

(1986) 08 MAD CK 0021

In the Madras High Court

Case No : Writ Petition No. 11428 of 1986

Hi Life Tapes P. Ltd.

APPELLANT

Vs

Collector of Central Excise and Others

RESPONDENT

Date of Decision : 27-08-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 11

Central Excises and Salt Act, 1944 — Section 11A, 11B, 2, 40

Citation : (1987) 13 ECC 326 : (1986) 26 ELT 935

Hon'ble Judges : Venkataswami, J

Bench : Single Bench

Advocate : R.L. Ramani and S. Subbaraya Aiyer, for the Appellant; T. Somasundaram, A.C.G.S.C., for the Respondent

Judgement

1. Pursuant to the notice of motion issued in the morning, Mr. T. Somasundaram, learned counsel for the respondents appeared. By consent, the

writ petition itself is taken up for final disposal and disposed of accordingly.

2. The grievance of the petitioner is that in the appeal pending before the first respondent against the orders of the second respondent, an

application for stay was filed and in spite of reminders, the first respondent had not taken up the said application and passed orders thereon. The

learned counsel for the petitioner also brought to my notice the trade notice dated 16.4.1985 issued by the Department of Central Excise which

reads as follows :

It has been represented that coercive action to realise arrears from the Assessee is being taken before the expiry of the statutory period for filing

appeal. It is clarified that no steps to recover disputed dues will be taken till one month after expiry of the period of appeal, that is to say, upto four

months from the date of the adjudication order"".

3. Placing reliance on the above trade notice, the learned counsel for the petitioner contends that the petitioner is entitled to the order of stay

pending disposal of his appeal by the Appellate Authority, namely, the first respondent. The learned counsel for the respondents submitted that the

first respondent can be directed to dispose of the stay petition filed by the petitioner within three weeks from the date of receipt of a copy of this

order and, in the meanwhile, stay of operation of the order of the second respondent can be granted. But the learned counsel for the petitioner

wants a further direction to be given to the first respondent to dispose of the appeal itself within a specified time which is opposed by the learned

counsel for the respondents.

4. After hearing the learned counsel on both sides, I consider that for the respondent the grievance of the petitioner can be redressed by directing

the first respondent to dispose of the stay petition pending on his file. Accordingly the first respondent is directed to dispose of the stay petition

filed by the petitioner and pending on his file within three weeks from the date of receipt of a copy of this order. Meanwhile, the order passed by

the second respondent will be kept in abeyance. The writ petition is ordered accordingly. No costs.

27. Neither the Assistant Collector to his orders dated 11th July, 1978 and October 6, 1977 or the Government of India in the said show cause

notice dated 10th September, 1981 nor the Assistant Collector of Central Excise who affirmed the affidavit in this proceeding mentioned about the

processes undertaken by the petitioner by which the said Cast rolls are allegedly converted into identifiable machine parts. The bare allegation is

that the said cast rolls were delivered from the factory of the petitioner in finished condition i.e. after machining, grinding and polishing by which the

said cast rolls acquired identity as machine parts. As indicated earlier and as found as a fact by the Appellate Collector in the case referred to

above that the said processes are undertaken simply to make the castings marketable. The Steel Plants have also corroborated the said fact. There

is thus no material whatsoever on record nor any evidence has been adduced in support of the contention that any identifiable machine part is

manufactured at the factory of the petitioner.

28. In issuing the impugned notice, the respondents proceeded on assumption of fact. The assumption is that by the said machining and polishing

etc. a distinct shape and character is given to the said products. This assumption has no basis. The product acquires the shape as and when it

comes out of the mould. The cast rolls when taken out of the mould emerge in the shape, size and form of the roll in which it was cast.

29. Item No. 25 of the First Schedule to the said Act covers, inter alia, iron cast in any shape or size. Similarly Item No. 26AA of the First

Schedule to the said Act covers all steel castings. There is absolutely no restriction whatsoever in the said item Nos. 25 and 26AA that the

castings, in order to be covered by the said items, must not be subjected to any process or that they should be rough castings as they came out of

the mould. If a product is iron casting, the same would be covered by the item No. 25 alone and if a product is still casting the same would be

covered by the item No. 26AA alone. The fact that such casting is capable of being used as a machine part does not alter its basic character as

castings. Item Nos. 25 and 26AA do not provide that castings which can be used as machine parts would not be castings under the said Tariff

Items. On the other hand the said items seek to include castings in any shape or form. The cast iron and cast steel rolls are admittedly iron castings

and steel castings respectively but according to the respondent No. 1 after machining and polishing it ceases to be so and acquires a distinctive

shape and character as machine parts. The said products cannot be taken out of the purview of the Item Nos. 25 and 26AA as castings even if

any machining is done. The basic fact is that the said cast iron rolls and cast steel rolls are made by the process of casting and the same are iron

castings and steel castings which can be covered only by item Nos. 25 and 26AA respectively. When a particular product comes under a specific

item of the Tariff Schedule, it cannot at the same time fall under the residuary item 68 of the Tariff Schedule. A product which is specifically made

chargeable under a distinct head cannot be brought to a charge under a different head in lieu of, or in addition to, being charged under a specific

head. The charge under the specific head is obligatory on the Department which has no option in the matter. The effect of the tariff schedule is to

classify the product under different heads according to the character of the product for the purpose of duty. Even if the assessee has shown a

product under a wrong head, even then the Department cannot levy duty on the basis of such admission. In any event, if a case appears to fall

within either of the two heads, it is the right of the assessee to claim that he should be taxed under one which leaves him with a lighter burden. It is

now well settled that when a specific head covers the product, the residuary head cannot be called in aid. Item 68 of the Tariff Schedule does not

come into operation until the preceding heads are excluded. This residuary head can be resorted to only if none of the specific heads is applicable

to the product.

30. Admittedly, prior to finishing, the said cast iron rolls and cast steel rolls are covered by Item Nos. 25 and 26AA respectively. The machining

and/or finishing of the said rolls does not and cannot change the said product so as to make them altogether a new and different product. By

machining and finishing the basis product is not changed. What is machined or finished is the product already in existence. When the castings are

made they become distinct products as cast. Whether one casts a machine part, pipe, man-hole cover or railway sleeper, it is the casting that

counts. The already cast material cannot become a different and distinct material by finishing or machining. Accordingly the castings do not cease

to be so by machining or finishing to goods different from that cast comes into existence. Item No. 68 of the First Schedule accordingly does not

and cannot have any application. The said products are classifiable only under Item No. 25 or Item No. 26AA as the case may be and there can

be no question of the same being again covered after machining by Item No. 68 which is a residuary item

31. The view I have taken is supported by the decision of the Patna High Court in the case of Tata Yodogwa Limited v. The Assistant Collector of

Central Excise reported in 1983 ELT 17. There the question before the Patna High Court was whether the Steel Castings are liable to duty under

Item 26AA(V) of Central Excise Tariff or under Item 68. Patna High Court was of the view that merely because some machining or polishing is

being done on the products, the basic character of such products as castings does not alter. It was further held in the said decision that item No.

26AA does not speak about semi-finished or finished castings and that since the manufacture is not complete until all the processes incidental or

ancillary to the completion of the manufacture have been carried out, it cannot be said that semi-finished castings are excisable as Castings and

after clearing, machining and polishing the same are again liable to duty under item No. 68.

32. The Patna High Court observed thus:

According to the appellate authority, if at the time of casting the end use of that casting as part of a certain machinery is already known, duty is

payable as identifiable machine part. If that is the position in law, the Steel Casting of the petitioner are excisable at one point only and under Item

68. But that is not the case of the respondents. Moreover as laid down by the Supreme Court in Dunlop's case (Supra) if the goods can be clearly

classified under a particular tariff item then it must be classified under that item and the ultimate use of the goods cannot be taken note of for the

purpose of its classification. The reasoning of the appellate authority cannot be accepted.

It was contended by Mr. Joshi that under Item 26AA(V) all other steel castings not otherwise specified in item 26AA(i) to (iv) are to be

classified. According to him this item does not speak about crude steel casting or even finished steel casting and even if at the end of the processing

by the petitioner it remains steel casting, the respondents cannot taken recourse to item 68 for the purpose of duty on the finished steel casting. This

submission was made by Mr. Joshi with reference to Annexure 1. From Annexure "1" it appears that respondent No. 1 is of the view that semi-

finished castings after cleaning, machining, polishing becomes excisable under Item 68. There is no warrant for this reasoning. Item 26AA(V) does

not speak about semi-finished and finished castings. In considering a fiscal statute, the language used in the statute cannot be allowed to be strained

in order to hold a subject liable to tax State of Punjab Vs. Jullunder Vegetables Syndicate, .

According to the definition "manufacture" in the Act, as interpreted in Hindustan General Electrical Corporation Ltd. (supra), the manufacture of

goods is not complete until all the processes incidental or ancillary to have been completed. According to the petitioners it manufacture goods

according to the specifications and designs of individual customers and what is excisable is when the goods is finished after completion of all

processes according to those specifications and designs. It is in evidence that the petitioners for the purpose of castings of molten steel pours it into

moulds of different types depending upon individual customer's ultimate requirements as per its drawing, designs and specifications. It is not the

case of the respondents that the molten steel is poured into one particular type of moulds and from these castings thereafter rolls of different

designs, drawing and specifications according to customers' order are manufactured. Had that been the case, perhaps duty would have been

payable when the casting was taken out of the mould. In this case the whole process from the start to the finish must be held to be "manufactured"

within the meaning of the Act. At no stage the goods become anything other than an item to be classified under Item to be classified under Item

26AA(V). Since there is no difficulty in this case for classifying the goods in question, the respondents cannot take recourse to the residuary item

i.e. Item 68 as has been laid down by the Supreme Court in Dunlop's case (Supra). For the reasons aforesaid, it must be held that the goods in

question manufactured by the petitioners is steel castings excisable under Item 26AA(V) and at no stage it becomes excisable under Item 68.

33. This decision fully supports the contention of the petitioner. Mr. Roy Chowdhury, the learned Advocate for the respondents has submitted that

SLP has been filed before the Supreme Court against the said judgment of the Patna High Court. He has submitted that it is a question of fact

whether the end-product as commercially known falls under which item. It is the view of the Central Government that the end-product is really a

machine part and is not specified in Items 25 or 26AA. Patna decision has not taken all these factors into consideration nor had it sufficient

evidence on record to make the said finding. It appears that the said SLP was filed in 1983 being SLP No. 9480/83. But the Supreme Court did

not grant any stay as yet of the said judgment. Patna High Court considered the nature of the processes and held that steel castings would come

under Item 26AA. Mr. Roy Choudhury has not indicated what evidence the Patna High Court failed to take into account. As indicated earlier

primary facts regarding the processes carried on by the petitioner are not in dispute nor the certificates of the Steel Plants considered by the

Tribunal in similar cases have been assented.

34. Another contention of Mr. Roy Chowdhury at this stage must be disposed of. It is his contention that in view of the amendment to provisions

of Central Excise Act, the provisional application would be decided by the Tribunal to whom the proceedings must be deemed to have been

transferred from 11th October, 1982. It will be open to the petitioner to agitate before the Tribunal to decide the jurisdiction and validity of the

Notice dated 10th September, 1981. I am, however, unable to accept this contention for more than one reason. Firstly, there is already a decision

of the Patna High Court on the identical question. Secondly, there are several decisions of the Tribunal taking the same view on this question on

fact and law. It will be, therefore, an idle formality to ask the petitioner to go before the Tribunal and then again come to this Court. I have already

held that there are no materials which would justify the issuance of the show cause notice in this case. It was faintly contended that the Tribunal is

the fact finding authority and the processes undertaken by the petitioner have to be determined by the Tribunal on the facts of this case. In other

words, the contention is that the actual manufacturing processes undertaken by the petitioner is a question of fact and that can only be gone into by

the Tribunal and accordingly, the Tribunal should decide this question. I am, however, unable to accept this contention. As indicated earlier, the

respondents did not say anywhere that what are the processes undertaken by the petitioner in manufacturing the cast rolls. On the other hand, the

processes described by the petitioner have not been disputed. There is, therefore, no question of finding out the actual manufacturing processes

undertaken by the petitioner. If it is contended that it is a question of fact, in that event, the finding given by the Tribunal in different cases against

the Excise Authority would be binding on them. There cannot be different processes undertaken in the manufacture of cast iron or cast steel rolls

by different manufacturers. The steel plants who are consumers of the products manufactured by the petitioner and other similar manufacturers

have also categorically stated the process undertaken by them for the purpose of making the casting into identifiable machine parts.

35. My attention has been drawn to several decision of the Tribunal where the Tribunal found that cast iron rolls have no doubt undergone some

machining and polishing after these are taken out of the moulds but such processing are incidental and ancillary to the completion of the casting iron

in any other shape or size and for the purpose of converting cast iron into identifiable machine parts certain other processes of manufacturing are still required to be undertaken. Only after completion of further manufacturing process the cast iron rolls can be treated as identifiable machine parts. One of the said decisions is in the case of Jamshedpur Engineering & Machine Manufacturing Company Ltd. v. Collector of Central Excise reported in 1984 (4) Excise Tribunal Reporter p. 1984 ELT 175. In that case Tribunal referred to and relied on an earlier decision of the Tribunal in Alloy & Engineering, Trichur v. Collector of Central Excise, Cochin, reported in (1984) 3 E.T.R. 527 and the judgment of the Patna High Court in Tata Yadogwa Ltd. (Supra). There the Tribunal in arriving at its finding relied on the certificates issued by Bharat Engineering Co. Ltd., Iron Steel Products Ltd., Bhilai Steel Plant etc. inter alia, to the effect that cast iron or cast steel supplied by the appellant therein were in incomplete condition and not completely finished products for direct use in their mills, those rolls cannot be considered as identifiable machine parts.

36. It is very significant that the Customs Department contended before the Tribunal in Tata Engineering Locomotive Company Limited v.

Collector of Customs reported in 1983 E.L.T. 1122 that the processes such as annealing, straightening, buffing, rough machining, surface

protection by metallic or non-metallic coatings etc. were not such as would convert castings into another identifiable article and that the castings still

remained only the castings even after the said processes.

37. In that case the question before the Tribunal was levy of additional duty on casting in semi-finished condition under item 25 of the Central

Excise Tariff. Under the Customs Tariff Act, 1975 an additional duty equal to excise duty, is levied, Section 3 of the Customs Tariff Act provides

that any article which is imported into India shall, in addition, be liable to a duty, (referred to as the additional duty) equal to the excise duty for the

time being leviable on a like article, if produced or manufactured in India. In that case before the Tribunal the Customs Department raised the same

contention as has been raised before me in this writ application.

38. The Tribunal held as follows:

During the hearing before us today, the appellants maintained that the subject goods, after being cast, underwent further processes of annealing,

straightening, buffing and rough machining and surface protection by metallic on non-metallic coatings in the foreign country before being shipped to

India. They stated that after these processes, the goods ceased to be mere iron cast in any shape or size and became semi-finished articles which

were not covered by item 25 CET. Since there was no other item of the CET covering such goods at the material time, the goods were free from

countervailing duty. The Department's representative stated that the further processes which the goods underwent in the foreign country were not

such as would convert that into another identifiable articles and that the goods still remained iron castings only. He added that the expression ""iron

cast in any other shape or size"", being a general one, would include all varieties of iron castings (ECR 1983-65 D-BOM).

We have carefully considered the matter. We agree with the Department's representative that the further processes mentioned by the appellants

which the subject goods reportedly undergone in the foreign country are such as would not convert iron castings into another identifiable article and

these processes are in the nature of cleaning and strengthening of the iron castings. The machining which they undergo is only rough machining to

give a smooth surface. The real processing or machining which would convert the iron casting into motor vehicle parts takes place after importation

of the castings into India. In view of these facts, we hold that the subject goods were covered by Item 25 CET and were correctly charged to

countervailing duty thereunder.

39. Thus the Casting under Tariff item No. 25 cannot have two different connotations - one while construed for the purpose of levy of additional

customs duty, other for the purpose of levy of excise duty. As a matter of fact it is the same article which calls for determination under both the

Acts. But basically the question is whether excise duty was leviable on the said article under Tariff Item No. 25 or not ? The Revenue cannot take

two different stands in respect of the same article.

40. A side argument of the respondents is that the Revisional Jurisdiction has since stood transferred to the Tribunal and it is for the Tribunal to

decide the question and the Court should not interfere at this stage. I have already referred to the decision of the Tribunal where the Tribunal have

uniformly accepted the contention which the petitioner as well as the Customs

Authorities raised. In that view of the matter even this case would have been transferred to the Tribunal, the Tribunal could not have decided in a different way as the question involved is identical.

41. Mr. Roy Chowdhury, learned counsel for the respondents however, has contended that the Tribunal is a quasi-judicial authority. Its earlier decision cannot be resjudicata or a precedent for subsequent decision but it is an important factor to be seriously taken into consideration and the Tribunal can differ on cogent grounds. There is no dispute on this proposition. The Tribunal is not a Court, therefore, the doctrine of resjudicata does not apply to its decision. But although the rule of resjudicata may not apply, the Tribunal cannot reopen a question previously decided. Only if fresh fact comes to light that may clothe the Tribunal to come to conclusion different from the one previously reached. The Tribunal being a quasi-judicial authority cannot arbitrarily depart from the finding reached after considering material evidence. It is not the case of the respondents that in the decisions rendered by the Tribunal, the Tribunal did not take into account the material evidence. Nor has it been suggested what new materials should have been taken into consideration in this case. This argument, therefore, has no substance.

42. It is then contended by Mr. Roy Chowdhury that the petitioner in effect has challenged the classification of the products and no writ would lie in such a case. He has submitted that test has been laid down by the Supreme Court to determine whether a product is liable to duty and what is manufactured which would depend upon the facts of each case and the matter has to be heard and considered by the Tribunal. He has relied on the decisions of the Supreme Court in Empire Industries Limited and Others Vs. Union of India and Others, and Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, in support of his contention that etymologically the word "manufacture" would cover the case of transformation and whether by such transformation a different commercial commodity having a distinct character, use and name and commercially known as such has emerged or not is a question depending upon the facts and circumstances of the case. Accordingly this is a question which should be decided by the Tribunal. I am unable to accept the contention of Mr. Roy Chowdhury. Firstly in Empire Industries

Ltd. (Supra) the Supreme Court was considering the extended definition of manufacture as given in Section 2(f)(v) of the said Act by the Central

Excises & Salt and Additional Duties of Excise (Amendment) Act, 1980. The effect of various amendments inserted by the Amendment Act was

to include the processes of bleaching, dyeing and printing etc. within the definition of the word "manufacture". Supreme Court held that the concept

of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making ""small repair"" and that is

permissible mode of legislation. In that case there was no challenge to the classification of any product. It Khandelwal Metal & Engineering Works

(supra) the question was with regard to the interpretation of the Customs Tariff Act, 1975. There again the Supreme Court was not concerned

with the question of jurisdiction of the Court to decide the validity of the classification of the product.

43. The question, however, in this case is whether the Central Excise Authorities have any jurisdiction to levy duty on the cast rolls at two stages,

firstly under item 25 or 26AA when the castings are taken of the moulds, then again under item 68 after polishing and finishing work is done. The

initiation of the proceedings for classifying the cast iron rolls under item 68 is also under challenge. It has been uniformly held by the different High

Courts that if the classification sought to be made by the Department is perverse or the view adopted by the Department is unreasonable, the High

Court can interfere under Article 226 of the Constitution. Several decisions have been cited from the Bar.

44. In Alkali and Chemical Corporation of India Limited v. Union of India and others reported in 1981 E.L.T. 22 Delhi High Court held that if the

Department had not adopted any reasonable view in interpreting the entries of Central Excise Tariff or the views of the Department were wholly

perverse and against their own interpretation and stand, the High Court can interfere under Article 226 of the Constitution.

45. In Techni-Glass Limited v. Union of India and others reported in 1981 E.L.T. 147 Bombay High Court held that it is well settled that if

adjudicating authority in customs or excise matters have preferred one of the possible meanings or placed a product in one category which could

perhaps be better placed in another, the court should not ordinarily interfere. But, if the adjudicating authorities have given a strained meaning to an

expression used in ordinary parlance or acted in a manner not warranted by settled rules of interpretation then the court has not merely the right to interfere but also a duty.

46. In *Navin Chamanlal Sutaria v. Union of India and others* reported in 1981 E.L.T. 913 Bombay High Court held that if the departmental

authorities did not go to the root of the matter before deciding the classification of a product, it clearly amounts to non-application of mind which

merits interference by the High Court under Article 226 of the Constitution.

47. In the case of *T.I. Miller Ltd. v. Union of India & Anr.* reported in 1984 ECR 1977 Madras High Court held that in a matter of classification,

the court has always adopted the principle that under writ jurisdiction it could examine the correctness of a particular classification. Right from the

earliest days, the courts were of the view that the classification of a particular item whether perverse or not is a matter which falls within the writ

jurisdiction.

48. In the case of *Union of India and Others Vs. T.S.R. and Co.*, the Division Bench of the Madras High Court held that if the classification is

found to be arbitrary and unreasonable so as to make it perverse the Court acting under Article 226 of the Constitution will be justified in interfering

with such classification.

49. Supreme Court in the case of *Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan & Others* reported in 1980 E.L.T. 383 held that if

the question relates to the construction of a Tariff Item, the matter was of substantial importance and not a question of fact and therefore, there was

a sufficient justification for the Supreme Court to entertain the appeals against it under their civil appellate jurisdiction.

50. The Supreme Court observed : ""Finally, it is urged by Shri Sinha that the question whether the rayon tyre cord fabric falls within the expression

rayon fabrics"" is a question of fact and the assessing authority, the appellate authority and the Revenue Board are all agreed that it cannot be

classified as a rayon fabric and, therefore, this Court should not interfere in these appeals. It is also pointed out that u/s 15 of the Rajasthan Sales

Tax Act a proceeding by way of reference is available to merits, should exercise no wider jurisdiction than that available to it if it had entertained a

reference. We are unable to agree that the question is one of fact. It is a

question which concerns the construction of Item 22 of the Schedule to the Additional Duties of Excise (Goods of Special Importance) Act by that item it is exempt from sales tax and there is no jurisdiction in the sales tax authorities to assess the appellants on its turnover. The question is one of substantial importance, and having regard to the circumstances there is good reason for entertaining the appeals and deciding them on the merits.

51. In the case of State of U.P. and Others Vs. Indian Hume Pipe Co. Ltd., the Supreme Court observed : ""Lastly, it was feebly argued by Mr.

Manchanda that the High Court ought not to have entertained the writ petition and should have allowed the assessee to avail of the remedies

provided to him under the U.P. Sales Tax Act, particularly when question of fact had to be determined. In the instant case, the question as to what

is the true connotation of the words ""sanitary fittings"" and whether the hume pipes manufactured and sold by the respondent were sanitary fittings

within the meaning of that expression was a question of law and since the entire material on the basis of which this question could be determined

was placed before the Sales Tax Officer and it pointed in one and only one direction, namely, that the hume pipes were not sanitary fittings and

there was nothing to show otherwise, the High Court was justified in entertaining the writ petition. Moreover, there is no rule of law that the High

Court should not entertain a writ petition where an alternative remedy is available to a party. It is always a matter of discretion with the Court and if

the discretion has been exercised by the High Court not unreasonable or perversely, it is the settled practice of this Court not to interfere with the

exercise of discretion by the High Court. The High Court in the present case entertained the writ petition and decided the question of law arising in

it and in our opinion rightly. In these circumstances, therefore, we would not be justified in the interest of justice in interfering in our jurisdiction

under Article 136 of the Constitution to quash the order of this High Court merely on this ground after having found that the order is legally

correct.

52. The facts are not in dispute in this case. The processes undertaken by the petitioner have been set out hereinbefore. The views taken by the

Tribunals on fact after considering certificates of the Steel Plants have also been considered. The Patna High Court on the identical question held

that the interpretation sought to be placed by the respondents on the scope of Item 25 and 26AA is erroneous. This Court in such a case has

jurisdiction to entertain the writ application. It is essentially a question of law as to whether cast rolls would come under Item 25 and Item 26AA or

Item 68. Accordingly the contention of the respondents has no substance and must fail.

53. The last but not the least contention of Mr. Roy Chowdhury which requires consideration is that the petitioner although paid the duty, has

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 learned Advocates.

54. Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, 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 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 reasons, it is impracticable to do so.

55. Bombay High Court in Maharashtra Vegetable Products Pvt. Ltd. v. Union of India reported in 1981 E.L.T. 468 :

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.

56. 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 reason 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.

57. 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 E.L.T. 531. Leukoplast 1983 E.L.T. 2106 and Chemicals & Fibres, 1982 E.L.T. 917. It therefore follows that 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.

58. Mr. Roy Chowdhury 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 omission or refund of the excise duty under mistake of law and not the manufacturer. Most of the 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 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.

59. In the case of Associated Bearing Company Limited v. Union of India reported in 1980 E.L.T. 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 had recovered it from the customer and had no intention to refund it to them. Similar view was also taken by the 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 E.L.T. 440. The Division Bench after considering the various decisions, inter alia, a decision of the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others, 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.

60. In Mahindra and Mahindra Limited v. Union of India and Others reported in 1984 E.L.T. 262 Bombay High Court held that the State is under an obligation to refund monies which have been recovered without authority of law. Merely because the extra duty has been collected from the consumers and refund would result in unjust enrichment of the manufacturer a refund cannot be denied to the petitioners except in exceptional circumstances if the Court strongly considers it unjust to do so.

61. This Court in the case of Union Carbide Co. Ltd. v. Assistant Collector of Central Excise reported in 1978 E.L.T. 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.

62. The Madras High Court in the case of Soft Beverages (Pvt) Ltd. Madurai v. Union of India and another reported in 1982 E.L.T. 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 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.

63. The Division Bench of this Court in the case of Kharda Company Ltd. v. Union

of India & Ors. reported in (1981) 1 CLJ 433 1983 E.L.T.

2159 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 this

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.

64. 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 inadvertance, 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

under an obligation to return the excess duty collected 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.

65. In any even on the facts of this case there cannot be any question of any unjust enrichment of the petitioner. The ground of refund of the

amounts collected without any authority of law is only consequential to the order passed by the Appellate Collector on 30th April, 1981 quashing

the orders made by the Assistant Collector on 6th October, 1977 and July 11, 1978. It is not a case that excise duty is payable by the

manufacturer. If there is a short levy of duty it is the manufacturer who would be

liable to pay the same on demand being raised by the Central Excise Authority u/s 11A of the said Act. In such a case, Central Excise Authority will not consider whether the manufacturer would be entitled to realise the short levied duty subsequently from the customers. According to the Excise Authorities this is not a relevant consideration in demanding short levied duty. By the time such duty is demanded the manufacturers may have sold the goods and they cannot realise it from the customers.

This hardship has not been a ground for not imposing the burden on the manufacturer. If this is an irrelevant consideration, on parity of reasoning if there is an excess payment it is the manufacturer who shall be entitled to refund u/s 11B of the said Act. It is immaterial whether the customers of the manufacturer had already paid as and by way of consideration any excise duty included in the price for sale of the goods. This cannot in any way affect the rights and liabilities of the manufacturer vis-a-vis of Central Excise Authority. The Central Excise Authority cannot proceed on two different standards one in asking the manufacturer to pay the duty short levied and in refusing to grant refund to the manufacturer duty collected in excess. If the collection has been made without any authority of law, the respondents cannot retain the same and are bound to refund to the manufacturers from whom such duty had been realised. If the orders are set aside being illegal or void all consequences of such determination must follow logically and if the consequence is to grant refund of the duty collected pursuant to the orders held to be bad and illegal, such duty must be refunded to the manufacturers on whom the liability to pay excise duty was fixed.

66. For the reasons aforesaid this application succeeds. The Rule is made absolute. Let appropriate writs be issued. The Show Cause Notice dated 10th September, 1981 is set aside. The respondents shall give effect to the order dated 30th April, 1981 of the Appellate Collector, and shall refund the sum of Rs. 92,28,857.03 to the petitioner payable in consequence of the said order dated April 30, 1981 of the Appellate Collector within eight weeks from the date of communication of this order.