

**(1986) 04 CAL CK 0015**  
**In the Calcutta High Court**  
**Case No : C.R. 13332 (W) of 1984**

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| Calcutta Paper Mills Manufacturing Co.                           | APPELLANT  |
| Vs                                                               |            |
| Customs, Excise and Gold (Control) Appellate Tribunal and Others | RESPONDENT |

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**Date of Decision :** 25-04-1986

**Acts Referred:**

Central Excise Rules, 1944 — Rule 11, 173(J), 9(1)  
Central Excises and Salt Act, 1944 — Section 11B  
Constitution of India, 1950 — Article 226  
Contract Act, 1872 — Section 72  
Income Tax Act, 1922 — Section 66(1)  
Limitation Act, 1963 — Section 5

**Citation :** (1987) 11 ECC 191 : (1987) 10 ECR 172 : (1986) 25 ELT 939

**Hon'ble Judges :** Ajit Kumar Sen Gupta, J

**Bench :** Single Bench

**Advocate :** Dilip Dhar, for the Appellant; Sanjay Bhattacharjee, for the Respondent

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## Judgement

Ajit Kumar Sen Gupta, J.—In this application under Article 226 of the Constitution of India the petitioner has asked for a direction on the respondents for refund of duties stated to have been collected illegally from the petitioner. The petitioner carries on business of processing, inter-alia, of Teleprinter paper rolls and tapes at No. 48 Canal East Road, Calcutta. The said goods are processed from duty paid printing and writing paper by cutting, slitting and inter-leaving with duty paid carbon paper for I.B.M. machine, adding Machine etc. The said printing and writing paper falls under Item No. 17 (1) of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as the said Act). According to the petitioner, the processing of the said goods by cutting, slitting and inter-leaving with carbon paper is not manufacture. The petitioner obtained a Central Excise Licence and used to pay duty on the said goods processed by it under Item No. 17 (1) of the First Schedule to the said Act. As the said goods were processed from duty paid printing and writing paper at the

initial stage, the petitioner allegedly mentioned the words "under protest" on the gate passes. The said protest, according to the petitioner, was discontinued as the petitioner was informed by the Departmental Officers that the said goods were liable to duty.

2. By a trade notice bearing No. 93/Paper-4/1977 dated May 28, 1977 issued by the Deputy Collector of Central Excise, Calcutta, it was clarified that teleprinter paper rolls and tapes after being cut to sizes and/or inter-leaved with carbon paper would not attract any further excise duty, if they are made from printing and writing papers which have already borne duty under Item No. 17 (1) of the First Schedule to the said Act. The case of the petitioner is that from the said trade notice the petitioner came to learn that collection of duty on the said goods was without authority of law. On December 15, 1977 the petitioner filed two claims for refund of duty paid for Rs. 1,56,774.24 and Rs. 30,288.57 for the period February 25, 1976 to May 28, 1977 and April 13, 1973 to February 24, 1976 respectively.

3. Upon receipt of the said refund applications the Assistant Collector of Central Excise the respondent No.3 asked the petitioner to produce documentary evidence showing the payment of duty "under protest". By a letter dated 28th February 1983 the petitioner informed the said respondent that the said goods were processed from duty paid printing and writing papers. It was also stated therein that at the initial stage the words "under protest" were mentioned in the gate passes, but the petitioner discontinued to write the word "under protest" on the representation of the Central Excise Officers that the goods were liable to duty. According to the petitioner, it all along paid the duty on mistaken belief that the goods were liable to duty. It was for the first time that the petitioner came to know from the said trade notice dated 28th May 1977 that the said goods were not liable to any duty. Two several notices were issued on 12th July 1979 and 3rd August 1979 asking the petitioner to show cause why the applications for refund should not be rejected as time barred under Rule 11 or Rule 11 read with Rule 173 (J) of the Central Excise Rules as the case may be. The petitioner duly replied to the show cause notices on 10th August 1979. During the pendency of the said refund applications Section 11B of the Central Excise and Salt Act came into force. On 13th May 1983 the Assistant Collector passed the order rejecting the claims of the petitioner for refund on the ground that the claims were barred in terms of Section 11B of the said Act. The petitioner thereupon filed appeal before the Collector of Central Excise. By the order dated 16th August 1983 the Collector (Appeals) allowed the appeal of the petitioner and set aside the order of Assistant Collector with a direction to grant refund to the petitioner. The Collector of Central Excise filed appeals before the Appellate Tribunal. On 24th July 1984 the Tribunal allowed the appeal of the Department on the ground that the Tribunal acts as quasi judicial authority under the Statute while considering the refund claim and cannot pass any order beyond jurisdiction conferred upon them by the relevant statute.

4. This application has been moved on 21st September 1984 challenging the said order of the Tribunal and asking for refund of the duty paid.

5. After affidavits had been completed this application has come for hearing. It is contended by Mr. Bhattacharjee, learned Advocate appearing for the respondents that Section 11B of the Act and/or Rule 11 of the said Rules would govern the cases of refund of duty in the instant case. Under the provisions of Section 11B or Rule 11 the period of limitation of six months for claiming refund can be extended where the duty has been paid under protest. In the instant case no proof of payment alleged to have been made when the Teleprinter paper Rolls and Tapes have been removed from the factory under protest has been produced by the petitioners. It is also contended that no proof of payment of duty at base paper stage out of which the teleprinter paper rolls or tapes have been manufactured has also been produced by the petitioners. In other words, the contention of the respondents is that the question of extension of the period of limitation does not and cannot arise. No refund can be made because no proof of payment of duty either at the base level or at the level of clearing the manufactured goods of teleprinter paper rolls or tapes was adduced, only on satisfactory proof of those two facts the petitioners can claim refund if the claim is otherwise within the period of limitation. This contention, however, cannot be accepted. In sub-paragraph (C) of paragraph 4 of the affidavit-in-opposition filed by the respondents it has been admitted that the petitioners paid duty under item 17 (1) of the First Schedule to the said Act from February 25, 1976. It is, therefore, admitted by the respondents that the petitioners paid duty on Teleprinter paper rolls/tapes. The said base paper was purchased by the petitioners from market. Rule 9(1) of the Central Excise Rules, 1944 provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured whether for consumption, export or manufacture or any other commodity in or outside such place until the excise duty leviable thereon has been paid. In other words, a manufacturer has to pay duty before clearing the goods from factory. No evidence was produced by the respondents in support of the contention that the goods which were purchased by the petitioners from the market did not suffer duty at the time when such goods were removed by the manufacturer from the concerned factory. It is not possible for the petitioners to discharge onus that the base paper purchased by the petitioners from the market is duty paid. The goods available in the market must be presumed to have been duty paid. It is absolutely impossible for a purchaser to know whether excise duty on the manufactured goods sold to the purchasers had already been paid by the manufacturers. If the purchaser has to satisfy the excise authorities that goods which he has purchased from the market suffers duty, it would impose a burden which no purchaser would be able to discharge. In the case of *Sulekh Ram and Sons v. Union of India and Ors.* reported in 1978 ELT 525, Delhi High Court has held that under excise system no goods can be removed from the place of manufacture without first paying the excise duty. Therefore, a purchaser can presume that the goods are duty paid. It

would be incredible if the purchasers were required to ascertain whether Excise duty has already been paid by the manufacturer before the sale of such goods or not in as much as the purchasers have no means of knowing it.

6. The contention of the respondents cannot in any event be accepted as no dispute was ever raised in any of the departmental adjudication proceedings regarding payment of duty on base paper or in the affidavit filed in this proceeding. The contention of the respondents, therefore, must fail.

7. It is then contended by Mr. Bhattacharjee, learned Advocate that delay in filing the application for refund cannot and should not be condoned. It is contended that if the statute does not provide for the condonation of delay such delay can be condoned by the Court. He has relied on the provisions of Section 66 (1) of the Indian Income Tax Act, 1922 and three decisions under the Income Tax Act. The decisions are in (1) Commissioner of Income Tax, Gujarat-III v. Western India Engineering Co. Ltd., reported in (1978) 77 ITR 165, (2) Commissioner of Income Tax v. P.C. Vereodkuty reported in (1971) 81 ITR 206 and (3) Commissioner of Income Tax (Central) Vs. Assam Oil Company Ltd., . These decisions, however, have no application to the facts of this case. In those cases the question before the Courts was whether Section 5 of the Limitation Act is applicable to the proceedings u/s 66(1) of the Indian Income Tax Act, 1922. u/s 66(1) of the Indian Income Tax Act, 1922 and application to the Tribunal to refer any question of law to the High Court must be made within 60 days upon which the applicant was served with the notice of the Tribunal's order. The view taken by the Calcutta High Court in these decisions is that Section 5 of the Limitation Act only applies to the proceeding in a Court. The Tribunal being not a Court no one can take the benefit of Section 5 of the Limitation Act. Accordingly the Tribunal has no power to condone the delay in making the application. In the instant case, the question is not whether the Tribunal should condone the delay. The question is whether the petitioner is entitled to the refund of duty collected by the respondents. It is not in dispute that no duty was payable by the petitioner on the Teleprinter paper Rolls/Tapes made from duty paid paper. The duty, therefore, was realised from the petitioner illegally and without authority of law. As there is no manufacture, the question of duty on Teleprinter paper Rolls/Tapes could not arise. What the authorities collected is not the duty as no duty was payable. They have collected certain sums from the petitioner in the guise of excise duty without any authority of law and such amount cannot be retained by the Central Excise Authority. In any event the payment of duty in question was made by the petitioner under a mistake of law. The petitioner discovered the mistake only after trade notice was published in May 1977. In this connection reference may be made to the several decisions relied on by the learned Advocate for the petitioner. In D. Cawasji and Co. and Others Vs. State of Mysore and Another, . Supreme Court held that where a suit lies to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed i.e. within three years of the knowledge of mistake would also lie. The Supreme Court observed: "A tax is intended for immediate

expenditure for the common good and it would be unjust to require its repayment after it has been in the whole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so".

"In the U.S.A., it is generally held that in the absence of a statute to the contrary taxes voluntarily paid under a mistake of law with full knowledge of facts cannot be recovered back while taxes paid under a mistake of fact may ordinarily be recovered back (see *Corpus Juris Secundum*, Vol.84 P.637). Although Section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reasons for the law according a different treatment both in the matter of the heads under which they could be recovered and the period of limitation for the recovery".

8. In *I.T.C. Limited Vs. M.K. Chipkar and others*, Bombay High Court held that Rule 11 of the Central Excise Rules applies to the cases where duties have been paid through inadvertence, error or misconstruction where refund application has to be made within three months from the date of such payment. But, if duty is collected without authority of law, the Department cannot retain the excess duty collected but is under an obligation to return the excess duty and the petitioner has a corresponding legal right to recover it. It is also held that if payment was made under mistake of law, Rule 11 would not apply to the claim of such refund. It does not prevent the department from taking cognizance of the claim in its administrative capacity by treating such application as representation for refund. Moreover, even if the Department is held obliged to grant refund only if the application is made within the prescribed period of one year and in no other case, it does not mean that the High Court cannot grant refund in a petition under Article 226 of the Constitution.

9. In *Khardah Company Ltd. v. Union of India and Ors.* reported in 1981 Cri LJ 433, the Division Bench of this Court held that the consistent view of all Courts is that all realisations made by the Government without authority of law must be reimbursed. Supreme Court has recognised the position that High Courts exercising their writ jurisdiction have power for the purpose of enforcement of fundamental as well as statutory rights to give consequential relief by ordering repayment of money so realised without any authority of law,

10. Similar view has been taken by the Karnataka High Court in the case of *Union of India v. I.T.C. Limited* reported in 21 Cri LJ 655.

11. Admittedly, the respondents collected as duty which was not and could not be excise duty, as no excise duty was leviable in the subject product. Thus the

collection of purported duty is illegal and so also its retention. The respondents can defeat the claim of the petitioner on the plea of limitation and retain the money which they were not authorised to collect or retain. The contention of the revenue must therefore fail.

12. The next contention is that the petitioner having realised the full amount of the duty from the ultimate customers, if the refund applied for is given, it will be a clear case of unjust enrichment of the petitioner. Reliance has been placed on the unreported judgment of the Delhi High Court in the case of P.M. Monge Brothers v. Union of India and Ors.. In that case the Division Bench of the Delhi High Court held as follows:

"By this petition the petitioner seeks refund of the Excise Duty paid by them for the period 17.3.72 to 17.6.76 in relation to their products namely Coca Cola and Fenta."

The case of the petitioner is that it was somewhere in December 1976, that the Bombay High Court took the view that the essence is a different from concentrate and therefore, petitioner was liable to pay the Excise Duty at a much lower rate than at the rate at which they had paid.

It was admitted case of petitioners that during the prescribed time, the petitioners never applied for refund.

The petitioners appear to have become wiser after judgment of Bombay High Court and in the light of that Judgement, they have been able to get certain orders favourable to them for the period 1976-77, when they applied for the refund on the basis of the said judgement.

It will be noticed for the relevant years the petitioners had already collected lacs & lacs of rupees from the customers.

They are at no loss whatsoever. They cannot now apply for refund."

13. The Delhi High Court has not given any reasons nor considered any of the decisions either of the Supreme court or other High Courts where consistently the view has been taken that if the collection is without jurisdiction then the plea of unjust enrichment cannot be advanced to deprive the persons who paid duty under mistake of law or otherwise. In the adjudication proceeding the question of unjust enrichment was never raised. There is no finding that the petitioner is not required to refund the amount to the ultimate consumers. The refund claimed cannot be rejected on the ground that the manufacturer has no intention to refund the same or on the ground of unjust enrichment. The Supreme Court in the case of D. Cawasji & Co. (Supra) held that there is no provision under which the Court could deny refund of tax even if a person who collected it from a customer and has no subsisting liability or intention to refund it to them, or for any reason, it is impracticable to do so. The Bombay High Court in I.T.C. Limited (Supra) also held that the ground of unjust enrichment as a defence against the claim of restitution has been rejected by various High Courts on the ground that

the duty which is collected without the authority of law was refundable even though it was recovered from the consumers or manufacturers and granting relief of refund may result in his unjust enrichment. The ground of unjust enrichment has also been successively rejected in three later decisions of the Bombay High Court in *Wipro Products Ltd. v. Union of India*, 1981 ELT 531, *Leukoplast*, 1983 ELT 2106 and *Chemicals & Fibres*, 1982 ELT 917. These decisions clearly lay down that a manufacturer cannot be refused refund of tax illegally collected from him though he may have passed on the burden of the tax to the consumer. A claim of restitution therefore cannot be denied even if the manufacturer may have collected the amount of tax from his consumers. The theory of unjust enrichment cannot be invoked in a case of claim for refund of excise duty recovered from the manufacturer without the authority of law. The claim for refund of excess excise duty paid by the petitioner cannot be denied on the alleged ground that granting relief of refund to it would result in its unjust enrichment.

14. The Madras High Court in the case of *Soft Beverages (Pvt) Ltd., Madurai v. Union of India and Anr.*, reported in 1982 ELT 119 held that the refund of duty paid and collected under the mistake of law cannot be denied even if the duty has already been recovered from the customer. In other words, the refund of duty wrongly paid under the mistake of law cannot be denied by the Government on the principle of unjust enrichment. The Madras High Court was of the view that the law declared by the Supreme Court in *D. Cawasji & Co. (supra)* holds the field and accordingly the contention of the respondents was rejected.

15. The Division Bench of this Court in the case of *Khardah Company Ltd. (supra)* also considered the contention of the respondents as regards unjust enrichment and observed as follows:

"If the liability imposed is of the assessee alone and if the assessee is liable to pay irrespective of whether he can pass on the liability to his customers, for the very same reason he can demand refund of all unauthorised levy irrespective of whether he had actually borne the burden himself or not, unless the statute provides it otherwise. The answer to the objection raised by Mr. Banerjee is to be found in the observations of the Supreme court in the case of (11) *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, relied on by the Bombay High Court in its later decision, which though obiter appeared to enunciate the true legal principle which follows from their earlier decisions referred to hereinbefore".

16. For the aforesaid reasons the contention of the respondents have to be rejected. On the facts and in the circumstances of this case the petitioner is entitled to refund.

17. There is another aspect of the matter. Section 11B of the Act came into force on November 17, 1980. The applications for refund were made on December 15, 1977. The rejection of the claim by Assistant Collector and Tribunal u/s 11B of

the Act is wrongful and illegal as Section 11B did not come into force when the applications for refund were made. Moreover, the mistake was discovered in July 1977 and the petitioner filed its application for refund in December 1977 i.e. within a period of six months and the question of delay does not arise in the facts of this case. Date of discovery of mistake is the starting point of limitation and the law prevailing at that point of time is applicable for refund. The petitioner is therefore entitled to get refund of excise duty paid by mistake. The other contention is with regard to the payment of interest. It is not disputed that the petitioner was not liable to pay any duty on the product processed by it. Thus, the collection made by the respondents is unauthorised. Interest is the return or compensation for the use or retention of another's money. The respondents have retained and enjoyed the benefit of such money so long. Accordingly, the petitioner is entitled to interest. Two decisions of Gujarat High Court support the view I have taken in *Vijay Textile, A Partnership Firm at plot No. 4, Nerol Abendaly v. Union of India* reported in 1979 ELT 181 the Gujarat High Court held that if the Excise Authorities have collected any amount as tax without authority of law, it is just and proper that they should pay interest at the rate of 12% per annum from the date of collection of the said amount till the date of actual repayment. Similar view was taken by the same High Court in the case of *Jyoti limited, Baroda V. Union of India and Anr.* reported in 1979 ELT 546.

18. For the reasons aforesaid the Rule is made absolute. Let appropriate writ be issued. The Respondents are directed to refund the said sums of Rs. 30,288.57 and Rs. 1,56,774.24 with interest at the rate of 12% per annum from the date of collection till the date of payment. Such refund shall be made within three weeks after the service of the plain copy of the operative part of this judgement.