

(1986) 04 CAL CK 0033
In the Calcutta High Court
Case No : C.O. No. 4117 (W) of 1984

Dulichand Shreelal

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 28-04-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 8(1)
Central Excises and Salt Act, 1944 — Section 11A, 11B, 11B(5), 3(1), 40
Constitution of India, 1950 — Article 226, 265, 301, 304, 32
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27
Limitation Act, 1908 — Article 96
Sea Customs Act, 1878 — Section 29, 30

Citation : (1987) 32 ELT 388

Hon'ble Judges : A.K. Sengupta, J

Bench : Single Bench

Advocate : P.K. Mullick and M.A. Vidyadharan, for the Appellant; Nilava Mitra, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sengupta, J.—The Petitioner, a partnership firm, carries on business of manufacture of vegetable non-essential oils falling under tariff item No. 12 of the Central Excise Tariff at its factory with the solvent extraction plant situated at the suburbs of Calcutta. The petitioner is required to pay duty on the manufactured product under Tariff Item No. 12. The petitioner also manufactures acid oil by treating soap stock obtained in the process of refining vegetable non-essential oils and obtains spent earth which are only by-products resulting from the products of oil mill and solvent extraction plant. According to the petitioner the said by products are exempt under Tariff Item No. 68 for which no clearance was required to be obtained under the Central Excises and Salt Act, 1944 and no duty was required to be paid therefore.

2. By a letter bearing No. IR 326, dated 26th June, 1977, the Superintendent,

Central Excise, AR-III, Calcutta-III Division, the respondent No. 3 herein, intimated -the petitioner that the manufacture of acid oil out of soap stock obtained from the processing of vegetable non-essential oils in the petitioner's factory was not" covered by any other Tariff item of the Central Excise Tariff. It attracted duty under Tariff Item No. 68 being goods not elsewhere specified and duty at the rate of 2% ad valorem is leviable on such goods with effect from 18th June, 1977. It has also been stated in the said letter that in terms of notification No. 176/77, dated 18th June, 1977, the manufacturers whose capital investment made from time to time on plant and machinery installed in the industrial unit is more than Rs. 10 lakhs are required to pay duty under Tariff Item No. 68. The petitioner was, therefore, directed to take out licence for manufacture of goods covered under Tariff Item No. 68 and observe all Central Excise formalities before any removal of such goods from the factory. The petitioner was also directed to pay appropriate Central Excise duty on such goods before removal. It was also pointed out that any deviation from observing the Central Excise formalities would be tantamount to violation of the Central Excise Rules and the petitioner would be liable for penal action.

3. In terms of the aforesaid direction, the petitioner obtained separate licence being Central Excise Licence L-4 under Tariff Item No. 68 for manufacture of goods including acid oil obtained as by-product and started making payment of duty on and from 12th August, 1977.

4. In or about July, 1979 the petitioner, it is alleged, for the first time came to know that the Collector, Central Excise, Guntur had in fact exempted soap stock obtained as by-product in oil mill and solvent extraction plant from payment of excise duty under Tariff Item No. 68 in terms of Notification No. 115/75-C.E., dated 30th April, 1975 issued by the Central Government along with its amendment vide Notification No. 122/75-C.E., dated 5th May, 1975. Immediately thereafter, the petitioner by letter dated 1st August, 1979 intimated the Assistant Collector, Central Excise, Calcutta-III Division as follows :-

"We have the following 3 independent units in the same premises at P-143, Raymond Road, Calcutta :

1. Oil mill.
2. Solvent extraction plant.
3. Vegetable oil refinery.

In the vegetable oil refinery we process the oil coming out of the solvent extraction plant as well as the oil purchased from the market. Presently we are processing the crude rapeseed oil supplied by the West Bengal Essential Commodities Supply Corporation (a Government of West Bengal Undertaking) and deliver back the refined oil to them. While processing this oil, we are getting soap stock as by-product which is being later converted to acid oil by treatment with sulphuric acid.

We understand that soap stock and acid oil come under Tariff Item 68 on which duty at the rate of 8% ad valorem is chargeable. As our units come under the category of oil mill and solvent extraction plant kindly GIVE US YOUR considered opinion as to whether the exemption of duty is applicable on these products coming out as by-products in our factory However, pending your decision we are paying duty, (underlined by me).

By a letter dated 9th August, 1979 the Assistant Collector, Central Excise, Calcutta-III Division, intimated the petitioner that the matter was under consideration and in the meanwhile the petitioner should submit relevant documents including trade licence evidencing that the concern of the petitioner falls exclusively under the category of "Oil Mill and Solvent Extraction Industry".

5. The petitioner complied with the said requisitions made by the Assistant Collector and produced the relevant records and papers in support of its contention. Thereafter, correspondence passed by and between the petitioner and the excise authorities, but no definite reply was received from the respondents. The matter was thereafter taken up with the Collector, Central Excise, by the Constituted Attorney of the petitioner who was a Member, Regional Advisory Committee (organised Sector). It was mentioned in the letter dated 20th March, 1982 written by the said Member of the Regional Advisory Committee to the Collector of Central Excise that the question of exemption of acid oil from Central Excise duty under Tariff Item No. 68 was discussed in the meeting of Regional Advisory Committee held on 23rd July, 1980. It was again discussed on 8th December, 1980. It was also discussed at the 16th South Zone Tariff-Cum-General Conference held at Madras on 29th and 30th October, 1981 where it was accepted that since acid oil was obtained only by treatment of soap stock with sulphuric acid, the exemption granted to soap stock would equally apply to acid oil. By a letter dated 5th May, 1982 the Deputy Collector informed the said Member of the Regional Advisory Committee [O.S.] as follows :-

"This is to inform you that acid oil produced by independent manufacturers without having solvent extraction plant or V.P. plant from soap stock will not be eligible for the benefit of excise duty exemption under Notification No. 115/75-C.E., dated 30th April, 1975, in view of the specific coverage of this notification to product of only noted industries."

In other words, it was admitted that acid oil produced by oil mills and solvent extraction plants would be eligible for exemption under the aforesaid Government notification. Thereafter correspondence passed by and between the petitioner and/or its authorised representative and the Collector, Central Excise. By a letter dated 18th May, 1982 the Collector of Central Excise intimated the petitioner as follows :-

"Under Notification No. 115/75-C.E., dated 30th April, 1975 as amended by Notification No. 122/75-C.E., dated 5th May, 1975 the goods falling under Item No. 68 of the First Schedule of Central Excises and Salt Act, 1944 and

manufactured in factories covered by all the industries specified in the schedule annexed to the said notification, are exempt from whole of the duty of excise leviable thereon. Since the factory of Messrs. Dulichand Shreelal, Raymond Road, Calcutta, are having oil mill and solvent extraction plant, the soap stock and acid oil produced in the said factory is exempt from payment of duty leviable under Item No. 68 of the Schedule."

6. By a letter dated 21st May, 1982 the Assistant Collector of Central Excise intimated the petitioner that

"acid oil attracting Tariff Classification No. 68 is eligible to enjoy exemption from payment of Central Excise duty in terms of Notification No. 115/75-C.E., dated 30th April, 1975 as amended by Notification No. 122/75-C.E., dated 5th May, 1975".

Similarly, by another letter dated 29th May, 1982 the Assistant Collector of Central Excise intimated the petitioner that the spent earth

"attracting Tariff Item No. 68 manufactured in the factory of the petitioner is eligible to enjoy exemption from payment of Central Excise Duty in terms of the aforesaid notifications".

7. On 23rd October, 1982 the petitioner submitted the claim for refund of excise duty amounting to Rs. 2,70,000 paid by it for the period from 12th August, 1977 to 14th May, 1982 on acid oil and soap stock allegedly under mistake of law. Thereafter the petitioner reconstructed the refund claim. It submitted its claim for Rs. 51,859.29 for the period from 12th August, 1977 till 31st July, 1979 during which period the duty was paid under alleged mistake of law and for Rs. 2,18,140.71 for the period from 1st August, 1979 to 14th May, 1982 when the duty was paid pending the decision of the department regarding exemption.

8. On or about 30th April, 1982 the Assistant Collector, Central Excise, Calcutta, issued two separate notices dated 30th July, 1982 upon the petitioner asking the petitioner to show cause as to why its claim for refund of excise duty should not be rejected being barred by limitation under the Central Excise Act. The petitioner duly replied to the said show cause notices. It was stated in the reply that none of the claims of refund was barred by limitation and the provision of Section 11B of the Central Excises and Salt Act, 1944 was inapplicable to the facts and circumstances of the case. In the reply the petitioner also relied on various decisions of the High Courts and Supreme Court. Both the claims of the petitioner were rejected by the Assistant Collector of Central Excise on the ground that the claims were barred by limitation under the provisions of Rule 11 of the Central Excise Rules and/or u/s 11B of the Central Excises and Salt Act, 1944.

9. The petitioner has challenged the said rejection of the claims of refund in this writ petition.

10. It has been contended by Mr. P.K. Mullick, learned Advocate for the petitioner,

that the respondents had no right to realise any amount on account of "excise duty by virtue of the Notification dated 30th April, 1975 as amended by Notification dated 5th May, 1975. Therefore, the entire realisation of Rs. 2,70,000 for the period between August, 1977 and May, 1982 was unauthorised. It is contended that the realisation of the said money amounts to extortion without any authority of law. This is clearly in contravention of Article 265 of the Constitution and Section 3(1) of the Central Excises and Salt Act, 1944. It is, therefore, contended that the respondents are bound to refund the same to the petitioner inasmuch as the entire levy is illegal. The limitation would not stand in the way of granting relief to the petitioner. It is submitted that this Court has jurisdiction to direct the refund of the amount wrongfully and illegally collected by the respondents without authority of law. It is also contended that the respondents have no jurisdiction to retain the money wrongfully realised from the petitioner without authority of law. In any event, it is contended, the application before the excise authorities was filed within the period of limitation. In support of its contention, Mr. Mullick has relied on several decisions to which I shall presently refer. On the other hand, Mr. N.C. Roy Chowdhury, the learned Advocate for the respondents, has submitted that the claim of the petitioner was barred by limitation under the Act or the Rules made thereunder. It is submitted that the petitioner did not pay the duty under protest and as such the claim was barred having been preferred more than six months after the date of payment of duty. It is further contended that under the Act and Rules either the petitioner has to pay duty under protest or to claim refund within six months from the date of payment, otherwise the claim for refund cannot be entertained. It is also contended that u/s 11A of the said Act which has come into force with effect from 17th November, 1980 a claim for refund on the ground that the goods were exempt from payment of duty can only be entertained, provided it is claimed within six months from the date of payment. It is also contended that in view of the amended provisions of Section 11A, the contention that refund of duty in respect of exempted goods would be governed by the general law of limitation, does not hold good. Special law as contained in the Excise Act will have overriding effect. It is further contended that assuming, but not admitting, that the general law of limitation would apply, even then the claim is ex facie barred by limitation as according to the petitioner it came to know about the mistake some time in July or August, 1979, but the claim of refund was made only in October, 1982. The writ application having been made after the expiry of more than three years, the present application is not maintainable. Mr. Roy Chowdhury has also relied on several decisions of different High Courts as well as of Supreme Court in support of his aforesaid contentions.

11. The respective contentions of the learned counsel have to be considered in the setting and context of the facts of this case. The Central Government issued Notification No. 115/75, dated 30th April, 1975 in exercise of the powers conferred by Rule 8(1) of the Central Excise Rules, 1944. By the said notification, Central Government exempted goods falling under Item No. 68 of the First

Schedule to the Central Excises and Salt Act, 1944 and manufactured in factories covered by any of the industries specified in the schedule annexed thereto from the whole of the duty of excise leviable thereon. One of the industries mentioned in the said schedule is oil mill and solvent extraction industry. By a subsequent Notification No. 122/75 issued on 5th May, 1975 the said notification No. 115/75, dated 30th April, 1975, was amended, but this amendment did not affect the oil mill and solvent extraction industry in any manner. In view of the aforesaid notification, acid oil manufactured by the petitioner by treating soap stock obtained in the process of refined vegetable non-essential oils in its oil mill and solvent extraction plant, was exempt from duty under Tariff Item No. 68. The said notification was and is binding on the respondents. The respondents, however, acting in complete disregard of the said notification, directed the petitioner, by the order dated 25th June, 1977, to obtain licence for manufacture of acid oil out of soap stock obtained from the processing of vegetable non-essential oils and the petitioner was directed to pay duty at the rate of 2% ad valorem as leviable under Tariff Item No. 68. This direction by the Superintendent, Central Excise, in terms whereof the petitioner obtained the licence for manufacture of the said acid oil out of soap stock and started paying duty on and from 12th August, 1977, was illegal and contrary to the said exemption notifications. The petitioner had to comply with the said direction to avoid penal consequences. In view of the said notifications the collection of duty is illegal and unauthorised. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. Therefore, the collection must be under the authority of law. The executive authority in the instant case collected the duty by not complying with the exemption notifications issued by the Central Government which governed the case of the petitioner. On the facts of this case the imposition of duty on the aforesaid products manufactured by the petitioner and collection thereof is without any authority of law and ultra vires the law under which the imposition or collection was made. If the imposition or collection of the duty is illegal and in contravention of Article 265, then acquiescence cannot take away from a party the relief he is entitled to nor does payment of illegal duty create estoppel against his subsequent challenge. The respondent-authorities were fully aware of the said exemption notifications and they could not have collected the duty as they purported to do in this case. In that view of the matter they acted illegally and without jurisdiction.

12. The question, therefore, is whether in such a case the period of limitation for getting a refund would be as prescribed by the statutory provisions under which the illegal levy was made or would be governed by the general law or whether the period of limitation at all would be, applicable in the case like this where collection is wholly illegal. In this context it is necessary to consider the several decisions relied on by Mr. Mullick.

13. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, the writ petitioners were assessed to sales tax on their sales of tobacco in accordance with the notification issued by the State Government in exercise of powers u/s 5 of the

State Sales Tax Act and large amounts were collected by the Madhya Bharat Government and later by the Madhya Pradesh Government. The petitioner contended that the taxing provision under which the tax was assessed and collected from them was unconstitutional as it infringed Article 301 of the Constitution and did not come within the special provisions of Article 304(a). Accordingly they prayed for appropriate writs or orders for refund of all the taxes that had been collected from them. The High Court upheld the contention of the writ petitioners and held that the imposition of a tax on import of goods made the provisions void in law. The prayer of refund v/as allowed. The Supreme Court upheld the decision of the High Court and held that the tax [was] rightly held by the High Court to be invalid. It is clear that the assessment of tax under the said notification was thus invalid in law. The Supreme Court observed,

"We are clearly of opinion that the High Court have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law."

The Supreme Court held that where sales tax assessed and paid by the order, is declared by a competent court to be invalid in law the payment of the tax already made is one made under a mistake within Section 72 of the Contract Act and so the Government to whom the payment has been made by mistake must in law repay it.

14. In *Patel India Private Limited Vs. Union of India and Others*, the excess duty was charged in violation of Sections 29 and 30 of the Sea Customs Act, 1878 and in excess of jurisdiction. The Union of India relied on Section 40 which provides that no customs duties or charges which have been paid, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be returned unless such a claim is made within three months from the date of such payment. Supreme Court held that Section 40 clearly applies only to cases where duties have been paid through inadvertence, error or misconstruction and where refund application has to be made within three months from the date of such payment. The present case was not one where the excess duty was paid through any of the three reasons set out in Section 40. The excess duty demanded on the ground that the invoice price was not real value of the imported goods and payment under protest was also made on that footing. The ultimate result in the appellant-company's revision was that charging of excess duty was not warranted under the Act, and that the value on which duty should have been assessed was the invoice price and nothing else. That being the position. Section 40 did not apply and could not have been relied upon by the customs authorities for refusing to refund the excess duty unlawfully levied on the appellant-company. The Supreme Court observed :

"If the customs authorities were not entitled to levy the excess duty and retain it, they were bound to return to the appellant company who had paid it under

protest and only with a view not to incur demurrage charges, unless there was some provision of the Act which debarred the appellant-company from recovering it. The only provision relied on by the customs authorities was Section 40 of the Act. Indeed their refusal to refund the excess duty both in their return and in the High Court was on the ground of the omission of the appellant-company to apply for the refund within the time provided by that section. It is necessary to emphasise that it was not their case that the invoice price of the items in question was not the real value or that the appellant-company was not entitled to the refund thereof for any reason except the omission to apply for it within the time prescribed by Section 40. But since Section 40 did not apply to the facts of the case the respondents could not retain the excess duty except upon the authority of some other provision of law. No other provision was pointed out by them which would disentitle the appellant-company to the refund on the ground of its right being time-barred or otherwise. No such provision other than Section 40 which disentitled the appellant-company to the refund having been put forward and the customs authorities not being entitled to retain the excess duty there was a legal obligation on the part of the respondents to return the excess duty and a corresponding legal right in the appellant-company to recover it. Besides, except Section 40, the Act contains no other provision laying down any limitation within which an importer has to apply for refund. The refusal to return the excess duty on the ground that the appellant-company had not applied within time provided by the Act was clearly unsustainable. Since there was not and could not be dispute with regard to the invoice price being the real value there was no point in filing any appeal; nor could the omission to file any such appeal be a proper or valid ground for refusing relief to the appellant-company when there remained no longer any dispute between the parties as to the invoice price being the real value of the imported items."

15. In *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, the Supreme Court held that -

"Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs on the negative plea of "alternative remedy" since the root principle of law married to justice, is *ubi jus ibi remedium*."

Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, the Supreme Court held that -

"where it is once established that the payment, even though it be of a tax has been made by the party labouring under a mistake of law, the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Contract Act. To hold that tax paid

by mistake of law cannot be recovered u/s 72 will be not to interpret _the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid". Merely because the State has not retained the monies paid as sales tax by the assessee but has spent them away in the ordinary course of the business of the State will not make any difference to the position and under the plain terms of Section 72 of the Contract Act the assessee will be entitled to recover back the monies paid by it to the State under mistake of law."

In *Burmah Construction Co. Vs. The State of Orissa and Others*, the Supreme Court observed that -

"if the tax was illegally collected the High Court in a petition under Article 226 of the Constitution of India may direct refund of such tax."

16. In *V. Mohammed Ismail Rowther Vs. The Sales Tax Officer and Another*, Kerala High Court observed that a petition under Article 226 of the Constitution of India for refund of tax paid under mistake of law is maintainable but the petition must be filed within three years from the date when the mistake becomes known to the petitioners.

17. In *Assistant Collector of Customs, Madras and Ors. v. Premraj and Ganapatraj and Co. (P) Ltd.* reported in (1978) ELT (630) the duty was paid by the assessee without taking into account the exemption notification. The assessee filed refund application after the time limit prescribed by the Act. That application was rejected by the authorities. In a petition under Article 226 of the Constitution, the High Court held that recovery of tax was without authority of law and directed the refund of duty. The Division Bench upheld the judgment of the Court of the first instance directing the refund.

18. These decisions support the contention of the petitioner that if the levy or collection is illegal the assessee is entitled to get the refund irrespective of whether the claim is barred by limitation under the Act or not. As indicated earlier, the imposition and the collection of the excise duty under Tariff Item No. 68 on the aforesaid products manufactured by the petitioner are exempt from duty. In that view of the matter it has to be held that the levy and collection of the excise duty on the aforesaid products manufactured by the petitioner is illegal. In other words, the assessments made levying the duty are consequentially illegal. Therefore, the Court can under such circumstances set aside the orders of assessment and direct the respondents to refund the duty illegally collected. In a case like this where the duty has been unlawfully collected the plea of limitation will not hold good. The Court can direct the refund of the duty unlawfully collected.

19. The next contention which is required to be considered is : Assuming that the period of limitation would be applicable the question is whether the limitation as prescribed under the Act or the limitation as prescribed under the general law would be applicable. When the duty was imposed by the respondents on the

product manufactured by the petitioner under Tariff Item No. 68, it was not known to the respondents that there was an exemption notification which entitled the petitioner to get exemption from duty. There was thus a mistake of law which is common to both the assessee and the taxing authority. In *State of Kerala v. Aluminium Industries Ltd.* reported in [1965] 16 STC 689 SC Supreme Court (Bench consisting of 7 Judges) held that money paid under a mistake of law comes within the word "mistake" in Section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the assessee and the taxing authority. If the tax is levied by mistake of law, it is ordinarily the duty of the State, subject to any provision of law relating to such tax, to refund the tax. If refund is not made, remedy through Court is open subject to the same restriction and also to the bar of limitation under Article 96 of the Limitation Act, 1908, namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake. It is the duty of the State to investigate the facts when the mistake is brought to its notice and to make refund if the mistake is proved and the claim is made within the period of limitation. The Supreme Court followed its earlier judgment in the case of the *State of Madhya Pradesh v. Bhailal Bhai* (supra).

20. It is however contended by the counsel for the respondents that in this case there has been a delay of more than three years and according to the petitioner it came to know for the first time that by Notification No. 115/75, dated 30th April, 1975 the soap stock obtained as by-product in the oil mill and solvent extraction plant was exempt from duty but the petitioner made a claim only on 23rd October, 1982. Accordingly, even if the general law of limitation is applied, the claim was barred as the application was moved sometimes in April, 1985. It is, therefore, submitted that the Court should not exercise its discretion in favour of the petitioner. I am, however, unable to accept this contention. The petitioner was not certain even in July, 1979 that the said products were exempt from duty or not. Accordingly, the correspondence passed by and between the petitioner and/or its authorised representative and the Collector of Central Excise. By the order dated 18th May, 1982 the Collector of Central Excise intimated the petitioner as follows :-

"Under Notification No. 115/75-C.E., dated 30th April, 1975 as amended by notification No. 122/75-C.E., dated 5th May, 1975 the goods falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and manufactured in factories covered by all the industries specified in the schedule annexed to the said notification are exempt from the whole of the duty of excise leviable thereon. Since the factory of Messrs. Dulichand Shreelal, Raymond Road, Calcutta are having oil mill and solvent extraction plant, the soap stock and acid oil produced in the said factory is exempt from payment of duty leviable under Item No. 68 of the said Schedule."

21. It is thus evident that it is only on 18th May, 1982 that the petitioner came to know that the products manufactured by the petitioner was exempt from the

levy of excisable duty. Thereafter, the petitioner stopped making any payment of the duty and preferred its claim for refund on 23rd October, 1982. Therefore, the claim of the petitioner was not barred and it was preferred within six months from the date of his knowledge. If it was the case that the petitioner was certain that such products were exempt from duty, in that event the petitioner would not have gone on paying the duty. The petitioner wanted to know the correct legal position and it is only when correct legal position was communicated to the petitioner by the Collector of Central Excise that the petitioner knew for certain that such by-products are not exigible to duty. I am, therefore, of the opinion that the claim for refund of the petitioner was not barred when it was preferred on 23rd October, 1982.

22. It is contended by Mr. Roy Chowdhury that the claim of the petitioner is barred by limitation both under the Central Excises and Salt Act and/or the Rules made thereunder as well as under the general law. It is his contention that the Assistant Collector of Central Excise in his order dated 11th November, 1982 has held that the petitioner has not paid the duty under protest and as such the claim was barred having been preferred more than six months from the date of payment of duty. The payment documents do not anywhere show that the petitioner has paid under protest. Mr. Roy Chowdhury has relied on a decision of this Court in the case of *Inchek Tyres v. Union of India* reported in (1978) ELT 643. There, one of the contentions raised by revenue was that by preferring objections in respect of two consignments the assessee would not Ipso facto claim that other subsequent payments of duty were also made under protest. It was also contended that payment in respect of each bill of entry constituted separate cause of action and unless protest was made for payment in respect of each of such consignments it cannot be held that the petitioner made payment under protest within the meaning of proviso to Section 27 of the Customs Act. In that context G.N. Ray, 3. held as follows :

"It is true that the petitioner had protested against payment of customs duty in respect of 2 earlier consignments and as a matter of fact took up appropriate legal proceedings in respect of such payment and ultimately succeeded in his contention but by the said fact alone it cannot be held that the petitioner had made payment in respect of other consignments under protest. In my view, until the payment is made under protest explicitly there is no scope to infer from circumstances that the petitioner had paid the duty in respect of other consignments under protest so as to entitle the petitioner to get the benefit of the proviso to Section 27 of the Customs Act. It is not enough to proceed on the footing that there is no liability for the duty in question and because of illegal demand involuntary payment was made. In my view, it is also necessary to lodge protest in clear terms that the payment was made not only involuntarily but under protest. Involuntary payment and payment under protest are not the same thing. For imposition of unjust duty one may be compelled to make payment and such payment will then be involuntary, but every involuntary payment cannot be held payment within the meaning of proviso to Section 27 of the Customs Act."

23. It is no doubt true that the observation made by the learned Judge in that case supports the contention of Mr. Roy Chowdhury but the observations must be understood in the context in which they were made. In the Customs Act the clearance of the goods has to be made after submission of the bill of entry. Therefore, unless a protest is made in respect of each and every consignment the protest made for one consignment cannot cover the other. In that context it was said that the protest cannot be gathered from the circumstances, if there is a protest in respect of 2 consignments, it does not follow that there was protest regarding payment so far as other consignments are concerned. Under the excise law, however, the position is different. One has to go on clearing the goods upon payment of duty unless it is known to him the duty is not exigible. Only when it becomes known to him that duty is not leviable, he can then clear the goods under protest. Thus for the period 12th August, 1977 to 31st Duly, 1979 the question of payment under protest did not arise as he was not aware at all that no duty was payable on the goods at all. Whatever might have been the position before 1st August, 1979 it could not be said about the payment made after 1st August, 1979. The petitioner made the payment from 1st August, 1979 till 14th May, 1982 subject to the determination by the appropriate authority of the question whether the products were exempt from duty or not. Payment under protest in this context can only mean that payment is made provisionally subject to the determination of the question of exigibility of the duty. A provisional payment is conditional. It was not a payment once for all. Such payment was temporary in nature on the implied condition that if ultimately the petitioner is not liable to pay, it will be refunded to him. On the facts of this case, I am unable to hold that the petitioner made the payment from August, 1979 without any protest.

24. Another contention of Mr. Roy Chowdhury is that by Section 11B of the Act, specific provision has been made for claiming refund. Section 11B(5) provides that save as otherwise provided by or under the said Act, no claim for refund of any duty of excise shall be entertained. He has also referred to Section 11B(5) which is in the following terms:

"Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no Court shall have any jurisdiction in respect of such claim."

It is his contention that the Court cannot grant any relief in this case in view of specific provision of Section 11B(5). I am however, unable to accept this contention. Where the collection is made without any authority of law, the writ Court has jurisdiction to grant relief notwithstanding the procedure prescribed by the Act. The orders passed by the departmental authorities are not administrative orders. The orders passed in this case by the Assistant Collector rejecting the claim of the refund are quasi-judicial orders and their validity can

be challenged in the writ application. When the collection or levy is in violation of Article 265 of the Constitution the question arises whether the authorities who collected such money or duty should be allowed to retain the same. The consistent view of all the Courts is that the authorities cannot retain such money illegally realised. Accordingly, the petitioner can, in a writ application, ask for return of the money collected as and by way of duty or otherwise without any authority of law and in contravention of article 265 of the Constitution. This contention of Mr. Roy Chowdhury therefore, must fail.

25. It is then contended by Mr. Roy Chowdhury that the general law of limitation would not apply where the limitation has been prescribed by special law. In this case under the provisions of Section 11B of the Act the period of limitation has been prescribed for preferring the claim for refund. This cannot be overridden by the ordinary law of limitation. This contention, however, as I have already held, cannot be accepted in view of the fact that here the duty was collected unlawfully. I have also held that even if limitation applies the limitation will start from the day when the petitioner has definite information that the by-products are not exigible to duty under Tariff Item No. 68. The said definite information came only on 18th May, 1982 when the Collector of Central Excise intimated the petitioner that the by-products manufactured by the petitioner are exempt from duty. Prior to that whatever might have been the notifications the petitioner was not certain whether such notification would govern the case of the petitioner. Thus the knowledge cannot be computed from the date when the petitioner came to know about the notification that is to say on 1st August, 1979. It would be from the date when the authority competent to decide with regard to the applicability of the notification communicated that decision.

26. The other limb of this contention is that even if the general law of limitation applies the application is barred inasmuch as the petitioner discovered its mistake in July, 1979 or 1st August, 1979 when he objected to the payment of duty but no suit has been filed since then and hence the claim is barred by limitation. I have already held that the starting point of limitation is May 18, 1982. It is also his contention that in a writ application generally refund is not ordered and the party is relegated to a suit. The present writ application has been filed after 5 years. Thus in that view of the matter the petitioner is not entitled to succeed. I am unable to accept this contention. Supreme Court has nowhere laid down that the High Court is powerless in appropriate case to direct refund under Article 226 of the Constitution if such refund is otherwise due to the assessee. On the facts of this [case] the petitioner is entitled to the relief inasmuch as it has not been disputed that the duty was collected unlawfully, whether it was by mistake or otherwise. The ground on which the refund was rejected was that it was barred by limitation under the Statute. It was not and could not have been rejected on the ground that the petitioner was not entitled to refund on merits. As indicated earlier, the Collector himself has said that the petitioner is not liable to pay any duty on the products as mentioned hereinabove. The extra-ordinary remedy under Article 226 of the Constitution is

therefore available to the petitioner on the facts of this case.

28. The next contention of Mr. Roy Chowdhury is that the petitioner having followed the statutory remedy provided under the Act, cannot invoke the jurisdiction of this Court. The claim for refund was not admitted. It was rejected on the ground that conditions prescribed by the statute were not fulfilled. In such a case it is not open to the petitioner to contend that the petitioner has a right of refund independent of statute. This contention again cannot be accepted. If the authorities concerned decide jurisdictional facts erroneously, the Court can interfere in such a case and give relief in a deserving case.

29. It is further contended that the decision of the Assistant Collector is not erroneous inasmuch as he has found that the petitioner did not fulfil the conditions of refund. In a sense the question of limitation is a question which pertains to the jurisdiction of the concerned officer. If it is erroneously held that the claim is barred by limitation, it is an error of law pertaining to the jurisdiction which can be corrected.

30. The last but not the least contention of Mr. Roy Chowdhury which requires consideration is that the petitioner, although paid the duty, had collected the full amount of such duty from the public. Such excise duty paid by the petitioner is included in the sale price. Thus if now excise duty paid is refunded to the petitioner it will amount to unjust enrichment and/or double payment to the petitioner. If any amount is refundable, it has to be refunded to the customers of the petitioner who purchased the goods from the petitioner. In this connection, several decisions have been relied on by the respondents. The first decision cited by Mr. Roy Chowdhury is in the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, . In that case the dealers had paid market fees at the increased rate of 3% (raised from the original 2%) under Haryana Act. The excess of 1% over the original rate having been declared ultra vires, [by] the decision of Supreme Court became refundable to the respective dealers from whom they were recovered by the marketing committee concerned. The demand for refund of the excess amount illegally recovered from them not having been complied with they filed writ applications under Article 32 and Article 226 of the Constitution for a direction to that effect to the marketing committees concerned. The marketing committee contended that although refund of the excess collection might be legally due to the dealers, many of them in turn recovered the excess percentage from the next purchaser. Supreme Court in that case held as follows:-

"Many dealers challenged the levies as unconstitutional, and this Court, in a series of appeals, C.A. No. 1083 of 1977, etc., Kewal Krishan Puri and Others Vs. State of Punjab and Another, ruled that the excess of 1% over the original rate of 2% was ultra vires. This cast a consequential liability on the market committees to refund the illegal portion. They were not so ordered probably because they could not straightway be quantified. The petitioners who had, under mistake, paid larger sums which, after the decision of this Court holding the levy illegal,

have become refundable, demand a direction to that effect to the market committees concerned. There cannot be any dispute about the obligation or the amount since the market committees have accounts of collections and are willing to disgorge the excess sums. Indeed, if they file suits within the limitation period, decrees must surely follow. What the period of limitation is and whether Article 226 will apply are moot as is evident from the High Court's judgment, but we are not called upon to pronounce on either point in the view we take. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy" since the root principle of law married to justice is *ubi fits ibi remedium*."

"The counsel for the market committees pointed out that although refund of excess collections might be legally due to the traders many of the traders had themselves recovered this excess percentage from the next purchasers. So much so, these tiny tittles if they are to return to the original payers, should revert to the next purchasers themselves. The traders who are the petitioners have no more right to keep such small sums than the market committees themselves. To the extent to which the traders had paid out of their own, of course they were entitled to keep them, but not where they had, in turn, collected from elsewhere. It would be hard to leave every agriculturist to file a suit or other legal proceeding for recovery of negligible sums which cumulatively amount to colossal amounts. Many a little makes a mickle."

In *Electric Lamp (India) Private Ltd. v. Collector of Central Excise, Calcutta* reported in (1978) ELT 84 Cal it has been held :

"Admittedly the petitioner had already collected the excise duty alleged to have been paid in excess by mistake, from its alleged wholesale dealer and as such the petitioner cannot be allowed to have an unjust enrichment by claiming again refund of the same amount. This unjust enrichment amounts to fraud and principles of waiver and acquiescence could not apply."

31. Similar view has been taken by A.K. Mukherjee, J. in *Hindustan Pilkington Glass Works Ltd. v. Superintendent, Central Excise, Asansol*, reported in (1978) ELT 229 wherein it has been laid down as follows :

"In *Ogale Glass Works v. Union of India* 1975 CenCus 115 before the Division Bench of the Maharashtra High Court a similar question arose; where a person has paid the tax under a mistake whether he was entitled to get it back, where the Court found that the assessment was void. In that case the Division Bench observed that justice did not lie on the side of the petitioner and that the Court would be doing justice in ordering the respondent to refund the amount of Rs. 12 lakhs to the petitioner when, to begin with that money never came from the

petitioner's pocket. It is true that the respondents may not have legal right to retain that money, but in the circumstances of the case justice does not require that this money should be transferred from the respondents (who have no right to it), to the petitioner who also have no right to it."

32. The decision of Electric Lamp (supra) was rendered long before the judgment of the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, where 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 100 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."

33. The decision in Hindustan Pilkington Glass Works Ltd. (supra) is based on the judgment of the Bombay High Court in Ogale Glass Works Ltd. v. Union of India (supra). This decision (Ogale Glass Works) was considered by the Division Bench of the Bombay High Court in Maharashtra Vegetable Products Pvt. Ltd. v. Union of India (supra) reported in (1981) ELT 468 where it was held that in Ogale Glass Works the Court declined to grant any relief on the ground of laches, not on the ground of unjust enrichment. The Division Bench observed at page 473 thus :

"We are unable to read the decision in Cawasji's case as an authority for the proposition that in every case, where the manufacturer who has paid the excise duty and has passed it on to the consumers and has recovered it, the claim to recover monies from the Government should be rejected."

The Division Bench after carefully analysing Cawasji's case observed at page 474 thus :

"It appears from the judgment of the Supreme Court that the fact that the appellants had not given any reasons as to why" that claim was not made in the earlier writ petition heavily weighed with the Supreme Court when they declined to interfere with the decision of the High Court. We are, therefore, unable to accept the contention advanced on behalf of the Union of India that the petitioners are not entitled to any refund as the levy has already been passed on to the consumer."

The ground of unjust enrichment as a defence against the claim of restitution was rightly rejected in Maharashtra Vegetable Products Pvt. Ltd. This ground of unjust enrichment has 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. It therefore follows that a duty or money collected without the authority of law thus illegally,

is refundable even if the incidence of tax has been passed on to the consumers and recovered by the assessee.

34. The further contention of Mr. Roy Choudhury is that in view of the principles laid down by the Supreme Court in Shiv Shankar Dal Mills (*supra*), the decision in Cawasji's case would no longer hold good. Shiv Shankar Dal Mills is not a case of claim for refund of tax and the violation of Article 265 of the Constitution was not an issue there. As a matter of fact the procedure adopted by the Supreme Court for disbursement of the monies was by consent of the parties. The decision of the Supreme Court in Cawasji's case was not referred to in Shiv Shankar Dal Mills., Shiv Shankar Dal Mills is not the authority for the proposition that the claim for refund on the ground that the assessee has recovered the duty from the ultimate consumers by passing on the incidence of tax to them (*sic*). On the other hand, I have already referred to the observation of the Supreme Court in Shiv Shankar Dal Mills elsewhere in this judgment which lays down that the public bodies have the obligation to refund money that was illegally collected.

35. The question is who should be entitled to such refund.

36. Mr. Roy Choudhury has contended that in view of the provisions of Section 11B it is clear that it is the ultimate buyer who would be entitled to remission or refund of the excise duty under mistake of law and not the manufacturer. He has also relied on a judgment of the Gujarat High Court in the case of Union of India and Ors. v. Ahmedabad Manufacturing & Calico Printing Co. Ltd. and Ors. reported in (1984) 17 ELT 246 (Guj.). The Division Bench of the Gujarat High Court held that the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric. It is true that the mills initially paid the excise duty on blended yarn but they did not bear its burden and threw it on their customers to whom the finished product, namely, art silk was sold. In the light of these factors, it can be said that the loss or injury was not caused to the mills but to the ultimate buyers of fabric to whom the burden of excise duty paid on blended yarn has been passed on. Therefore, if anybody is entitled to restitution, it is the buyer of the fabric and not the mills. Before the Gujarat High Court the decision of the Supreme Court in Cawasji's case was referred to in another context. It was urged that in view of the decision of the Supreme Court in Cawasji's case even if the mills had collected the excise duty from the buyers they cannot be prevented from recovering thereof the revenue. It was also urged that in view of the said decision of the Supreme Court it was not necessary for the mills to prove any loss or injury. The Gujarat High Court observed that the question whether loss or injury while claiming restitution u/s 72 of the Contract Act has to be proved was not raised before the Supreme Court and accordingly the Supreme Court did not express any opinion thereon. In that view of the matter the Gujarat High Court rejected the contention that the mills are not required to prove injury or loss to them. The Gujarat High Court did not go into the other question as (to) whether the manufacturer is entitled to restitution of the collection was illegal even if the incidence of the tax was passed on to the

ultimate consumers.

37. Other High Courts have consistently taken the view 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 proceedings 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 and Co. (supra)* held that there is no provision under which the Court could deny refund of tax even if a person 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.

38. In the case of *Associated Bearing Company Limited v. Union of India* reported in (1980) ELT 415 the Division Bench of the Bombay High Court following the decision in the case of *D. Cawasji & Co. (supra)* has held that there is no provision in the central excise law under which a manufacturer can be denied the refund of duty illegally collected from him even though he had recovered it from the customer and had no intention to refund it to them. Similar view was also taken by Division Bench of the Rajasthan High Court in the case of *Prem Cables Pvt. Ltd. v. Assistant Collector (Principal Appraiser), Customs, Bombay*, reported in (1981) ELT 440. The Division Bench after considering the various decisions inter alia a decision of the Supreme Court in *Bhailal Bhai (supra)* held that the consequential relief for the refund of illegally collected amount can be granted by the Court in exercise of its jurisdiction under Article 226 of the Constitution.

39. This Court in the case of *Union Carbide Co. Ltd. v. Assistant Collector of Central Excise* reported in (1978) ELT (180) held that good fiscal administration enjoins that all lawful taxes should be properly collected and taxes which are not due if realised by the State should be refunded. The theory of unjust enrichment therefore cannot be invoked.

40. 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. The refund of duty wrongly paid 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.

41. The Division Bench of this Court in the case of *Kharchah Company Ltd. v. Union of India and Ors.* reported in (1981) 1 CLJ 433 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 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 appear to enunciate the true legal principle which follows from their earlier decisions referred to hereinbefore."

In the case of 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 and 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 does not apply to the claim of the refund. However, 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.

42. For the reasons aforesaid the petitioner is entitled to the refund of the amounts collected by the respondents inasmuch as such collection was without any authority of law.

43. 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 1(1979) ELT (181) 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 reported in (1979) ELT 546.

44. For the reasons aforesaid this application succeeds. The respondents are directed to refund the sums of Rs. 2,18,140.71 and Rs. 51,859.29 with interest

at the rate of 12 per cent per annum from the date of collection till the date of payment.

45. Such refund shall be made within three weeks after the service of the plain copy of the operative part of this judgment.

46. Stay asked for is refused.