable to suggest any conceivable case to

which Rule 14(2) could apply apart from cases in which interference is sought in favour of an assessee.

32. It remains to consider the intermediate case between a truly escaped turnover as we have indicated above and a case where the turnover has not escaped - only it has escaped assessment by reason of some error on the part of the assessing officer. We have in mind cases where the entire turnover is before the assessing officer but he fails to levy tax upon the whole or any part of it either because in his view it could not be included in the taxable turnover of the assessee or because of deduction allowed by him, but fails to make specific reference to these matters in the assessment order, in other words, where only the final result is reflected in the order without the details as to how the computation was made being specifically noted in it. In this-class of cases if by the record were meant only the assessment order, there may not be any reference to the particular transaction or turnover though as a fact that has been considered by the assessing authority though omitted to be referred to in the. assessment order. We are of the opinion that the expression ""record"" would include not merely the assessment order but the entire assessment file and, in the intermediate cases also, if from a perusal of the record or the assessment files the revising-authority can find that the turnover was before the assessing officer, it is competent for it to pronounce upon the legality or propriety of the assessment order under Rule 14(a). We are of the opinion that the construction which we have placed upon the relative content of Rules 14(2) and 17(1) gives proper effect to both the provisions and assigns to each the role which it was designed to accomplish.

33. In the light of the above discussion, our answers to the reference are as follows : (1) Rule 14(2) is intra vires the rule-making power of the Provincial Government u/s 19 of the Act. (2) The revisional powers under Rule 14(2) cannot be exercised in cases to which Rule 17 applies. (3) Rule 17 applies only to cases of escaped turnover as described earlier.

JUDGMENT

34. These two appeals are against the decrees in two suits; on the Original Side of this Court - C.S. No. 446 of 1947 and C.S. No. 370 of 1950.

Louis Dreyfus & Co., Ltd., a dealer on a large scale in groundnuts is the plaintiff in both these suits which were against the State of Madras, the

relief sought being the refund of sales-tax stated to have been collected improperly and illegally from them.

35. The earlier suit C.S. No. 446 of 1947 relates to the assessment year 1944-45 and claims the recovery of a sum of Rs. 26,933-0-5 as the

amount illegally exacted¹ from the plaintiffs. This suit has been decreed in plaintiffs' favour and O.S.A. No. 62 of 1951 is the appeal by the State

against the decree against them. The claim in the other suit was for obtaining a refund of Rs. 87,419-14-4, stated to have been unlawfully collected

from the plaintiffs as sales-tax for the assessment year 1945-46. This suit having been dismissed, the aggrieved plaintiffs have preferred O.S.A.

No. 54 of 1953.

36. The nature of the transactions, on the basis of which the liability to tax under the Madras General Sales-tax is rested by the State is the same in

regard to the two years which are the subject-matter of these two appeals, but different decisions have been rendered in the two suits, because of

factors to which we shall later advert.

37. In Suit No. 446 of 1947 relating to the year 1944-45, from which O.S.A. No. 62 of 1951 had been filed, the Deputy Commercial Tax

Officer, Harbour Division - the assessing authority - determined the total turnover of Louis Dreyfus & Co., Ltd., whom we shall hereafter call the

assessee, at Rs. 2,53,72,4 8-14-11 by an order dated 27th March, 1946, and levied the tax payable on that figure, which the assessee duly paid

and the correctness of this levy is not in dispute. But just about a year afterwards, on 28th March, 1947, the Commercial Tax Officer, North

Madras, issued a notice to the assessee to show cause why the above assessment should not be revised under Rule 14(2) of the Madras General

Sales Tax Rules, and after considering the objection to his jurisdiction and the merits of the contentions raised, this officer by his proceedings dated

31st March, 1947, revised the figure of the total turnover by the addition of a further sum of Rs. 30,03,650-12-6 and demanded the extra tax

which this revised turnover involved. The assessee paid the sum under protest and filed the suit for the refund of this extra tax. Two points were

raised by the plaintiff. The first was that the transaction giving rise to the additional turnover did not affect tax liability under the Madras General

Sales-tax Act, 1938 : the sales involved were outside the State of Madras and

therefore outside the purview of the relevant taxing statute, the contention in this regard being that the essentials of the contract of sale including the passing of the property all happened beyond the limits of the State. The second attack on the legality of the extra levy was based on the circumstance that the addition was made by the Commercial Tax Officer by revising a final order of assessment passed by the Deputy Commercial Tax Officer. It was contended by the assessee that on a proper construction of the Madras General Sales-tax Act, 1939, Rule 14(2), which enabled a Commercial Tax Officer to revise an order of an assessing officer, was beyond the powers of the rule-making authority. It was also said that, even if the said rule was intra vires, this rule had been misapplied to a case, which, according to the assessee, fell to be dealt with as a case of an escaped assessment under Rule 17. In the written statement that the State filed all these contentions were denied, as also the jurisdiction of the Court to grant relief to the assessee. The trial was before Krishnaswami Nayudu, J. The learned Judge held in favour of the assessee on all the points raised by it, that the tax was not leviable as the sales were outside the State and also that the power of revision was not available to enable the further tax to be levied. It is really unnecessary to set out or canvass the grounds on which the latter point was answered in the assessee's favour for reasons which would be apparent in a minute. He accordingly decreed the suit by the assessee, against which the State filed O.S.A. No.62 of 1951, as we have already mentioned. While this appeal was pending, the question of the validity of Rule 14(2), as well as the circumstances in which it could, if valid, be applied came up for consideration before Govinda Menon and Krishnaswami Nayudu, JJ., in Second Appeal No. 612.of 1949, in which judgment was rendered on 28th March, 1952. This judgment which was delivered by Krishnaswami Nayudu, J., for the Bench substantially affirmed what has been laid down in C.S. No. 446 of 1947 as regards these rules. A similar decision had also been reached by a Judge of the City Civil Court from which the State had filed C.C.C.A. No. 137 of 1951. The State, which challenged the correctness of the construction of the rules adopted in these several decisions, requested that the question involved might be heard by a Full Bench, and as the point was of general importance the request was

granted. The Full Bench has now answered the reference against the assessee. It is unnecessary to set this out in any detail, as the further hearing of

this appeal has proceeded on the basis that as the result of the Full Bench ruling the jurisdiction of the Commercial Tax Officer to revise the

assessment in the circumstances of this cases stands affirmed, leaving the question as to the liability to tax arising out of the sales-transactions

involved in the suit as the only one left for determination. As the transactions of sale stated to give rise to the tax are of the same types in both the

years involved in the two suits, we shall deal with them in common, after setting out of the matters connected with O.S.A. No. 54 of 1953.

38. C.S. No. 370 of 1950, from which the appeal just now mentioned arises, was heard and decided by Subba Rao, J., in January, 1953. After

the decree in C.S. No. 446 of 1947 in October, 1950 and before C.S. No. 370 of 1950 came on for trial, a Bench of this Court had to construe

the provisions of the taxing enactment in *Poppatlal Shah v. State of Madras* (1952) 2 M.L.J. 593, in order to consider the circumstances in which

the liability to tax would fasten on a transaction of sale. A firm trading under the style of the Indo-Milayan Trading Co., which was the assessee

concerned in that case was convicted for failure to pay the sales tax imposed on it. The firm questioned the legality of the tax imposed on the

ground, that the sales, which were included in the turnover on which the assessment was levied, did not take place within this State so as to involve

any tax liability under the Madras General Sales Tax Act. The firm which had an office in Madras received orders for the supply of groundnut oil,

etc., (in which the tax is collected for the seller) from merchants in Calcutta, and these, when accepted, the relative goods were purchased in the

local markets and despatched to Calcutta by rail or steamer, the Railway receipts or bills of lading being taken in the name of the sellers. These

documents were then forwarded to their bankers in Calcutta, who, in their turn, handed them over to the buyers after the bills were retired. The

contention of the assessee was that as the property in the goods did not pass to their sellers within the State of Madras but only the delivery of the

goods or at least of the documents of title relating to them - the buyers at Calcutta, they were not sales on which tax was due or exigible under the

Madras General Sales Tax Act. That on the arrangement and contract between the assessee and his buyers the property in the goods did not pass

to the buyers until the goods were paid for and cleared in Calcutta was not disputed by the State, but it was contended on its behalf that if there

was a substantial nexus between this State and any of the components of the contract of sale, it was a sale within this jurisdiction giving rise to a tax

liability, and the circumstance that the title to the goods passed to the buyer beyond the limits of this State was not a final or determining factor.

This Court accepted this contention of Government and as

the assessee had an office at Madras, its accounts were maintained here; the goods which were the subject-matter of sale were in Madras and

delivered to common carriers in Madras and the sale price was entered in the accounts of the assessee maintained at Madras

the transaction was held to have sufficient connection with Madras so as to enable the seller to be taxed.

39. It was by applying the principles of this decision which was binding on him that Subba Rao, J., held against the plaintiff in O.S. No. 370 of

1950. The learned Judge rested his decision almost wholly on the circumstances that the goods which were the subject-matter of the transactions

in the case before him were within the State at the time of the contract, and that they were despatched from here in implementation of the contract.

The place of the passing of property as the sole test for determining the locus for fixing liability to sales tax, which is the ratio of the decision of

Krishnaswami Nayudu, J., in C.S. No. 446 of 1947, could not obviously have been accepted or applied by Subba Rao, J., in view of the decision

of the Bench in Poppatlal Shah's case (1952) 2 M.L.J. 593.

40. The decision in Poppatlal Shah's case (1952) 2 M.L.J. 593, was taken in appeal to the Supreme Court, where it was reversed Poppatlal Shah

v. State of Madras (1953) 1 M.L.J. 739 : (1953) S.C.J. 369 the decision of the Supreme Court being some time after the Judgment of Subba

Rao, J. The Supreme Court accepted the contention raised on behalf of the assessee-appellant, that the test for determining whether a sale took

place in the State or not was whether; under the contract between the buyer and seller the property in the goods did or did not pass within the

State. If that test were applied there was no dispute there that property in the goods did not pass in Madras.

41. In view of this decision of the Supreme Court as regards the circumstances in

which the tax liability accrues, and the decision of the Full Bench regarding the revisional powers of the Commercial Tax Officer under Rule 14(2) of the Madras General Sales Tax Rules, the only point for consideration in both the appeals is the correctness of the conclusion reached by Krishnaswami Nayudu, J., that on the terms of the relevant contract under which the sales were effected the property in the goods did not pass while they were within the limits of the Madras State. We have to add that under the rules framed under the taxing enactment in regard to groundnut, this tax is levied on the purchaser. The question therefore is whether the title to the goods purchased by the assessees passed to them in this State.

42. The assessees are a limited liability Company incorporated in England and carry on business, inter alia, in groundnuts at, among other places, Madras and with their head office in Bombay. During the war, the assessees contracted to supply groundnut to the British Ministry of Food, the export from India being from the port of Marmagao. To implement this contract, the assessees entered into various-types of arrangements to procure the goods, and among them only two are of relevance for the decision of these appeals, the Bombay and the arthia sales.

43. The first one has been compendiously termed the ""Bombay sales"". Under this the assessees' head office at Bombay entered into contracts of purchase with merchants in Bombay through the brokers of that city. The contracts were in the form set out in Exhibit P-1 in G.S. No. 370 of 1950, which is identical with Exhibit P-19 in C.S. No. 446 of 1947, these being the counterparts signed by the seller. This document which was signed by the seller and addressed to the assessee, the buyer, after reciting the sale of the quantity specified and the price stipulated for the latter being free railway station Bombay or to be delivered at buyer's godown"" which is also at Bombay. The payment was to be according to the rules of the general terms and conditions, that 90 per cent, of the invoice price was to be paid against railway-receipts and the balance after the acceptance of the goods and after a final weigh-ment at Marmagao (Marmagao was expressly named as the place where the goods were to be delivered.) The buyer had an option of rejecting the goods after their delivery at Marmagao, if it should turn out they were not equal to the quality

stipulated. It was a further term of this contract that the sellers should intimate the buyer the name of their constituents, the quantities of goods

which they were in a position to consign as well as the stations at which the goods would be loaded. Those were the terms of the contract in

writing. The practice in regard to the carrying out of this contract was spoken to by the manager of the assessee at Bombay. He said that after

these contracts were signed by the buyer and a seller at Bombay through the medium of the brokers, the sellers would intimate, to the buyer, the

name of their constituent, the quantity available and the stations where the goods could be put on rail. This information the buyers passed on to the

office of the British Ministry of Food at Bombay, and they in their turn advised the Railways concerned for arranging the requisite waggons.

Thereupon "the constituents" loaded the goods-on the waggons, got the railway receipt in the name of Louis Dreyfus & Company, Ltd., as

consignor and consignee and despatched the railway receipts to the Bombay sellers. These latter then tendered the railway receipts to the assessee

at Bombay against payment of 90 per cent, of the purchase price. The assessee would then clear the goods at Marmagao and have the goods

weighed and surveyed for quality and it was after their final weighment and acceptance of the goods after survey that the balance of the price, etc.,

would be paid - also in Bombay. Such of the goods as did not conform to the quality stipulated under the contract would be rejected by the buyers

the intimation in this regard being at Bombay.

44. It will be seen from the above that the offer and acceptance which results in the contract of sale and the final acceptance of the goods in

performance thereof as well as the payment of the price all took place outside this State. The only matters which occurred in this jurisdiction were

(1) the presence of the goods at the time of the formation of the contract and their despatch from here to implement it; (2) the consignment of the

goods by rail by railway-receipts in which the buyer is shown as both consignor or consignee. It was the first factor and that alone that was held to

impose tax liability on the assessee by Subba Rao, J., based on the decision of this Court in Poppatlal Shah's case (1952) 2 M.L.J. 593. But in

view of the reversal of this view by the Supreme Court, the presence of the goods here at the time of the sale should be held to be irrelevant; and

this was conceded.

45. The learned Advocate-General who argued these appeals on behalf of the State relied on the second of the above matters to support the levy

of the tax. The contract here was one for the sale of unascertained goods, and hence there could be no passing of property until the goods were

ascertained. The argument advanced was that the goods became ascertained when the dealers or "constituents" who had sold the goods to the

sellers from whom the assessee purchased, lost control over the goods by loading them in waggons, taking the railway receipts in the name of the

sellei's nominees, viz., the assessees as the consignors. It was urged that if the property in the goods passed from these "constituents" by their

delivery to a carrier, the person to whom the property would pass would be their Bombay buyers, but as these buyers had in their turn sold the

goods to the assessees and had nominated the latter to accept the delivery by taking the receipt in their name as consignor, the title to the goods

would pass by the very act of delivery to the carrier to the assessee itself. It will be seen that this contention rests primarily on the circumstances of

the assessees; figuring as consignor and consignee in the Railway receipts obtained by "the constituents". Delivery to a carrier would no doubt be

an appropriation in cases where the buyer authorises the despatch of goods through that agency, but the appropriation involved in such act need

not necessarily be unconditional, which it has to be for the passing of property, where delivery to the carrier is the only fact relied on for

constituting the appropriation and so the transfer of property.

46. In the present case there are several circumstances which militate against the delivery to the carrier and the goods being consigned in the name

of the assessees being treated as sufficient to pass property. The first is that this was done because of the requirements of the war-time regulations

under which railway priority could be obtained only if the goods were consigned in the name of a party who had contracted to supply goods to

Government. Further the Assistant Manager of Louis Dreyfus, who was examined as P.W. 1 in C.S. No. 446 of 1947 deposed thus:

Question: Why are the goods consigned in Louis Dreyfus's name?

Answer: To meet the requirements of Government. They have imposed a ban.

The ban referred to was a ban on exports from this State, which was relaxed in

the case of those who had to fulfil contracts for supply to the British Government. The position which was not disputed by the Government at the stage of the trial was accepted by the learned Judges in both the Judgments under appeal, and indeed is-not contested by the learned Advocate-General before us. But his argument was that this circumstance did not establish that nothing except the requirements of Government led to the goods being consigned in the name of the assesseees. We are however unable to agree with the implication of this suggestion, that the procedure might have been thought of as a means of effecting a complete delivery to the buyer even at that stage. Such an idea is inconsistent with the form of the transaction under which any portion of the purchase price became payable only on tender of the railway-receipt in Bombay.

47. If then this circumstance were eliminated, we have the fact that 90 per cent-of the invoice price was paid only on tender of the documents at Bombay. The delivery to the carrier could not therefore be deemed to be an unconditional appropriation but governed by Section 25 of the Sale of Goods Act. Besides, there are the further facts, that the goods were checked by weight, and analysed for quality at Marmagao, and that the final payment was made after adjusting the freight to the account of the sellers which is indication that the intention of the parties in having the goods consigned in the name of the buyer as consignor and consignee was merely to enable the export of the goods to be effected so as to comply with the restrictions in that regard and not to pass title in the goods to the buyer.

48. We have had occasion to deal with a similar question in *Gandhi and Sons v. State of Madras* (1955) 2 M.L.J. 545, and therefore, we do not find it necessary to embark again on any detailed discussion of the legal principles involved. Following the reasoning of that decision we hold that the learned Judges were right in their view, that the property in the goods in what are termed the Bombay sales did not pass to the buyer within this State.

49. The result is that on the ruling of *Poppatlal Shah's case*¹, the assesseees are not liable to sales-tax in respect of these purchases.

17. We shall next consider the purchases through the *arthias* which are referred to as the Port-pass contracts in C.C. No. 446 of 1947. The etymological meaning of the expression *arthia* appears to be a commission

agent. There were two such arthias employed by the assesseees for procuring their requirement of groundnuts, but the nature of the transaction and the terms of the contract were the same. Exhibit P-14 (a) in C.S. No. 446 of 1947 which is the contract entered into with one Gulfaroz represents one such. The terms of the commission were determined by this arrangement, and the goods obtained under it were consigned to the buyers under what are termed "Port-pass terms", and these terms are to be found in the type exemplified by Exhibit P-14 (c). The conditions of the Port-pass are substantially identical with those to be found in the Bombay sales - Marmagoa named as the place of delivery where the final weighment and analysis of the goods would take place, with a right in the buyer to reject in the event of the goods not conforming to the contract specifications; 90 per cent, of the price being paid at Bombay on delivery of the railway receipts by the arthias the receipts themselves being taken in the name of the buyer as consignor and consignee, and the balance of the price being paid after the report regarding weighment and analysis were received. It will thus be seen that the only point of difference between the Bombay sales and the arthia sales is in the existence of the arthia commission agency terms embodied in the type represented by Exhibit P-14 (a) and the sole question for our consideration is whether Exhibit P-14 (a) taken in conjunction with Exhibit P-14 (c) is really different from the Bombay sale.

50. The document Exhibit P-14 (a) is most clumsily worded each clause appearing to contradict the legal relationship indicated by the previous one. The first clause:

That the said "artyas" shall serve the said "traders" in the Raichur/Gurberga, Wadi/Warrangal and Hyderabad/Kurnool lines for the purchase of groundnuts and other commodities for their houses at Bombay and Madras, by its use of the expression "serve...for the purchase of groundnuts for their (traders) house" seems to say that the arthias are agents for effecting purchases. The succeeding clause which runs "that the traders shall not be bound to buy exclusively from these artyas but shall be at liberty to buy from any other party in the jurisdiction hereinabove mentioned" speaking of "buying from the arthia and of "buying from any other party" by implication appears to suggest that the relationship between the arthia and

trader is that of seller and buyer.

51. Clause 3 reverts to the idea expressed in Clause 1 and provides:

That the said artyas shall on receipt of orders from the said traders make purchases for the ""traders"" houses concerned of such goods within such quantities and within such limits of price as the artyas may from time to time be advised and on such terms as the usual port-pass contract of the said traders for the various articles they deal in may contain from time to time.

The practice appears to have been for the assessee to indicate quantities required, as well as the prices it was willing to pay, and on receipt of this advice the arthias, would, either from goods already contracted for by them or from those which they were able to secure subsequently implement their contract with the traders. The assessees called in this contract ""traders"" had no concern with the prices at which the arthias were able to effect their purchases, and Clause 13 expressly forbade the arthias to pledge the credit of the traders. Clause 13 runs:

That the artyas shall not pledge the credit of the traders in connection with any purchases advised by the artyas who alone will be responsible to the third parties on account of such transactions. The traders will recognise the artyas only for such transactions and will in no case be responsible or answerable to third parties in respect of purchases made or advised by the artyas.

The corollary to this is Clause 12 which runs:

That the said artyas shall be wholly and solely responsible for the due fulfilment of all contracts of purchases advised by them.

The ""purchases made by the arthias"" were to be advised to the ""traders"" and this was under Clause 4 ""to be understood to be on Port-pass terms an aspect emphasised and underlined by Clauses 6 and 7, so that the condition of the other Port-pass contract were integrated with and made part of the arthia agreement. We shall be referring to the ""Port-pass terms"" after setting out the other terms of Exhibit P-14 (a). These include provision for the payment of 90 per cent, against clean and unqualified railway receipts and 10 per cent, after final check and analysis; a commission of 3/4 per cent, on the net amount paid against contracts of purchase; and for arbitration in the event of disputes.

52. The Port-pass contract which is referred to in the arthia agreement starts by

designating the arthias as the seller and the trader as the buyer, and after specifying the quantity sold and describing the quality and price of the goods sold provides the buyer with an option to reject the goods in the event of non-conformity to the contract quality. Marmagoa harbour is named as the place of delivery and the terms of payment are identical with those in the Bombay sales. The procedure followed in the case of the arthia sales was identical with that in the other sale, viz., an intimation to the buyer of the name of the constituent, the railway station where the goods would be loaded into waggons, the quantity, etc. Of course, here also the ""constituents"" after loading the goods, obtained the railway-receipts in the name of the assessee as consignor or consignee; but for reasons already mentioned, we do not consider this as very material for determining the point when property in the goods passed to the buyer.

53. The argument by the learned Advocate-General was that the arthias were commission agents, and when they entered into a contract for purchase from the growers or dealers, it was as if the assessees had themselves entered into these contracts, with the result that when these constituents delivered these goods at the railway stations for being loaded in waggons they parted with their title which thereafter vested in the assessees. But this would be the case only if the arthias were strictly intermediaries who brought about the relationship of seller and buyer between the constituent and the assessees. The terms of Exhibit P-14 (a), however, do not enable this to be established. The arrangements riddled as it is with ambiguity as regards the legal relationship brought about between arthias and traders had to be read along with the Port-pass terms which it incorporates. There is no ambiguity or doubt as regards the latter, and Exhibit P-14 (c) clearly envisages the arthia, as a seller in relation to the trader. Further, having regard to Clauses 12 and 13 of Exhibit P-14 (a), there could be no contractual relationship between ""constituent"" and the assessee. In the face of these, we are clearly of the opinion that for the present purposes there is no essential difference between the direct purchases from the Bombay merchants and these purchases through the arthias, and that in the latter case also the property in the goods did not pass to the assessees in the State of Madras.

54. The assessees are, therefore, entitled to succeed in both the suits, with the

result that O.S.A. No. 62 of 1951 fails and has to be dismissed, while O.S.A. No. 54 of 1953 succeeds and has to be allowed. The assesseees are entitled to their costs in both the appeals, as well as before the trial Judge.