stand on a different footing from new assessments after the new law comes into force. It is true that Parliament provided otherwise in this case and the Finance Act of 1950 said that the old assessments would be carried on by the corresponding officers under the Indian Income Tax Act. By mistake however that provision was overlooked and the old assessments were made by the old officers under the old law. All that Parliament did by the Validating Act was to allow the old assessments to be made under the procedure provided under the old law and we can see no discrimination in the Validating Act on account of this fact. We are therefore of opinion that the Validating Act is not hit by Art. 14. Further we have not been able to understand how the validation is of no effect so far as the present cases are concerned. The present cases are with reference to years 1940—48, that is before the accounting year ending on March 31, 1949. The assessments in these cases were carried on by the old officers under the old law and the Validating Act specifically validates such assessments. In these circumstances we have not been able to understand how it can be said that these assessments have not been validated by the Validating Act. The contention under this head must therefore also fail.

The appeal fails and is hereby dismissed with costs.

Appeal dismissed.

R. ABDUL QUADER AND CO.

v.

SALES TAX OFFICER, HYDERABAD

(P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.)

Sales Tax—Tax Collected otherwise than in accordance with the Act—Provision enabling the Government to recover such tax collected—Not within the competence of State Legislature—Constitution of India, Schedule VII, Entry 26 and 54 of List II—Hyderabad General Sales Tax Act, 1950 (*XIV of* 1950), *s.* 11.

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The appellant collected sales tax from the purchasers of betel leaves in connection with the sales made by it. But it did not pay the amount collected to the Government. The Government directed the appellant to pay the amount to the Government and it thereupon filed a writ petition in the High Court questioning the validity of s. 11(2) of the Hyderabad General Sales Tax Act, 1950.

The main contention of the appellant before the High Court was that s. 11(2) of the Act which authorises the Government to recover a tax collected without the authority of law was beyond the competence of the State Legislature because a tax collected without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect under the authority of a law enacted under the Entry 54 of List II of the VII Schedule to the Constitution any such amount as it was not a tax on sale or purchase of goods. The High Court held that s. 11(2) was good as an ancillary provision with regard to the collection of sales or purchase tax and therefore incidental to the power under Entry 54, List II. The High Court also held that even if s. 11(2) cannot be justified under that entry it could be justified under Entry 26, List II and in the result the writ petition was dismissed. The present appeal is by way of special leave granted by this Court.

Held: (i) It cannot be said that the State Legislature was directly legislating for the imposition of sales or purchase tax under Entry 54, List II when it made the provisions of s. 11(2) for on the face of the provisions the amount, though collected by way of tax was not exigible as tax under the law.

(ii) It is true that the heads of legislation in the various lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topic mentioned therein. Even so there is a limit to such incidental or ancillary powers. These have to be exercised in aid of the main topic of legislation, which in the present case is a tax on sale or purchase of goods. The ambit of ancillary or incidental powers does not go to the extent of permitting the legislature to provide that though the amount collected, may be wrongly, by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to the Government as if it were a tax. Therefore the provision contained in s. 11(2) cannot be made under Entry 54, List II and cannot be justified even as incidental or ancillary provisions permitted under that Entry.

(iii) Section 11(2) cannot be justified as providing for a penalty for the breach of any provision of the Act.

(iv) Entry 26, List II deals with trade and commerce and has nothing to do with taxing or recovering amounts realised wrongly as tax. There is no element of regulation of trade and commerce in a provision like s. 11(2) and therefore that section cannot be justified under Entry 26, List II.

(v) The provision in s. 20(c) is also invalid as it is merely consequential to s. 11(2).

The Orient Papers Mills Ltd. v. *State of Orissa*, [1962] 1 S.C.R. 549, distinguished.

State of Bombay v. *United Motors (India) Ltd.*, [1953] S.C.R. 1069, referred to.

Indian Aluminium Co. v. *State of Madras*, (1962) XIII Sales Tax Cases 967, held to be wrongly decided.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 760 of 1962.

Appeal by special leave from the judgment and order dated July 16, 1959 of the Andhra Pradesh High Court in Writ Petition No. 1123 of 1956.

K. R. Chaudhuri, for the appellant.

A. Ranganadham Chetty and *B. R. G. K. Achar*, for the respondent.

February 21, 1964. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This is an appeal by special leave against the order of the Andhra Pradesh High Court. The appellant filed a writ petition in the High Court questioning the validity of s. 11 (2) of the Hyderabad General Sales Tax Act, No. XIV of 1950, (hereinafter referred to as the Act). The material facts on which the petition was based were these. The appellant acted as agent in the then State of Hyderabad to both resident and non-resident principals in regard to sale of betel leaves. Under the Act betel leaves were taxable at the purchase point from May 1, 1953, by virtue of a notification in that behalf. We are here concerned with the assessment period from May 1, 1953 to March 31, 1954, covered by the assessment year 1953-54. The appellant collected sales tax from the purchasers in connection with the sales made by it on the basis that the incident of the tax lay on the sellers and assured the purchasers that after paying the tax to the appellant, there would be no further liability on them. After realising the tax, however, the appellant did not pay the amount realised to the Government but kept it in the suspense account of its principals, namely,

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the purchasers. When the accounts were scrutinized by the Sales Tax Department, this was discovered and thereupon the appellant was called upon to pay the amounts realised to the Government. The appellant however objected to the payment on the ground that it was the seller and the relevant notification for the relevant period imposed tax at the purchase point, *i.e.* on the purchaser. This objection was over-ruled and the appellant was directed to pay the amount to Government.

The main contention raised on behalf of the appellant in the High Court was that s. 11 (2) of the Act, which authorised the Government to recover from any person, who had collected or collects, after May 1, 1950, any amount by way of tax otherwise than in accordance with the provisions of the Act, as arrears of land revenue, was beyond the legislative competance of the State legislature. The argument was that the Act was passed under Entry 54 of List II of the Seventh Schedule to the Constitution, which enables the State legislature to enact a law taxing transactions of sale or purchase of goods. The entry therefore vests power in the State legislature to make a law for taxing sales and purchases of goods and for making all necessary incidental provisions in that behalf for the levy and collection of sales or purchase tax. But it was urged that that entry did not empower the State legislature to enact a law by which a dealer who may have collected a tax without authority is required to hand over the amount to Government, as any collection without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect under the authority of a law enacted under Entry 54 of List II any such amount as it was not a tax on sale or purchase of goods. The High Court held s. 11 (2) good as an ancillary provision with regard to the collection of sales or purchase tax and therefore incidental to the taxing power under Entry 54 of List II. Further the High Court took the view that assuming that Entry 54 of List II could not sustain s. 11 (2), it could be sustained under Entry 26 of List II. Consequently the writ petition was dismissed. The High Court having refused a certificate to appeal to this Court, the appellant obtained special leave and that is how the matter has come up before us.

It is necessary to read s. 11 of the Act in order to appreciate the point urged on behalf of the appellant. Section 11 is in these terms:—

"11(1) No person who is not registered as a dealer shall collect any amount by way of tax under this Act nor shall a registered dealer make any such collection before the 1st day of May, 1950. except in accordance with such conditions and restrictions, if any, as may be prescribed:

Provided that Government may exempt persons who are not registered dealers from the provisions of this sub-section until such date, not being later than the 1st day of June, 1950, as Government may direct.

(2) Notwithstanding to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

It will be seen that s. 11 (1) forbids an unregistered dealer from collecting any amount by way of tax under the Act. That provision however does not apply in the present case, for the appellant is admittedly a registered dealer. Further s. 11 (1) lays down that a registered dealer shall not make any such collection before May 1, 1950, except in accordance with such conditions and restrictions, if any, as may be prescribed. This provision again does not apply, for we are not concerned here with any collection made by the appellant before May 1, 1950. The prohibition therefore of s. 11 (1) did not apply to the appellant. Then comes s. 11 (2). It applies to collections made after May 1, 1950 by any person whether a registered dealer or otherwise and lays down that any amount collected by way of tax otherwise than in accordance with the provisions of the Act shall be paid over to

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the Government and in default of such payment, the said amount shall be recovered from such person as if it were arrears of land revenue. It is clear from the words "otherwise than in accordance with the provisions of this Act" that though the amount may have been collected by way of tax it was not exigible as tax under the Act. Section 11(2) thus provides that amounts collected by way of tax though not exigible as tax under the Act shall be paid over to Government, and if not paid over they shall be recovered from such person as if they were arrears of land revenue. Clearly therefore s. 11 (2) as it stands provides for recovery of an amount collected by way of tax as arrears of land revenue though the amount was not due as tax under the Act.

The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it is not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation.

which in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent ot permitting the legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what s. 11 (2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in s. 11(2) cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.

An attempt was made to justify the provision as providing for a penalty. But as we read s. 11 (2) we cannot find anything in it to justify that it is a penalty for breach of any prohibition in the Act. Penalties imposed under taxing statutes are generally with respect to attempts at evasion of taxes or to default in the payment of taxes properly levied (see ss. 28 and 46 of the Indian Income Tax Act, 1922). The Act also provides for penalties, for example s. 19 and s. 20. The latter section makes certain acts or omissions of an

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assessee offences punishable by a magistrate subject to composition under s. 21. Section 11 (2) in our opinion has nothing to do with penalties and cannot be justified as a penalty on the dealer. Actually s. 20 makes provision in cl. (b) for penalty in case of breach of s. 11 (1) and makes the person committing a breach of that provision liable, on conviction by a Magistrate of the first class, to a fine. We are therefore of opinion that s. 11 (2) cannot be justified under Entry 54 of List II either as a provision for levying the tax or as an incidental or ancillary provision relating to the collection of tax. In this connection we may refer to cl. (c) of s. 20, which provides that any person who fails "to pay the amounts specified in sub-section (2) of section 11 within the prescribed time" shall on a conviction by a Magistrate be liable to fine. It is remarkable that this provision makes the person punishable for his failure to pay the amount which is not authorised as a tax at all under the law, to Government. It does not provide for a penalty collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II, nor can the State legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. We are therefore of opinion that s.11 (2) is not within the competence of the State legislature under Entry 54 of List II.

The respondent in this connection relies on the decision of this Court in *The Orient Paper Mills Limited* v. *The State of Orissa*(1). That case in our opinion has no application to the facts of the present case. In that case the dealer had been assessed to tax and had paid the tax. Later in view of the judgment of this Court in *State of Bombay* v. *The United Motors (India) Limited*(2) the amounts paid in

(1) [1962] 1 S. C. R. 549. (2) [1953] S. C. R. 1069.

respect of goods despatched for consumption outside the State were held to be not taxable. The dealer then applied for refund of tax, which was held to be not exigible. The refund was refused and and the dealer went to the High Court by a writ petition claiming that it was entitled to refund under s. 14 of the Orissa Sales Tax Act (which was the law under consideration in that case). The High Court allowed the petition in part and there were appeals to this Court both by the dealer and the State. In the meantime, the Orissa legislature amended the law, by introducing s. 14A, in the principal Act, which provided that refund could be claimed only by a person from whom the dealer had actually realised the amount as tax. That provision was challenged in this Court but was upheld on the ground that it came within the incidental power arising out of Entry 54 of List II. That matter dealt with a question of refund and it cannot be doubted that refund of the tax collected is always a matter covered by incidental and ancillary powers relating to the levy and collection of tax. We are not dealing with a case of refund in the present case. What s. 11 (2) provides is that something collected by way of tax, though it is not really due as a tax under the law enacted under Entry 54 of List II must be paid to the Government. This situation in our opinion is entirely different from the situation in the *Orient Paper Mills Limited's* case(1).

The respondent further relies on a decision of the Madras High Court in *Indian Aluminium Co.* v. *The State of Madras*(2). That decision was with respect to s. 8-B of the Madras General Sales Tax Act of 1939 as amended by Madras Act 1 of 1957. Though the words in s. 8-B (2) were not exactly the same as the words in s. 11 (2), with which we are concerned here, the provision in substance was to the same effect as s. 11 (2). In view of what we have said above, that decision must be held to be incorrect.

Lastly, we come to the contention of the respondent that s. 11 (2) is within the legislative competence of the State legislature in view of Entry 26 of List II. That entry deals with "trade and commerce within the State subject to the provisions of entry 33 of List III". It is well settled that

(1) [1962] 1 S.C.R. 549.

(2) [1962] XIII S.T.C. 967.

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taxing entries in the legislative Lists I and II of the Seventh Schedule are entirely separate from other entries. Entry 26 of List II deals with trade and commerce and has nothing to do with taxing or recovering amounts realised wrongly as tax. It is said that s. 11 (2) regulates trade and commerce and the State legislature therefore was competent under Entry 26 of List II to enact it. We have not been able to understand what such a provision has to do with the regulation of trade and commerce; it can only be justified as a provision ancillary to a taxing statute. If it cannot be so justified—as we hold that it cannot—we are unable to uphold it as regulating trade and commerce under Entry 26 of List II. There is in our opinion no element of regulation of trade and commerce in a provision like s. 11 (2).

We are therefore of opinion that the State legislature was incompetent to enact a provision like s. 11 (2). We may also add that the provision contained in s. 20(c), being consequential to s. 11 (2) will fall along with it. In consequence it was not open to the Sales Tax Officer to ask the appellant to make over what he had collected from the purchasers wrongly as sales tax. It is not disputed, as appears from the final assessment order of the Sales Tax Officer, that the appellant was not liable to pay the amount as sales tax for the relevant period. We therefore allow the appeal and quash the assessment order dated September 27, 1956 insofar as it is based on s. 11 (2). The appellant will get his costs in this Court as well as in the High Court.

Appeal allowed.

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February 24.

RAFIQUENNESSA

v.

LAL BAHADUR CHETRI (DEAD) THROUGH HIS REPRESENTATIVES AND OTHERS

(P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI JJ.)

Retroactivity—Enactment of the Act pending appeal—Appeal if governed by the Act—Assam Non-Agricultural Urban Areas Tenancy Act, 1955 (Assam Act No. 12 of 1955), s. 5.