
(2016) 06 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application No. 2556 of 2015

Joshi Technologies International

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-06-2016

Acts Referred:

Citation : (2016) 339 ELT 21

Hon'ble Judges : Harsha Devani and A.G. Uraizee, JJ.

Bench : Division Bench

Advocate : S/Shri Sujit Ghosh for Harsh N. Parekh, Advocates, for the Petitioners; S/Shri Ankit Shah, Devang Vyas and R.J. Oza, Advocates, for the Respondents

Final Decision : Partly Allowed

Judgement

Harsha Devani, J. (Oral)—The petitioner, a Company is engaged in the extraction of crude oil falling under Tariff Item 2709 00 00 of the Central Excise Tariff Act, 1985. The petitioner is paying cess on the clearance of petroleum/crude oil under the provisions of Section 15 of the Oil Industry (Development) Act, 1974 (hereinafter referred to as "the OID Act"). The petitioner entered into Production Sharing Contract with the Ministry of Petroleum and Natural Gas, Government of India for Dholka and Wavel fields for the purpose of carrying out exploration and production activity. In furtherance thereto, the petitioner entered into a Crude Off take and Sales Agreement with Oil and Natural Gas Corporation, (hereinafter referred to as "ONGC" or "the custodian") and Indian Oil Corporation Limited (hereinafter referred to as "IOCL" or "buyer"). Under the said agreement, the petitioner supplies crude oil to the custodian, ONGC. On custody transfer of the crude oil, ONGC provides a custody report indicating the quantity of the crude oil received from the petitioner. The ONGC, then, supplies the crude oil to the buyer/IOCL.

2. The petitioner, at the end of the month, after receiving the crude receipt from ONGC, raises a tax invoice on IOCL containing the details of the quantity of crude

oil supplied by ONGC and also charges Gujarat Value Added Tax (hereinafter referred to as "the GVAT") on the value of crude oil indicated in such tax invoices. After supplying crude oil to ONGC, the petitioner has paid Petroleum/ Crude Oil Cess in terms of the provisions of Section 15 of the OID Act for the period July, 2004 to April 30, 2014. The Crude Oil Cess is levied by the Ministry of Petroleum and Natural Gas and collected by the Department of Revenue, Ministry of Finance. It is the case of the petitioner that it paid Primary Education Cess (hereinafter referred to as the "Education Cess") and Secondary and Higher Secondary Education Cess on Crude Oil Cess for the aforesaid period amounting to Rs. 73,60,061/-. The Central Board of Direct Taxes issued a circular dated 7-1-2014 clarifying that the Education Cess and Secondary and Higher Secondary Education Cess are not to be calculated on cesses which are levied under the Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue) in terms of those Acts. In view of the above, the petitioner filed a letter dated 17-7-2014 requesting for refund of the amount of Rs. 73,60,061/- of Education Cess and Secondary and Higher Secondary Education Cess inadvertently paid by it for the aforesaid period in terms of the circular dated 7-1-2014. As per the understanding of the petitioner, its refund claim was sent to the concerned Range Superintendent vide letter dated 22-7-2014, who by letter dated 8-8-2014 and 16-9-2014, submitted his verification report with the recommendation of rejection of refund claim. In view of the above, a show cause notice dated 3-11-2014 came to be issued to the petitioner to show cause as to why the refund claim of Rs. 73,60,061/- filed by it should not be rejected under the provisions of Section 11B of the Central Excise Act, 1944 (hereinafter referred to as the "Central Excise Act"). It is the case of the petitioner that it was granted personal hearing on 17-11-2014 and its authorised representative appeared before the second respondent and also submitted written submission dated 13-11-2014. During the course of personal hearing, it was submitted by the petitioner that the refund application for Education Cess and Secondary and Higher Secondary Education Cess was not filed by it under Section 11B of the CE Act and hence, the provisions thereof would not apply. It was submitted that the Education Cess and Secondary and Higher Secondary Education Cess paid by the petitioner are not to be charged on cess which are levied under the OID Act administered by Petroleum Ministry other than Ministry of Finance (Department of Revenue). It is further the case of the petitioner that during the personal hearing, it was given to understand that the documents submitted by it for unjust enrichment are sufficient and the second respondent did not ask for any additional documents on the aspect of unjust enrichment in any of the communications. However, a certificate from IOCL had been submitted to the effect that IOCL does not pay Education Cess and Secondary and Higher Secondary Education Cess to the petitioner. It is the case of the petitioner that without considering the submissions advanced on behalf of the petitioner during the course of personal hearing and in the written submissions, by the impugned order dated 24-11-2014, the second respondent rejected the entire refund claim of Rs. 73,60,061/- under the provisions of

Section 11B of the Central Excise Act. Being aggrieved, the petitioner has filed the present petition challenging the order-in-original dated 24-11-2014 passed by the Respondent No. 2 and seeks a direction to the second respondent to forthwith sanction and grant the petitioner refund of Rs. 73,60,061/- along with interest at the rate of 18% per annum claimed vide application dated 21-7-2014.

3. Mr. Sujit Ghosh, learned advocate for the petitioner vehemently assailed the impugned order by submitting that the same is non est, void and ex facie erroneous and bad in law. It was submitted that the second respondent has invoked the provisions of Section 11B of the CE Act which is not applicable in the facts of the present case. It was submitted that the impugned order passed by the second respondent suffers from a fallacy, inasmuch as, the crude oil cess is not a central excise duty. Elaborating upon the said submission, it was submitted that as per Section 15(1) of the OID Act, there shall be levied and collected, as a cess, for the purpose of the OID Act, on every specified item which is produced in India and removed to a refinery or factory or transferred by the person by whom such item is produced to another person, a duty of excise at a specified rate. It was pointed out that the levy of duty of excise as a cess on removal or transfer of crude oil is provided under the OID Act which is administered by the Ministry of Petroleum and Natural Gas, Government of India. Also, the power to levy cess on crude oil is with the Ministry of Petroleum and Natural Gas and not with Ministry of Finance. It was submitted that the cess on crude oil is neither levied under the Central Excise Act, nor by the Ministry of Finance, Government of India.

3.1 The attention of the court was invited to the provisions of Section 91 of the Finance Act, 2004 and Sections 136 and 138(1) of the Finance Act, 2007, to submit that on a plain reading of the said statutory provisions, it becomes clear that education cess is levied on the aggregate of all duties of excise which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under the provisions of the CE Act. However, the crude oil cess paid by the petitioner is levied by the Ministry of Petroleum and Natural Gas and is neither levied under the Central Excise Act, 1944 nor levied by the Ministry of Finance (Department of Revenue) but under the OID Act. It was submitted that the petroleum/crude oil cess stands levied by virtue of Section 15 of the OID Act and the same is merely collected as excise duty by the Ministry of Finance (Department of Revenue). It was submitted that the education cess is to be collected on the aggregate dues of excise duty levied and collected by the Department of Revenue, and only such dues which are (a) levied and collected dues of excise, and (b) are both levied and collected by Department of Revenue, should be taken into account for calculating the education cess. It was contended that the crude oil cess is levied by the Central Government in the Ministry of Petroleum as established under the OID Act and the same cannot be held as levied by the Ministry of Finance. For the purpose of levying Education Cess on any kind of duty of excise, the latter should be leviable and recoverable by the Central Government in the Ministry of Finance. However, as Crude Oil Cess is not

levied by the Ministry of Finance, Education Cess cannot be levied on the same.

3.2 In support of his submissions, the learned counsel placed reliance upon the decision of this court in the case of *Commissioner v. Sahakari Khand Udyog Mandli Ltd.*, 2011 (263) E.L.T. 34 (Guj.) wherein, the court in the context of the Sugar Cess Act, 1982 which contained similar provisions, held that the provisions of levy and collection of cess under the Central Excise Act and the rules thereunder have been incorporated and are to be read as part and parcel of the Cess Act. By adopting this legislative procedure, the Legislature has used a well known legislative tool, but from the said exercise, it cannot be inferred or stated that the sugar cess imposed under the provisions of the Cess Act assume the characteristic of central excise duty so as to warrant calculation of education cess on the amount of cess so collected. The court held that the sugar cess levied and collected cannot be equated with duty of central excise and therefore, cannot be treated to be part and parcel of the amount on which the education cess has to be calculated. It was submitted that the above decision was squarely applicable to the facts of the present case and that the second respondent, in gross violation of the judicial discipline, has ignored the said order.

3.3 It was submitted that the fact that the education cess is not leviable upon the crude oil cess as the same is not the duty of excise, though collected by the Department of Revenue, has also been stated by the C.B.E. & C. in its circulars dated 10-8-2004 as well as 7-1-2014. It was submitted that the above circulars are binding upon the second respondent and hence, the second respondent has erred in not following the departmental clarifications. It was submitted that when the Department itself considers the crude oil cess as a cess which is different from the central excise duty, the second respondent is not justified in holding that the same is in the nature of central excise duty and hence, amenable to education cess.

3.4 It was further submitted that the refund claimed under Section 11B of the CE Act is limited for the purpose of claiming refund of any duty of excise and interest, if any, paid thereon. It was submitted that crude oil cess paid by the petitioner is not in the nature of duty of excise and therefore, the second respondent was not justified in rejecting the claim of refund of the above amount in terms of Section 11B of the CE Act. It was submitted that the petitioner had filed an application for refund of the amount paid under mistake of law and not the refund claim for excise duty under Section 11B of the CE Act. In support of his submissions, the learned counsel placed reliance upon the decision of this High Court in the case of *Alstom India Limited v. Union of India*, 2014 (301) E.L.T. 446 (Guj.), for the proposition that it is now well settled law that a citizen, even after making payment of tax on demand by either misinterpretation of the statutory provision or under unconstitutional provision or under mistake of law, can subsequently challenge the inherent lack of jurisdiction on the part of the State authority to demand tax, and if such a citizen succeeds, the court can, in an appropriate case, direct refund of the amount which had been collected by the

State authority having no jurisdiction. Reliance was also placed upon the decision of the Bombay High Court in the case of ITC Ltd. v. M.K. Chipkar and others, 1985 (19) E.L.T. 373 (Bom.), wherein it has been held that the time limit laid down under Rule 11 of the Central Excise Rules, 1944 (corresponding to Section 11B of the Central Excises and Salt Act) shall not be applicable on an amount paid under mistake of law. The decision of this court in the case of Swastik Sanitarywares Ltd. v. Union of India, 2013 (296) E.L.T. 321 (Guj.), was cited for the proposition that a deposit of amount paid under a mistake does not amount to deposit of excise duty and was a pure mistaken deposit of an amount with the Government which the revenue cannot retain or withhold. Such claim, therefore, would not fall within the ambit of Section 11B of the Act. It was, accordingly, urged that since the provisions of Section 11B of the CE Act are not applicable to the facts of the present case, the question of unjust enrichment, limitation, etc., shall not apply for the purpose of claiming refund of the Education Cess and Secondary and Higher Secondary Education Cess.

3.5 The attention of the court was invited to Paragraph 4.8(vi) of the affidavit-in-reply filed on behalf of the second respondent, wherein, it has been stated thus :

"[vi] Further the conference of the all Chief Commissioner was held in Bangalore on 26th and 27th Nov., 2014 and the instant issue was discussed whether the Education cess and SHE cess on Oil cess is payable or otherwise. The minutes of the meeting of the said conference has been circulated vide F. No. 96/79/2014-CX1(Pt.11), dated 9-2-2015 wherein it is admitted at point No. 1-9 of Annexure-A (page.08) that the Oil Cess is administered under Act administered by different ministries, it was further clarified that no cesses are leviable on oil cess. In light of this clarification, the instant issue may be considered as settled and no further demand notices may be required to be issued and decision for pending issues may be decided accordingly."

It was submitted that refund claimed under Section 11B of the Central Excise Act, 1944 is limited for the purpose of claiming refund of any duty of excise and interest, if any, paid thereon. It was submitted that Crude Oil Cess paid by the petitioner is not in the nature of duty of excise and hence, Section 11B of the Act would not be applicable in respect thereof. Referring to Section 3 of the Central Excise Act, it was pointed out that the cess paid by the petitioner does not fall within the scope or ambit of sub-section (1) thereof. Reference was made to Rule 2(e) of the Central Excise Rules, 2002, which defines duty to mean duty payable under Section 3 of the Central Excise Act, to submit that the cess paid by the petitioner is not a duty payable under Section 3 of the Central Excise Act and hence is not a duty within the meaning of such expression as envisaged under Rule 2(e) of the rules. It was submitted that for the period from July, 2004 to April, 2014, till the C.B.E. & C. circular dated 7-1-2014 came to be issued, the position was not at all clear. It was pointed out that the C.B.E. & C. circular came to be issued on 7-1-2014 and the petitioner filed claim for refund on 17-7-2014. Reference was made to the provisions of Section 17 of the Limitation Act, 1963,

to submit that in case where a suit or application for which a period of limitation is prescribed by the Act and the suit or application is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or mistake or could, with reasonable diligence, have discovered it. It was submitted that thus, in case where the amount is paid under a mistake, the limitation is three years from the date of discovery of such mistake. It was submitted that the petitioner came to know about its mistake only after issuance of the C.B.E. & C. circular dated 7-1-2014 and hence, the limitation would start to run only thereafter. Accordingly, the claim filed by the petitioner for refund on 17th July, 2014 was well within the prescribed period of limitation.

3.6 As regards the existence of an efficacious alternative statutory remedy it was submitted that since this is not a case of duty of excise, the petitioner need not go to the authority under the CE Act. In support of his submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of *State of Rajasthan v. Hindustan Copper Ltd.*, (1998) 9 SCC 708. It was, accordingly, urged that the impugned order being contrary to the statutory provisions and therefore, bad in law, deserves to be quashed and set aside and that the petition deserves to be allowed by directing the respondents to forthwith sanction and grant the petitioner refund of Rs. 73,60,061/- as sought for vide application dated 21-7-2014.

4. Vehemently opposing the petition, Mr. R.J. Oza, Senior Advocate and learned Senior Standing Counsel for the respondents, invited the attention of the court to the reliefs prayed for in the petition, to point out that what is subject matter of challenge before this court is the order-in-original passed by the adjudicating authority. It was submitted that all the contentions advanced before this court have been raised before the adjudicating authority, who has recorded a finding on each contention. It was submitted that since the adjudicating authority has recorded findings on all the points that are raised by the petitioner before this court, this court should not exercise writ jurisdiction and render an opinion on the correctness of the order of the adjudicating authority. It was submitted that against the impugned order, the petitioner has an alternative efficacious remedy under the provisions of the CE Act and hence, on this ground alone, the petition is required to be dismissed. Reliance was placed upon the decision of the Supreme Court in the case of *CIT v. Chhabil Dass Agarwal*, (2014) 1 SCC 603 wherein, the court has held that it is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or

there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. It was submitted that the present case does not fall within any of exceptions carved out in the above decision and hence, the present petition is not maintainable and that the petitioner should be relegated to avail of the remedy of appeal under Section 35 of the Central Excise Act.

4.1 Next, it was submitted that the petitioner was required to file a claim for refund under the provisions of Section 11B of the CE Act along with documentary evidence as provided under Section 12A thereof. The petitioner failed to prove that the incidence of duty paid by it had not been passed by it to any other person and hence, the petitioner having failed to prove that the incidence of duty had not been passed by it to any other person, the refund claim was squarely hit by unjust enrichment in view of the provisions of Section 12B of the Central Excise Act. In support of such submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of *Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs*, (2005) 3 SCC 738 = 2005 (181) E.L.T. 328 (S.C.), for the proposition that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. The court was of the opinion that irrespective of applicability of Section 11B of the Central Excise Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. The court was of the view that Section 11B of the Central Excise Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in the absence of a statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner-appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss. It was submitted that for the purpose of examining whether or not there was unjust enrichment, this court would have to enter into disputed questions of fact, which it would not entertain in exercise of its writ jurisdiction.

4.2 It was further submitted that the claim of the petitioner is barred by limitation, inasmuch as, Section 11B of the Central Excise Act provides for a limitation of one year from the date of payment of such amount. It was submitted that in the facts of the present case, the claim relates to the period July, 2004 to April, 2014 and hence, on the face of it, it is evident that the claim beyond a period of one year from the date of payment was barred by limitation. Insofar as the contention raised on behalf of the petitioner that the limitation would run from the date when the mistake came to the notice of the petitioner, the learned counsel submitted that in the facts of the present case, there is no mistake of law, inasmuch as, a trade notice was issued way back in the year 2004, despite which, the petitioner went on making payment and did not make any application within the period prescribed under Section 11B of the Central Excise Act and that such payment was made without any demur. It was submitted that accordingly, the provisions of Section 11B of the Central Excise Act would apply and in view of the provisions of Explanation-B thereto, the

relevant is the date of payment of duty and the limitation for filing a claim for refund is within the period of one year from the relevant date. Alternatively, it was submitted that, if at all, the court is of the view that Section 11B of the CE Act is not applicable to the facts of the present case, the general principles of limitation would apply and the limitation period of three years for filing a suit would apply.

4.3 Reliance was also placed upon the decision of the Supreme Court in the case of *Paros Electronics (P) Ltd. v. Union of India*, 1996 (83) E.L.T. 261 (S.C.) wherein, the court observed that in the proceedings which emanated for levy of duty the order became final and without having that order set aside by a competent court there would be no question of grant of refund merely on the ground that in some other case a different view was taken, even if the payment is made under mistake of law. As long as the order which became final stands the authority cannot grant refund. If the application is under Section 27 of the Customs Act then the authority, being a creation of the statute, must act within the ambit of that provision and if the application is delayed he has no alternative but to reject it as barred by limitation. It was submitted that in the facts of the present case, the amount in question has been paid by the petitioner by way of self-assessment. Such assessment has become final and the petitioner has not challenged the same. It was submitted that no refund claim can be filed directly on the basis of C.B.E. & C. circular dated 7-1-2014 before the pending assessment is finalized. Accordingly, for claiming any refund for the period from July, 2004 to April, 2014, on the basis of the C.B.E. & C. circular dated 7-1-2014, the essential pre-condition is to first finalize the pending assessment, only then the question of any refund would arise. In the facts of the present case, the petitioner had already made self-assessment and paid the duty under Rule 6 of the Central Excise Rules, 2002 for the period July, 2004 to April, 2014, which is deemed to be final assessment. For the purpose of claiming any refund on the basis of C.B.E. & C. circular dated 7-1-2014, assessment is required to be pending, whereas in the present case, self-assessment is deemed to be final assessment and hence, the second respondent was justified in rejecting the claim made by the petitioner.

4.4 Reliance was also placed upon the decision of the Supreme Court in the case of *Suganmal v. State of M.P.*, AIR 1965 SC 1740, for the proposition that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. The court held that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right. It was, accordingly, urged that therefore also, the present petition does not deserve to be entertained by this court.

4.5 On the question of delay and laches in filing the present petition, it was submitted that the conduct of the petitioner is required to be noted. The petitioner went on depositing money since 2004 to 2014. It is the say of the petitioner that its case does not fall under Section 11B of the Central Excise Act despite which, it opted for adjudication and received an order and has, thereafter, filed the present petition. It was submitted that if the petitioner bona fide wanted to contend that Section 11B of the Central Excise Act was not applicable, it could have directly filed the writ petition instead of submitting to the jurisdiction of the Central Excise authorities. It was urged that the petitioner, by its conduct, is not entitled to equitable relief under Article 226 of the Constitution of India. Reference was also made to the contents of the affidavit-in-reply filed on behalf of the Respondents No. 1 and 2 and the contents thereof were reiterated. It was, accordingly, urged that the petition being devoid of merits, deserves to be dismissed.

5. In rejoinder, Mr. Ghosh, learned counsel for the petitioner submitted that there is a clear distinction between a trade notice and a circular. It was submitted that the circular dated 7-1-2014 has been issued presumably under Section 37B of the Central Excise Act in the year 2014 to remove doubts, whereas the trade notice has been issued by the Commissioners of different Zones. Under the circumstances, merely because the trade notice was issued at some point of time, does not mean that the petitioner was aware of the same. It was submitted that in the facts of the present case, the decision of the Supreme Court in the case of CIT v. Chhabil Dass Agarwal (supra) would not be applicable. As regards the decision of the Supreme Court in the case of Suganmal v. State of M.P. (supra), it was submitted that the facts of the present case are distinguishable from the facts of the said case and that the petitioner does not have any remedy except under Article 226 of the Constitution of India. It was submitted that under Section 35 of the Central Excise Act, a decision rendered by the authority has to be under that Act, whereas in the facts of the present case, the dispute does not relate to any decision under the provisions of the CE Act and hence, the remedy under Section 35 of the CE Act, cannot be said to be an efficacious alternative remedy.

5.1 On the question of the claim of the petitioner being barred by limitation, the learned counsel placed reliance upon the decision of the Supreme Court in the case of Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur, (1992) 2 SCC 598, wherein, the court held that the rule which says that the court may not enquire into belated and stale claim is not a rule of law but a rule of practise based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come

to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or delay. It was submitted that in the facts of the present case, there is no question of any parallel right having been created, inasmuch as, it is only the amount which has been paid under mistake that has been retained by the respondents and which is required to be refunded to the petitioner. Reliance was also placed upon the decision of the Supreme Court in the case of *Salonah Tea Co. Ltd. v. Superintendent of Taxes*, (1988) 1 SCC 401 = 1988 (33) E.L.T. 249 (S.C.), for the proposition that where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the court has power to direct the refund unless there have been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to the respondent or any third party.

5.2 It was submitted that in the present case, there was no assessment to begin and that mere payment of tax cannot be said to be an assessment. It was submitted that assessment is a machinery provision which derives relevance from substantive power, that is, levy. If the levy does not exist, there is no question of assessment.

5.3 On the question of unjust enrichment, it was submitted that the Chartered Accountant had on the basis of invoices, issued a certificate to the effect that the IOCL, the sole customer of the petitioner had not paid the Education Cess and Secondary and Higher Secondary Education Cess. Under the circumstances, there was no question of any unjust enrichment in the facts of the present case.

5.4 In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of *Competent Authority v. Barangore Jute Factory*, (2005) 13 SCC 477. Reliance was also placed upon the decision of the Delhi High Court in the case of *Hind Agro Industries Limited v. Commissioner of Customs*, 2008 (221) E.L.T. 336 (Del.), for the proposition that the customs authorities were bound to refund the cess erroneously paid under a mistake of law. The court noted that the appellant therein had paid the cess when in fact no such cess was payable and as such there was no question of processing a claim of refund of such amount in terms of the Customs Act at all because the payment made mistakenly was not under that Act. The court, accordingly, held that the period of limitation under Section 27 of the Customs Act would not apply and that the applications for refund having been made well within the period of three years" after discovery of mistake by the appellants therein, were not barred by limitation. It was submitted that the above decision would be squarely applicable to the facts of the present case.

5.5 Reliance was also placed upon the decision of this court in the case of *Swastik Sanitary wares Ltd. v. Union of India*, 2013 (296) E.L.T. 321 (Guj.), wherein the court found that the second deposit of the same amount on clearance of the same goods did not amount to deposit of excise duty and was a

pure mistaken deposit of an amount with the Government which the revenue cannot retain or withhold. Such claim, therefore, would not fall within Section 11B of the Act. The court held that merely because there is no specific statutory provision pertaining to return of amount deposited under a mistake, per se, in its opinion, should not deter it from directing the respondents to return such amount. Admittedly, there is no prohibition under the Act from returning such an amount. The court was of the opinion that allowing the respondents to retain such amount would be highly inequitable. Reliance was also placed upon the decision of the Supreme Court in the case of *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, (2001) 2 SCC 549 = 2001 (128) E.L.T. 3 (S.C.), for the proposition that a tax or money realised without authority of law is bad under Article 265 of the Constitution and that the money or tax so collected is refundable. The court held that the decision of the Supreme Court in the case of *Suganmal v. State of M.P.* (supra) cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. The court observed that it is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case.

5.6 Reliance was also placed upon the decision of this court in the case of *Gujarat Insecticides Ltd. v. Union of India*, 2005 (183) E.L.T. 9 (Guj.), wherein the court observed that the amount had been retained by the respondent authorities without any justifiable reason, and ordered the same to be refunded to the petitioner immediately with interest @ 8% p.a. Reliance was also placed upon the decision of the Supreme Court in the case of *State of Rajasthan v. Hindustan Copper Ltd.*, (1998) 9 SCC 708, wherein an affidavit of the authorised representative of the respondent had been filed stating that there was no question of any unjust enrichment of the respondent as a result of the refund of the excise duty paid on rectified spirit because the respondent has not passed on the duty to any consumer of the final product, viz., copper, manufactured by the respondent. The court found no reason to doubt the correctness of the aforesaid statement contained in the said affidavit and held that no case was made out for interference with the direction issued by the High Court regarding refund of excise duty paid by the respondent on import of rectified spirit used in the manufacture of copper.

5.7 On the question of existence of an alternative remedy, the learned counsel placed reliance upon the decision of the Kerala High Court in the case of *Geojit BNP Paribas Financial Services Ltd. v. C.C.E., Customs & Sales Tax, Kochi*, 2015 (39) S.T.R. 706 (Ker.), wherein the court held that the question of alternative remedy would arise if service tax is otherwise leviable under the Central Excise Act. The court found that in the facts of that case, there was no dispute with regard to the fact that no service tax was leviable for the services extended by

the petitioner to the Muskat Bank. The court held that the writ petition is maintainable when the amount is arbitrarily withheld without any justification in law as the refund claimed by the petitioner was not relatable to Section 11B of the CE Act.

5.8 It was, accordingly, urged that there being no efficacious alternative remedy available to the petitioner, the petitioner has rightly availed of the remedy under Article 226 of the Constitution of India before this court.

6. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the impugned order passed by the adjudicating authority as well as the decisions cited at the bar and the record of the case as available before the court.

7. From the submissions advanced by the learned counsel for the respondents as well as from the findings recorded in the impugned order, it is apparent that it is the case of the respondents that the refund claim has not been filed under the provisions of Section 11B(1) of the Central Excise Act, 1944, but has been filed seeking the benefits on the basis of principles of natural justice. In this regard, it is the case of the petitioner that it had paid education cess under a mistake of law. By the circular dated 7th January, 2014, the Central Board of Customs and Excise, has pursuant to representations received from trade and field formations seeking clarification as to whether the Education Cess chargeable under Section 93(1) of the Finance Act, 2004 and the Secondary and Higher Secondary Education Cess chargeable under Section 138(1) of the Finance Act, 2007 should be calculated taking into account the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Departments, such as, Sugar Cess levied under Sugar Cess Act, 1982, Tea Cess levied under the Tea Act, 1953, etc., clarified that a cess levied under an Act which is not administered by Ministry of Finance (Department of Revenue) but only collected by the Department of Revenue under the provisions of that Act cannot be treated as a duty which is both levied and collected by the Department of Revenue. It has been reiterated that the Education Cess and the Secondary and Higher Secondary Education Cess are not to be calculated on cesses which are levied under Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue) but are only collected by the Department of Revenue in terms of those Acts.

7.1 It is the case of the petitioner that in view of the above clarification, it realised that it has been erroneously paying Education Cess without there being any such liability on its part. Having realised the mistake, the petitioner moved the application for refund of the amount paid under mistake.

7.2 Insofar as the case of the petitioner that it had paid the amount under a mistake of law is concerned, the say of the petitioner appears to be credible inasmuch as no assessee would continue paying a tax for years together if it had any reason to believe that it was not liable to pay the same. On a plain reading

of the circular dated 7th January, 2014, it is evident that the issue was not free from doubt and, therefore, representations were made by the trade as well as field formations, pursuant to which such doubt was cleared. Since Oil Cess is not administered by the Department of Revenue, the petitioner came to know that it was not required to pay Education Cess and Secondary and Higher Secondary Education Cess only when the position was clarified by the above circular and upon realising its mistake made the application for refund.

8. Since the adjudicating authority has held that the circular dated 7-1-2014 would not apply to the petitioner as the same relates to the cesses levied and administered by different departments such as Sugar Cess levied under Sugar Cess Act, 1982, Tea Cess levied under the Tea Act, 1953, etc., and not under the Oil Industries Development Act, it would be necessary to deal with the said aspect at the outset.

8.1 A perusal of the notifications issued by the Central Government from time to time under the provisions of the OID Act shows that, undoubtedly, it is the Ministry of Petroleum and Natural Gas which is administering the cess levied under that Act. Clearly therefore, the cess levied under the OID Act which is not administered by Ministry of Finance (Department of Revenue) but only collected by the Department of Revenue under the provisions of that Act, cannot, in view of the clarification issued by the C.B.E. & C. be treated as a duty which is both levied and collected by the Department of Revenue.

8.2 The adjudicating authority has, in the impugned order, held that the oil cess levied under the OID Act is nothing but a duty of excise and therefore exigible to levy of Education Cess. According to the adjudicating authority, under sub-section (4) of Section 15 of the OID Act it is specified that the provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation to the levy and collection of duties of excise leviable under that section and for this purpose the provisions of that Act (CE Act) shall have effect as if that Act provided for levy of duties of excise on all items specified in the Schedule. Oil cess is nothing but excise duty on which Education Cess and Secondary and Higher Secondary Education Cess has been paid in terms of the provisions of Finance Acts, 2004 and 2007 respectively and all provisions of the Central Excise Act, 1944 and rules made thereunder, including refund of duty, are squarely applicable to the claimant. The adjudicating authority was further of the opinion that the clarification rendered in C.B.E. & C. Circular is only in respect of Sugar Cess levied under the Sugar Cess Act, 1982 and Tea Cess levied under the Tea Act, 1953. The duty of excise levied under the provisions of OID Act on crude oil is also included within the meaning of "any other duty of excise" for the purposes of levy and collection of Education Cess and Secondary and Higher Secondary Education Cess under the provisions of Finance Acts, 2004 and 2007 respectively, and that the circular dated 7-1-2014 is not applicable to the facts of the present case.

8.3 Insofar as the finding that the Oil Cess is nothing but excise duty is concerned, it may be germane to refer to the decision of this court in the case of Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra) wherein the court in the context of the Sugar Cess Act, 1982, which contains provisions similar to the provisions of the OID Act has held thus :

"5. Sections 3 and 4 of the Cess Act read as under :

"SECTION 3 : Imposition of cess : - There shall be levied and collected as a cess, for the purposes of the Sugar Development Fund Act, 1982, a duty of excise on all sugar produced by any sugar factory in India, at such rate not exceeding twenty-five rupees per quintal of sugar, as the Central Government may, by notification in the Official Gazette, specify from time to time.

(2) The duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on sugar under the Central Excise Act, 1944 (1 of 1944), or any other law for the time being in force.

(3) The duty of excise levied under sub-section (1) shall be payable by the occupier of the sugar factory in which sugar is produced.

(4) The provisions of the Central Excise Act, 1944 (1 of 1944), and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the said duty of excise as they apply in relation to the levy and collection of the duty of excise on sugar under that Act.

SECTION 4 : Crediting proceeds of duty to Consolidated Fund of India. - The proceeds of the duty of excise levied under Section 3 shall be credited to the Consolidated Fund of India."

6. Under Section 3(1) of the Cess Act, a provision is made for imposition of cess and it is specifically provided that "There shall be levied and collected as a cess". Meaning thereby, the levy and collection is of a cess for the purposes of the Sugar Development Fund Act, 1982. Thereafter, the provision goes on to state, what should be the rate at which the cess is to be levied and for sake of convenience, the same is described as duty of excise. In the event it was a central excise duty, as contended, the rate would have been provided in the Tariff Act and not in this provision.

7. Similarly, when one reads sub-section (2) of Section 3 of the Cess Act, it becomes clear that what is levied under sub-section (1) is in addition to the duty of excise leviable on sugar under the Central Excise Act, 1944, or any other law for the time being in force. Once again, pointing out to the Scheme which is distinct from the provisions of the Central Excise Act read with the Tariff Act. When one reads sub-section (4) of Section 3 of the Cess Act, it becomes clear that for the purposes of levy and collection of the cess levied under sub-section (1) of Section 3 of the Cess Act, the procedural provisions relatable to levy and collection of the duty of excise, provisions relating to refund and exemption from

duty, etc., are made applicable by invoking principle of incorporation. In other words, instead of bodily repeating the provisions of levy and collection of cess by this provision, the provisions under the Central Excise Act and the Rules thereunder have been incorporated and are to be read as part and parcel of the Cess Act. By adopting this legislative procedure, the Legislature has used a well known legislative tool, but from the said exercise, it cannot be inferred or stated that the sugar cess imposed under the provisions of the Cess Act assume the characteristic of central excise duty so as to warrant calculation of education cess on the amount of cess so collected.

8. Section 4 of the Cess Act is again an inherent indicator when it provides that the proceeds of the duty of excise levied under Section 3 (sugar cess) shall be credited to the Consolidated Fund of India. For the purposes of utilization of the said fund, one has to consider provisions of Sugar Development Fund Act, 1982 simultaneously to ascertain as to whether the sugar cess is in fact and in law only a cess or is a duty of central excise.

9. Under the Sugar Development Fund Act, 1982, "fund" means sugar development fund formed under Section 3 of the said Act, under sub-section (2) of Section 3 of the Sugar Development Fund Act, 1982, it is provided that an amount equivalent to the cess collected under the Cess Act, reduced by the cost of collection, together with any moneys received by the Central Government for the purposes of the Sugar Development Fund Act, shall, after due appropriation made by Parliament by law be credited to the sugar development fund. To put it differently, amount which was collected by way of sugar cess under the Cess Act is in the first instance, credited to the Consolidated Fund of India and thereafter, by due appropriation made by the Parliament by law credited to the sugar development fund.

10. For the present, it is not necessary to consider other provisions of the Sugar Development Fund Act, 1982 relating to application of the sugar development fund, etc. Suffice it to state that the Cess Act and the Sugar Development Fund Act both have been brought on the statute book simultaneously on the same day and operate as a consolidated scheme and the provisions of both the Acts have to be read together. On such conjoint reading, it is apparent that a plain reading by itself would indicate that the sugar cess levied and collected cannot be equated with duty of central excise and therefore, cannot be treated to be part and parcel of the amount on which education cess has to be calculated. In the circumstances, there is no infirmity in the impugned order of Tribunal to warrant interference."

8.4 Adverting to the provisions of the OID Act, Sections 15 and 16 thereof which are more or less in pari materia with Sections 3 and 4 of the Sugar Cess Act respectively, read thus :

"15. Duties of excise. - (1) There shall be levied and collected, as a cess for the purposes of this Act, on every item specified in column 2 of the Schedule, which

is produced in India (including the continental shelf thereof) and -

(a) removed to a refinery or factory; or

(b) transferred by the person by whom such item is produced to another person, a duty of excise at such rate not exceeding the rate set forth in the corresponding entry in column 3 of the Schedule, as the Central Government may, by notification in the Official Gazette, specify :

Provided that until the Central Government specifies by such notification the rate of the duty of excise in respect of crude oil (being an item specified in the Schedule) the duty of excise on crude oil under this sub-section shall be levied and collected at the rate of rupees sixty per tonne.

(2) Every duty of excise leviable under sub-section (1) on any item shall be payable by the person by whom such item is produced, and in the case of crude oil, the duty of excise shall be collected on the quantity received in a refinery.

(3) The duties of excise under sub-section (1) on the items specified in the Schedule shall be in addition to any cess or duty leviable on those items under any other law for the time being in force.

(4) The provisions of the Central Excises and Salt Act, 1944 (1 of 1944), and the rules made thereunder, including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation to the levy and collection of duties of excise leviable under this section and for this purpose the provisions of that Act shall have effect if that Act provided for the levy of duties of excise on all items specified in the Schedule.

16. Crediting of proceeds of duty to Consolidated Fund of India. - The proceeds of the duties of excise levied under Section 15 shall first be credited to the Consolidated Fund of India and the Central Government may, if Parliament by appropriation made by law in this behalf, so provides, pay to the Board from time to time, from out of such proceeds, after deducting the expenses of collection, such sums of money as it may think fit for being utilised exclusively for the purposes of this Act."

8.5 Thus, under sub-section (1) of Section 15 of the OID Act, what is levied is a cess for the purpose of the OID Act. The provision further provides as to what should be the rate at which the cess is to be levied and for the sake of convenience, the same is described as duty of excise. As held by this court in the above decision, in the event it was a central excise duty, the rate would have been provided in the Tariff Act and not in this provision. Sub-section (4) of Section 15 of the OID Act is the machinery provision, and instead of bodily repeating the provisions of levy and collection of cess in the said provision, the provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated and are to be read as part and parcel of the OID Act. Merely because the provisions of the Central Excise Act, 1944 and the rules framed

thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in the above decision.

9. As regards the finding that the circular dated 7-1-2014 relates only to the cesses collected by the Department of Revenue, but levied under an Act which is administered by different Department, such as, Sugar Cess levied under the Sugar Cess Act, 1982, Tea Cess levied under the Tea Act, 1953, etc., relates only to the Sugar Cess and Tea Cess levied under the said Acts is concerned, in the opinion of this court, such finding is based upon a complete misreading of the said circular, inasmuch as, the adjudicating authority has completely ignored the fact that the words and figures "Sugar Cess levied under the Sugar Cess Act, 1982, Tea Cess levied under Tea Act, 1953" are followed by the expression "etc.". Therefore, it is evident that the sugar cess and tea cess levied under the above Acts are merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Department are not chargeable to Education Cess and Secondary and Higher Secondary Education Cess chargeable under the provisions of the Finance Acts, 2004 and 2007 respectively.

10. What is subject matter of challenge in the present petition, is the order passed by the adjudicating authority rejecting the application made by the petitioner seeking refund of the Education Cess, Secondary and Higher Secondary Education Cess erroneously paid by it, and hence, the next question that arises for consideration is as to whether the petitioner was liable to pay Education Cess and Secondary and Higher Secondary Education Cess. Education Cess has been levied under Section 93 of the Finance Act, 2004 and Secondary and Higher Secondary Education Cess has been levied under Section 138 of the Finance Act, 2007. It would, therefore, be germane to refer to the said provisions, which read as under :

"93. Education Cess on excisable goods.

- (1) The Education Cess levied under Section 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but [excluding Education Cess, and Secondary and Higher Education Cess levied under Section 136 of the Finance Act, 2007] on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

138. Secondary and Higher Education Cess on excisable goods. - (1) The Secondary and Higher Education Cess levied under Section 136, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one per cent calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess chargeable under Section 93 of the Finance (No. 2) Act, 2004 (23 of 2004) and Secondary and Higher Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Secondary and Higher Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force and the Education Cess chargeable under Section 93 of the Finance (No. 2) Act, 2004 (23 of 2004).

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules made thereunder, as the case may be."

10.1 On a plain reading of Section 93, it is clear that the Education Cess levied under the Finance Act, 2004 is a duty of excise levied at the rate of two per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess, and Secondary and Higher Secondary Education Cess levied under Section 136 of the Finance Act, 2007 on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force. Thus, Education Cess is levied on the aggregate of all duties of

excise (except to the extent indicated herein above) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under the provisions of the CE Act or any other law for the time being in force. The provisions of Section 138 of the Finance Act, 2007 are identically worded except that the rate of Secondary and Higher Secondary Education Cess is one per cent. Thus, Education Cess and Secondary and Higher Secondary Education Cess being a cess levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case, as noted herein above, oil cess is not a duty of excise, under the circumstances, the basic requirement of levy of such cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the oil cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

11. Since the machinery provisions of the Central Excise Act, 1944 have been incorporated in the OID Act and consequently the Education Cess and Secondary and Higher Secondary Education Cess had been paid to the Central Excise authorities, the petitioner was wholly justified in making the application for the refund to the second respondent. However, merely because the application is made to an authority under the Central Excise Act, the same would not lead to an inference that the application has been made under the provisions of the Central Excise Act, 1944 so as to make the provisions of appeal, etc., applicable. In the present case, there was no liability to pay Education Cess or Secondary and Higher Secondary Education Cess on the part of the petitioner. Under Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, Education Cess and Secondary and Higher Secondary Education Cess levied thereunder are treated as duties of excise. The petitioner having paid Education Cess and Secondary and Higher Secondary Education Cess under a mistake of law without there being any liability on the part of the petitioner to pay such amount, the

amount paid by the petitioner would not take the colour of a duty of excise and would merely be an amount deposited by the petitioner under a mistake of law. Under the circumstances, the provisions of the CE Act would not be applicable when the petitioner seeks refund of such amount.

11.1 At this juncture, it may be apposite to refer to the decision of the Supreme Court in *U.P. Pollution Control Board v. Kanoria Industrial Ltd.* (supra), wherein it has been held thus :

"9. In *H.M.M. Ltd. v. Administrator, Bangalore City Corpn.*, 1997 (91) E.L.T. 27 (S.C.), it is held that a tax or money realised without authority of law is bad under Article 265 of the Constitution and that the money or tax so collected is refundable. In that case octroi was levied and collected in respect of goods on their mere physical entry into the city limits, which were not used or consumed or sold within the municipal limits. This Court, dealing with the refund in para 12 of the judgment, held thus :

"We see no ground as to why amount should not be refunded. Realisation of tax or money without the authority of law is bad under Article 265 of the Constitution. Octroi cannot be levied or collected in respect of goods which are not used or consumed or sold within the municipal limits. So these amounts become collection without the authority of law. The respondent is a statutory authority in the present case. It has no right to retain the amount, so far and so much. These are refundable within the period of limitation. There is no question of limitation. There is no dispute as to the amount. There is no scope of any possible dispute on the plea of undue enrichment of the petitioners. We are, therefore, of the opinion that the Division Bench was in error in the view it took. Where there is no question of undue enrichment, in respect of money collected or retained, refund, to which a citizen is entitled, must be made in a situation like this."

"15. The learned counsel for the petitioners strongly relied on a Constitution Bench judgment of this Court in *Mafatlal Industries Ltd. v. Union of India*, 1997 (89) E.L.T. 247 (S.C.). That was a case where refund was claimed on the ground that tax/duty had been collected by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 and the Rules and Regulations or the notifications issued under such enactments. In such cases claims for refund had to be preferred under, and in accordance with, the provisions of the respective enactments before the authorities specified and within the period of limitation prescribed therein. Hence it was held that petition under Article 226 of the Constitution could not be entertained having regard to the legislative intention evidenced by the provisions of the said Act and the writ petition, if any, would be considered and disposed of in the light of and in accordance with the provisions of Section 11B of the Central Excises and Salt Act, 1944 stating that power under Article 226 has to be exercised to effectuate the rule of law and not to abrogate it. In the present cases there is no corresponding section to Section 11B of the Central

Excises and Salt Act, 1944 for making claim for refund of money and, therefore, the respondents could maintain the writ petitions under Article 226 of the Constitution. Further in para 108(ii) of the judgment it is held that where, however, a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of suit or by way of writ petition.

6. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in *Suganmal v. State of M.P.*, AIR 1965 SC 1740, was cited. In AIR para 6 of the said judgment, it is stated that -

"we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax".

Again in AIR para 9, the Court held :

"We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence

but may be refused on several grounds depending on facts and circumstances of a given case."

[Emphasis supplied]

11.2 Reference may also be made to the decision of the Delhi High Court in *Hind Agro Industries Limited v. Commissioner of Customs*, 2008 (221) E.L.T. 336 (Del.), wherein it has been held thus :

"10. There can be no doubt that the above provision applies to a claim for refund of "any duty" within the meaning of that Act. A word "duty" has been defined under Section 2(15) of the Act means, "a duty of customs leviable under this Act." The entire Section 27 of the Act can, therefore, obviously apply if and only if, the refund that is being sought is of customs duty otherwise leviable under the Act."

"13. It is clear that in *Mafatlal Industries* the Hon"ble Supreme Court had only talked of refund of duty payable within the meaning of either the Central Excises and Salt Act, 1944 ("Excise Act") or the Customs Act, 1962, as the case may be. In other words when the Hon"ble Supreme Court said that all claims for refund ought to be filed only in accordance with the Customs Act or Excise Act, it obviously did not include payment made under some enactment, which for some reason, had erroneously been made to the Customs authorities. Nowhere did *Mafatlal Industries* talk of a situation where the refund of a cess paid under the Cess Act, 1985 albeit erroneously, was required to be made under the Excise Act or the Customs Act and under no other enactment. Consequently, the observation in para 4 of the judgment of the Hon"ble Supreme Court in *Anam Electrical Manufacturing Co.* has also to be understood in the same manner. Para 4 of the said judgment it has been explained that the rules pertaining to refund would not apply where refund is sought of a "duty levied and recovered under an unconstitutional provision." It was explained that the period of limitation in such cases would be in terms of the law laid down in *Mafatlal Industries*. It is obvious that when the Hon"ble Supreme Court talked of "duty levied and recovered under an unconstitutional provision" the reference was not to a duty of customs or excise. Therefore, to rely upon either *Mafatlal Industries* or *Anam Electrical Manufacturing Co.* to deny the claim of the Appellants in this case is entirely misconceived."

"16. There can be no manner of doubt that the customs authorities in the instant case were bound to refund the cess erroneously paid by the Appellants for the period from 15th January, 2001 till 19th February, 2002 under a mistake of law. They had paid the cess when in fact no such cess was payable. There is no question of processing a claim of refund of such amount in terms of the Customs Act at all because the payment made mistakenly was not under that Act. In the circumstances, the period of limitation under Section 27 of the Act would not apply, as explained in *Salonah Tea Company Limited*. The applications for refund having been made well within the period of three years" after discovery of

mistake by the Appellants, are not barred by limitation. Question (a) in para 7 above is accordingly answered in favour of the Appellants. Consequently, the need to answer question (b) does not arise."

(Emphasis supplied)

11.3 In the light of the principles enunciated in the above decisions, having regard to the fact that in the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. Under the circumstances, the petitioner is justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.

12. Since it has been contended on behalf of the revenue that the application for refund ought to have been made under Section 11B of the Central Excise Act, 1944, reference may be made to the said section which reads thus :

"11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act :

Provided further that the limitation of one year shall not apply where any duty has been paid under protest."

12.1 Thus, Section 11B of the Central Excise Act applies to the claim for refund of any duty of excise and interest, if any, paid on such duty. In the present case, as discussed herein above, Oil Cess under the OID Act is not a duty of excise though described as such for the sake of convenience. Education Cess under Section 93 of the Finance Act and Secondary and Higher Secondary Education Cess under Section 138 of the Finance Act, 2007 are duties of excise calculated on the aggregate of all duties of excise to the extent provided thereunder. Reverting to the facts of the present case, since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of

excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged in the said provisions. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. As held by the Supreme Court in *U.P. Pollution Control Board v. Kanoria Industrial Ltd.*, (supra), a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of suit or by way of writ petition. In the present case, though the provision under which the amount was paid was not declared unconstitutional, it has been declared that the same applies only in cases where the duty is both, administered and collected, by the Department of Revenue, whereas in the present case, the Oil Cess, though collected by the Department of Revenue is administered by the Ministry of Petroleum and Natural Gas. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under Section 11B of the Central Excise Act, 1944.

13. The next question that needs to be addressed is the aspect of limitation. The refund application has been made in July, 2014 seeking refund of the amount paid for the period July, 2004 to April, 2014. On behalf of the revenue it has been contended that in view of the provisions of Section 11B of the CE Act, the limitation for filing the refund claim would be before the expiry of one year from the relevant date. The expression "relevant date" is defined under clause (B) of the Explanation to Section 11B of CE Act and insofar as the present case is concerned would be the date of payment of duty. However, as discussed herein above, the provisions of Section 11B of the Act would not apply to the claim of refund made by the petitioner. Consequently, the limitation prescribed under the said provision would also not be applicable.

14. It has been further contended on behalf of the revenue, that in case the limitation prescribed under Section 11B of the CE Act is not applicable, the general principles of limitation would apply and the limitation of three years for filing a suit would apply, whereas on behalf of the petitioner reliance has been placed upon Section 17 of the Limitation Act, 1963 to contend that this case would be governed by the said provision and hence the limitation would not begin to run till the petitioner discovered the mistake. In support of the above submission, on behalf of the petitioner, reliance has been placed on the following decisions :

14.1 The decision of the Supreme Court in *Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur* (supra), was cited, wherein it has been held thus :

"12. The question thus for consideration is whether the appellant should be deprived of the relief on account of the laches and delay. It is true that the

appellant could have even when instituting the suit agitated the question of legality of the demands and claimed relief in respect of the earlier years while challenging the demand for the subsequent years in the writ petition. But the failure to do so by itself in the circumstances of the case, in our opinion, does not disentitle the appellant from the remedies open under the law. The demand is per se not based on the net profits of the immovable property, but on the income of the business and is, therefore, without authority. The appellant has offered explanation for not raising the question of legality in the earlier proceedings. It appears that the authorities proceeded under a mistake of law as to the nature of the claim. The appellant did not include the earlier demand in the writ petition because the suit to enforce the agreement limiting the liability was pending in appeal, but the appellant did attempt to raise the question in the appeal itself. However, the Court declined to entertain the additional ground as it was beyond the scope of the suit. Thereafter, the present writ petition was filed explaining all the circumstances. The High Court considered the delay as inordinate. In our view, the High Court failed to appreciate all material facts particularly the fact that the demand is illegal as already declared by it in the earlier case.

13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practise based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilokchand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that the suit has been rightly dismissed."

(Emphasis supplied)

14.2 Reliance was also placed upon the decision of this court in *Swastik Sanitarywares Ltd. v. Union of India* (supra), wherein it has been held as follows :

"15. In the present case, however, we find that the second deposit of the same

amount on clearance of the same goods did not amount to deposit of excise duty and was a pure mistaken deposit of an amount with the Government which the revenue cannot retain or withhold. Such claim, therefore, would not fall within Section 11B of the Act. It is true that insofar as the Act is concerned, for refund of duty, the provision is contained in Section 11B. However, merely because there is no specific statutory provision pertaining to return of amount deposited under a mistake, per se, in our opinion, should not deter us from directing the respondents to return such amount. Admittedly, there is no prohibition under the Act from returning such an amount. Allowing the respondents to retain such amount would be, in our opinion, highly inequitable. We may not be seen to suggest that such a claim can be raised at any point of time without any explanation. In a given case, if the petitioner is found to be sleeping over his right, or raises such a claim after unduly long period of time, it may be open for the Government to refuse to return the same and this court in exercise of discretionary writ jurisdiction, may also not compel the Government to do so.

16. In the present case, however, no such inordinate delay is pointed out. The petitioners have contended that the error was noticed by them some time in October, 2003 whereupon immediately on 1-11-2003, such refund claim was filed.

17. In a recent judgment in case of C.C. Patel & Associates Pvt. Ltd. (supra), this court had occasion to deal with somewhat similar situation where the petitioner had deposited service tax twice which was not being refunded by the Department. In that context, it was observed as under :-

(12) We fail to see how the department can withhold such refund. We say so for several reasons. Firstly, we notice that under sub-section(3) of section 68, the time available to a service provider such as the petitioner for depositing with the Government service tax though not collected from the service recipient was 75 days from the end of the month when such service was provided. This is in contrast to the duty to be deposited by a service provider upon actual collection by the 15th of the month following the end of the month when such duty is collected. Sub-section (3) of section 68 thus provided for an outer limit of 75 days, but never provided that the same cannot be paid by the 15th of the month following the end of the month when such service was provided. Thus, if the petitioner deposited such duty with the Government during a particular quarter on the basis of billing without actual collection, he had discharged his liability under sub-section (3) of section 68. Thereafter, on an artificial basis, the Assessing Officer could not have held that he ought to have deposited same amount once all over again in the following quarter. This is fundamentally flawed logic on the part of the Assessing Officer.

(13) Further, to accept such formula adopted by the Assessing Officer would amount to collecting the tax from the petitioner twice. The petitioner having already paid up the service tax even before collection in a particular quarter, cannot be asked to pay such tax all over again in the following quarter on the same service on the ground that such tax had to be deposited in the later

quarter but was deposited earlier. Any such action would be without authority of law. Further, before raising demand of Rs. 1,19,465/- under the head of duty short paid, the Assessing Officer should have granted adjustment of the duty already paid by the petitioner towards the same liability.

(14) Under the circumstances, we are of the opinion that the department cannot withhold such amount which the petitioner rightfully claimed. Under the circumstances, question of applying limitation under section 11B of the Act would not arise since we hold that retention of such service tax would be without any authority of law."

14.3 Strong reliance was placed upon the decision of the Supreme Court in *Salonah Tea Co. Ltd. v. Supdt. of Taxes* (supra), wherein it has been held thus :

"13. Under Article 113 of the Limitation Act, 1963 the limitation was the period of three years from the date the right to sue accrues. It may be noted that in the instant case under Section 23 of the Act, it was provided that the Commissioner shall, in the prescribed manner refund to a producer or a dealer any sum paid or realised in excess of the sum due from him under this Act either by cash or, at the option of the producer or dealer, be set off against the sum due from him in respect of any other period. Section 23 applies only in a case where money is paid under the Act. If there is no provision for realisation of the money under the Act, the act of payment was ultra vires, the money had not been paid under the Act. In that view of the matter Section 23 would not apply.

14. The High Court in the instant case after analysing the various decisions came to the conclusion that where a petitioner approached the High Court with the sole prayer of claiming refund of money by writ of mandamus, the same was normally not granted but where the refund was prayed as a consequential relief the same was normally entertained if there was no obstruction or if there was no triable issue like that of limitation. We agree that normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the court has power to direct the refund unless there have been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party. It is true that in some cases the period of three years is normally taken as a period beyond which the court should not grant relief but that is not an inflexible rule. It depends upon the facts of each case. In this case, however, the High Court refused to grant the relief on the ground that when the section was declared ultra vires originally that was the time when refund should have been claimed. But it appears to us, it is only when the *Loong Soong* case was decided by the High Court in 1973 that the appellant became aware of his crystal right of having the assessment declared ultra vires and in that view of the matter in October, 1973 when the judgment was delivered in July, 1973 the appellant came to know that there is mistake in paying the tax and the appellant was entitled to refund of the amount paid. That

was the time when the appellant came to know of it. Within a month in November, 1973 the present petition was filed. There was no unexplained delay. There was no fact indicated to the High Court from which it could be inferred that the appellant had either abandoned his claims or the respondent had changed his position in such a way that granting relief of refund would cause either injury to the respondent or anybody else. On the other hand, refunding the amount as a consequence of declaring the assessment to be bad and recovery to be illegal will be in consonance with justice, equity and good conscience. We are, therefore of the view that the view of the High Court in this matter cannot be sustained."

"20. In *State of M.P. v. Bhailal Bhai*, AIR 1964 SC 1006, this Court had occasion to consider what was unreasonable delay in moving the court when tax was paid under a mistake. There the respondents were dealers in tobacco in the State of Madhya Bharat. The State had imposed sales tax on the sale of imported tobacco by the respondents. But no such tax was imposed on the sale of indigenous tobacco. The respondents filed writ petitions under Article 226 of the Constitution for the issue of writ of mandamus directing the refund of sales tax collected from them. They contended that the impugned tax was violative of Article 301(a) of the Constitution and they paid the tax under a mistake of law and the tax so paid was refundable under Section 72 of the Indian Contract Act, 1872. The appellant contended that there was no violation of Article 301 of the Constitution, and even if there was such violation the tax came within the special provision under Article 304(a) of the Constitution and the High Court had no power to direct refund of tax already paid and in any event the High Court should not exercise its discretionary power of issuing a writ of mandamus directing this to be done since there was unreasonable delay in filing the petition. The High Court rejected all the contentions of the appellant and a writ of mandamus was issued as prayed for. It was held that tax was violative under Article 301 of the Constitution. But it was held that even though the tax contravened Article 301 of the Constitution, it was valid if it came within the saving provisions of Article 304 of the Constitution. Tobacco manufactured or produced in the appellant State, similar to the tobacco imported from outside had not been subjected to the tax and therefore the tax was not within the saving provisions of Article 304(a) of the Constitution. It was reiterated that the tax which had already been paid was so paid under a mistake of law under Section 72 of the Indian Contract Act. The High Courts had power for the purpose of enforcement of fundamental rights and statutory rights to grant consequential reliefs by ordering repayment of money realised by the government without the authority of law. It was reiterated that as a general rule if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by the extraordinary remedy of mandamus. Even if there is no such delay, in cases where the opposite party raises a prima facie issue as regards the availability of such relief on the merits on grounds like limitation the court should ordinarily refuse to issue the writ of mandamus. Though the provisions of the Limitation Act did not as such, it was further held, apply to the granting of relief under Article 226, the maximum period fixed by the Legislature as the time

within which relief by a suit in a civil court must be claimed may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 could be measured. The court might consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy. Where the delay is more than that period it will almost always be proper for the court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act was three years from the date when the mistake was known. In this case knowledge is attributable from the date of the judgment in Loong Soong case on 10-7-1973 and there being a statement that the appellant came to know of that fact in October, 1973 and there being no denial by the averment made on this ground, the High Court, in our opinion, in the instant case was in error in presuming that there was a triable issue on this ground and refusing to grant refund."

(Emphasis supplied)

14.4 Thus, in view of the principles enunciated by the Supreme Court in *Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong* (supra), in case where money is paid by mistake, the period of limitation prescribed is three years from the date when the mistake was known. Besides, Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Therefore, in case where money is paid under a mistake, the limitation would begin to run only when the applicant comes to know of such mistake or with reasonable diligence could have discovered such mistake. Adverting to the case at hand, the mistake is in the nature of a mistake of law. It appears that the legal position was not clear and hence, pursuant to representations made by the trade and field formations, the C.B.E. & C. was required to issue the circular dated 7-1-2014 clarifying the issue. As noticed earlier, the petitioner had all along, right from July, 2004 been paying Education Cess and subsequently, from the year 2007 was paying Secondary and Higher Secondary Education Cess, till April, 2014. It was only when the Circular dated 7-1-2014 came to be issued by the C.B.E. & C., clarifying the issue, that the petitioner came to know about its mistake. Considering the nature of the mistake and the fact that the issue was not free from doubt till the above circular came to be issued by the C.B.E. & C., it also cannot be said that the petitioner could with reasonable diligence have discovered the mistake. It appears that it is only sometime after the Education Cess and Secondary and Higher Secondary Education Cess came to be paid for the month of April, 2014 that the petitioner came to know about its mistake and in July, 2014, it filed the application for refund before the second respondent. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, as discussed herein above, the retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is

without authority of law and hence, in the light of the decision of this court in *Swastik Sanitary wares Ltd. v. Union of India* (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

15. One of the contentions advanced before this court, which is also a ground for rejecting the refund application, is that the petitioner has paid Education Cess and Secondary and Higher Secondary Education Cess on self assessment basis and not under a mistake of law and that the petitioner having paid the amounts by way of self assessment, which has become final, in the absence of any challenge to the assessment, a refund claim cannot be filed directly on the basis of the C.B.E. & C. Circular. In support of such contention reliance has been placed upon the decision of the Supreme Court in *Paros Electronics (P) Ltd. v. Union of India*, 1995 Supp (3) SCC 578 = 1996 (83) E.L.T. 261 (S.C.), wherein it has been held as follows :

"2. We have heard learned counsel for the appellants and we do not see any infirmity in the order made by the authority rejecting the application. In the first place, in the proceedings which emanated for levy of duty the order became final and without having that order set aside by a competent court there would be no question of grant of refund merely on the ground that in some other case a different view was taken, even if the payment is made under mistake of law. As long as the order which became final stands the authority cannot grant refund. If the application is under Section 27 of the Act then the authority, being a creation of the statute, must act within the ambit of that provision and if the application is delayed he has no alternative but to reject it as barred by limitation."

15.1 The contention that the Education Cess and Secondary and Higher Secondary Education Cess having been paid by way of self assessment is not by way of a mistake, is thoroughly misconceived. The fact that despite there being no liability on the part of the petitioner to pay Education Cess and Secondary and Higher Secondary Education Cess, it has paid the same from July, 2004 to April, 2014, on the face of its shows that the same was by way of a mistake. As regards the contention that the self assessment having become final, it is not open for the petitioner to claim refund, the adjudicating authority, in the impugned order has held thus :

"No refund claim can be filed directly on the basis of C.B.E. & C. Circular dated 7-1-2014, before the pending assessment is finalised. Accordingly, for claiming any refund for the period from July, 2004 to April, 2014, on the basis of C.B.E. & C. circular dated 7-1-2014, the essential pre-condition is to first finalise the pending assessment, only then the question of any refund would arise. On verification of records, it is observed that the claimant has already self-assessed and paid the duty under Rule 6 of the CER, 2002 for the period July, 2004 to April, 2014 which is deemed to be final assessment. Hence the question of finalisation of the same does not arise. For the purpose of claiming any refund on the basis of C.B.E. & C. circular the assessment is supposed to be pending whereas in the present case the self assessment is deemed to be final

assessment and hence the claim even on merits is not admissible."

15.2 Essentially, therefore, the case of the respondents is that self assessment amounts to assessment and in the absence of any challenge thereto, it has become final and, therefore, unless such assessment is set aside, refund cannot be claimed. In this regard it may be germane to refer to the decision of the Supreme Court in CIT v. Shelly Products, (2003) 5 SCC 461, on which reliance has been placed by the learned counsel for the petitioner, wherein the court has held thus :

"35. What then is the effect of the failure to make an order of assessment after the earlier assessment made is set aside or nullified in appropriate proceedings? If the Assessing Authority cannot make a fresh assessment in accordance with the provisions of the Act it amounts to deemed acceptance of the return of income furnished by the assessee. In such a case the Assessing Authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment. It must accept the return as furnished and shall not in any event raise a demand for payment of further taxes. Accepting the income as disclosed in the return of income furnished by the assessee, it must refund to the assessee any tax paid in excess of the liability incurred by him on the basis of income disclosed. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred. In other words, the tax paid by the assessee must be accepted as it is, and in the event of the tax paid being in excess of the tax liability duly computed on the basis of return furnished and the rates applicable, the excess shall be refunded to the assessee, since its retention may offend Article 265 of the Constitution.

36. We cannot lose sight of the fact that the failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. He can certainly make such a claim also before the authority concerned calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income-tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the Assessing Authority, which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the authority concerned in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by Section 240 of the Act, an obligation is cast upon the Revenue to refund the amount to the assessee without his having to make any claim in that behalf. In

appropriate cases therefore, it is open to the assessee to bring facts to the notice of the authority concerned on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under Section 237 of the Act. The authority concerned, for the limited purpose of calculating the amount to be refunded under Section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantageous position than what he would have been, had an assessment been made in accordance with law."

15.3 Though the above decision has been rendered in the context of the Income-tax Act, 1961, two principles can be culled out therefrom insofar as the present case is concerned. Firstly, retention of any amount paid in excess of the liability may offend Article 265 of the Constitution of India. Secondly, even in case of self assessment, if any amount has been paid by way of mistake or inadvertence or on account of ignorance, the assessee may bring it to the notice of the authority concerned, which may take into account the relevant material and calculate the amount to be refunded. In case of self assessment there would not be any assessment order which can be challenged before the higher forum. Therefore, the contention that the self assessment made by the petitioner has attained finality and hence, the petitioner cannot claim refund unless the assessment is challenged is misconceived and contrary to the law laid down in the above decision. The upshot of the above discussion is that even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which bears the heading "Taxes not to be imposed save by authority of law" and lays down that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same. The decision of the Supreme Court in the case of *Paros Electronics (P) Ltd. v. Union of India* (supra) would have no applicability to the facts of the present case, inasmuch as, in that case the refund was not granted as the levy had become final being contested at all departmental levels. In the present case, the education cesses have been paid by the petitioner by way of self assessment and no assessment order has been passed thereon.

15.4 Reference may also be made at this stage to the decision of this court in the case of *Alstom India Ltd. v. Union of India*, 2014 (301) E.L.T. 446 (Guj.), on which reliance has been placed by the learned counsel for the petitioner, wherein it has been held as follows :

"11. It is now well-settled law that a citizen, even after making payment of tax

on demand by either misinterpretation of the statutory provision or under unconstitutional provision or under mistake of law, can subsequently challenge the inherent lack of jurisdiction on the part of the said State authority to demand tax, and if such a citizen succeeds, the Court can, in an appropriate case, direct refund of the amount which had been collected by the State authority having no jurisdiction. There are instances where after payment of tax by an assessee, on his prayer, the provisions of imposition of tax has been held ultra vires the Constitution of India and in such a case, the subsequent proceedings for annulment of the proceedings under which the tax was collected cannot be dismissed on the sole ground of payment of tax by the petitioner inasmuch as there cannot be a waiver of constitutional rights of mandatory character or fundamental rights. The only exception to this principle is where the assessee has passed on the burden of tax to the third parties i.e. the consumers. [See *Mafatlal Industries Ltd. and Others v. Union of India and Others* reported in (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.)]. Thus, if the Constitution does not permit an authority to collect tax by enactment of appropriate law vesting such power, merely because such authority has recovered the amount by virtue of ultra vires adjudication, cannot be a factor standing in the way of the assessee to challenge the provisions as ultra vires just as in a Civil Litigation after suffering a decree, the judgment debtor in the executing proceedings can pray for declaration that the decree sought to be executed is a nullity for want of inherent jurisdiction without preferring any appeal against the original decree [See *Chiranjilal Shrilal Goenka v. Jasjit Singh* reported in (1993) 2 SCC 507]."

16. The claim of refund made by the petitioner to the extent the same was within the period of limitation has been turned down by the adjudicating authority on the ground of unjust enrichment. The adjudicating authority has held that the petitioner was required to file the refund claim under the provisions of Section 11B of the Central Excise Act, 1944 along with the documentary evidences as provided under Section 12A. According to the adjudicating authority, two basic requirements are to be complied with based on documentary evidences (i) the amount of duty, in relation to which the refund is claimed, is paid by the claimant; and (ii) the incidence of such duty has not been passed by the claimant to any other person. The first requirement is satisfied. As regards the second requirement, the adjudicating authority has found that the petitioner has failed to prove conclusively and beyond doubt that the incidence of the duty, in relation to which the refund is claimed, has not been passed by it to any other person and has held that the refund claim is therefore squarely hit by unjust enrichment in view of the provisions of Section 12B of the Central Excise Act, 1944 as the claimant has passed on the incidence of duty to any other person. In this regard, it may be germane to refer to Paragraph 19.19 of the impugned order wherein the adjudicating authority has recorded thus :

"19.19 The claimant vide letter F. No. JTI/2014-15/Excise/416, dated 20-11-2014 (received in the office on 21-11-2014) has also submitted a certificate dated 20-11-2014 signed by N.M. Bhalerao, Senior Finance Manager of

M/s. Indian Oil Corporation Ltd. (IOCL) to an effect that "M/s. Indian Oil Corporation Limited (the buyer of crude oil from Dholka and Wavel Fields) do hereby confirm that they have not paid the amount of Primary Education Cess and Secondary & Higher Education Cess on OID Cess to JTI on purchase of crude oil from them".

Further, it is mentioned in the said certificate that "this certificate has been issued on the request of JTI for onward submission to the concerned Central Excise Authorities, in support of refund claim of Primary Education Cess and Secondary & Higher Education Cess on OID Cess. This certificate should not be used other than the intended purpose, without obtaining written permission from them". This certificate has been issued by the customer (M/s. IOCL), on the request of the claimant and it has been mentioned that it should not be used anywhere else, without their prior written permission. Hence, this certificate is merely statement without being backed by any supporting documents on the basis of which the veracity of the content could be verified. Hence, this certificate is not having any evidential value.

On verification of contents of the said certificates, it is also observed that these are mere statements, without giving the specific details of the relevant financial record i.e. balance sheet, from which the veracity of the said statement could be verified. The above said certificates itself does not have any evidential value, unless the contents of them are supported by documentary evidence."

16.1 At this juncture it may be germane to refer to the decision of the Kerala High Court in Cadbury India Ltd. v. Union of India, 2015 (315) E.L.T. 488 (Ker.), on which reliance has been placed by the learned counsel for the petitioner, wherein it has been held thus :

"3. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I am of the view that in Ext. P10 order, the 3rd respondent rejects the refund claim preferred by the petitioner for the sole reason that the petitioner had only produced a Chartered Accountant's certificate to substantiate his claim with regard to the absence of unjust enrichment and had not produced any further document to show the absence of unjust enrichment. Other than stating that the Chartered Accountant's statement was silent about the documents that were verified by him in order to come to the conclusion that the incidence of duty had not been passed on, the 3rd respondent does not state any other reason as to why the claim of the petitioner for refund cannot be entertained. While preferring a claim for refund, it is for the claimant to establish through proper documents that the burden, of the amount claimed by way of refund, has not been passed on to any third person through any subsequent transaction of the claimant. While a certificate issued by a Chartered Accountant or a Cost Accountant would normally suffice to discharge that burden, if the revenue authorities have any doubt with regard to the genuineness of the certificate or the correctness of it, it is for them to insist on further documents from the claimant to support the certificate issued by the

Chartered Accountant or the Cost Accountant. In the instant case, in Ext. P10 order, while the 3rd respondent has chosen not to rely on the certificate of the Chartered Accountant produced by the petitioner, it is evident that the petitioner was not given any further opportunity to produce documents to substantiate the correctness of the said certificate, on the 3rd respondent entertaining a doubt regarding the correctness of the said certificate. I am of the view that if the 3rd respondent had any doubt regarding either the genuineness of the certificate or the correctness of the contents therein, it should have informed the petitioner of the same and given the petitioner an opportunity of producing additional documents to substantiate his claim for refund. That procedure not having been adopted by the 3rd respondent, I am of the view that Ext. P10 order passed by him cannot be legally sustained. Resultantly, I quash Ext. P10 order of the 3rd respondent and direct him to consider the matter afresh after affording the petitioner an opportunity of being heard. It will be open to the petitioner to produce supporting materials to substantiate his claim for refund and in particular to establish that by the grant of refund to him, he will not be unjustly enriched. The 3rd respondent shall pass fresh orders in the matter within a period of three months from the date of receipt of a copy of this judgment, after hearing the petitioner, for which due notice shall be given to the petitioner."

16.2 Adverting to the facts of the present case, it is the specific case of the petitioner as averred in Paragraphs 5.12 and 5.13 of the memorandum of petition that during the course of personal hearing the petitioner was given to understand that the documents submitted by the petitioner for unjust enrichment are sufficient. It is the case of the petitioner that IOCL is its sole customer, and that the petitioner had furnished a Chartered Accountant's certificate based on the petitioner's invoices certifying that the petitioner has not charged any Education Cess and Secondary and Higher Secondary Education Cess to its customer. In the opinion of this court, if the adjudicating authority was not satisfied with the certificate and the material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

17. The next question that would therefore arise for consideration is as to whether the matter should be restored to the file of the adjudicating authority for the purpose of examining the issue of unjust enrichment as has been done by the Kerala High Court in the above decision.

17.1 In this regard it may be noted that it is the case of the petitioner that as per the Crude Off take and Sales Agreement, the ONGC is required to transfer the quantity of crude oil to IOCL and the Company is required to issue invoice

containing the details of quantity of crude oil transferred to IOCL by ONGC along with GVAT charged on the sales price of crude oil supplied. It is further the case of the petitioner that it does not charge any excise duty or crude oil cess to IOCL in the said invoices and that it is also not recovering the said crude oil cess from IOCL in any other form or through any other mode. It is also the case of the petitioner that the sales price of crude oil is derived independently based on price of Dubai crude oil price per barrel as published in Platt Oil Gram. The sales price does not have any nexus with the associated costs and statutory levies, taxes and duties. The petitioner has submitted copies of the Crude Off take and Sales Agreement as well as the Production Sharing Contract. A perusal of the production sharing contract shows that the contract is by and between the Ministry of Petroleum and Natural Gas, Government of India and Larsen & Toubro Limited and the Petitioner Joshi Technologies International Inc. and not with the IOCL. Hence reference to Clause 15 thereof by the adjudicating authority is misconceived. Insofar as IOCL is concerned there is a Crude Off take and Sales Agreement and the price at which crude oil is sold is in terms of Article 13 thereof, which is the price clause. For the sake of convenience Article 13 is reproduced hereunder.

"ARTICLE 13 - PRICE :

[13.1] Initially the contractor shall be paid by IOC a provisional price based on calendar month average FOB selling price for Dubai crude oil per barrel as published in Platt Oil Gram (Article 18.4 a of PSC).

[13.2] Price per barrel of Dholka Crude delivered in any month during the period of agreement shall be calculated using the following formula :

[a] Price of deliveries made up to December, 1998 : A/B less US \$ 1.00/bbl.

[b] Price of deliveries made from January 1999 : A/B less US \$ 0.96/BBI.

Where A = the sum of the daily mean values of the low and high quotations of "Brent (DTD)" in US \$/bbl under the heading "Spot Crude Assessment" in Platts Crude Oil Marketware for each day of the month during which the delivery was made to Buyer.

B = the number of day's during the relevant month given in A on which Brent (DTD) price was published in Platts Crude Oil Market ware.

The calculation of the price shall be rounded to three (3) places with 0.0005 and below being rounded down and above 0.0005 to be rounded up.

[13.3] Adjustment, if any, will be carried out for the difference of final pricing basis arrived at in accordance with Article 13.2 of this agreement and provisional payments released as per Article 13.1 of this Agreement in respect of crude oil delivered to IOC at the Custody Transfer Point. However, no interest, penalty, damages and other changes will be payable to parties if differential payments are released within 45 days from the date that the invoice for differential payment is

delivered by the Party entitled to the differential to the other party after determination of the final price. Without prejudice to any other right of recovery available to IOC, IOC may adjust any differential payment, which it is entitled to from the price payable against future delivery of the crude oil by and/or on behalf of the Contractor.

[13.4] Payments to Indian Parties will be made in Indian rupees. For conversion of foreign currency to Indian rupees, TT Buying Rate as taken by State Bank of India on the date of payment will be applied.

[13.5] The parties shall meet annually or sooner upon notice served by any party on the other to review the final pricing basis and agree on the modifications."

17.2 On a close reading of the price clause, it is evident that the price of crude oil is based upon the formula provided under Clause 13.2 which clearly does not include any tax, including Education Cess and Secondary and Higher Secondary Education Cess. The fact that no Crude Oil Cess is payable by the purchaser is further supported by the certificate of the Chartered Accountant based on the petitioner's invoices and also on the contractual clauses contained in the Crude Off take and Sales Agreement as well as a copy of a letter dated 29th July, 2015 issued by Shri N.M. Bhalerao, Chief Finance Manager, IOCL, wherein the certificate dated 20th November, 2014, issued earlier by IOCL has been explained and it has been stated that the price paid to the petitioner by IOCL was solely dependent upon the daily mean values of high and low quotations of Brent under the heading viz. "Spot Crude Oil Assessment" in Platts Crude Oil Market ware and the same has no connection with Indian taxes. It is further stated therein that since, price paid for crude purchased by them from the petitioner is fixed solely on the basis of the international price of crude as traded in the international market and the burden of cess and royalty payable to Government of India is on the seller, they confirm that they have neither paid any cess, royalty over and above the price, nor paid any Education Cess and/or Secondary and Higher Education Cess on such OID Cess to the petitioner. It is further stated that their statement that the certificate dated 20th November, 2014, was issued by them at the request of the petitioner is factually correct. It has been stated that IOCL would never had an occasion to issue such a certificate on its own, unless called for by another party which seeks such certificate. Hence, their obligation to issue such a certificate arises only if such a request is made to them. Reference in this regard may be made to the decision of the Supreme Court in *State of Rajasthan v. Hindustan Copper Ltd.* (supra), wherein it has been held as follows :

"2. On the question of refund, an affidavit of Shri Prashant Swarup, authorised representative of the respondent, has been filed wherein it has been stated that there is no question of any unjust enrichment of the respondent as a result of the refund of the excise duty paid on rectified spirit because the respondent has not passed on the duty to any consumer of the final product, viz., copper, manufactured by the respondent. It has been stated in the said affidavit that the

price of copper has always been fixed by the Mineral & Metal Trading Corporation (MMTC) on the basis of the prevailing price fixed by the London Metal Exchange (LME) and this was done not only for the period in question but also for prior and subsequent period and that only such price could be charged and that no part of the duty in respect of rectified spirit captively consumed in the manufacture of copper could be added to the price of copper which was fixed on the basis of the LME prices. We have no reason to doubt the correctness of the aforesaid statement contained in the said affidavit. In the circumstances, no case is made out for interference with the direction contained in the impugned judgment of the High Court regarding refund of excise duty paid by the respondent on import of rectified spirit used in the manufacture of copper. The appeals are, therefore, dismissed. No order as to costs."

17.3 In the opinion of this court having regard to the price clause contained in the Crude Off take and Sales Agreement and the certificate of the Chartered Accountant and the documents referred to herein above, more particularly, the certificate dated 29-7-2015 issued by IOCL, the above decision of the Supreme Court would be squarely applicable to the facts of the present case. Thus, from the certificate issued by the IOCL, it is evident that the IOCL which is the sole customer, has certified that it has not paid any Education Cess and/or Secondary and Higher Secondary Education Cess on the OID cess to the petitioner in view of the fact that the price paid for crude purchased by it from the petitioner is fixed solely on the basis of the international price of crude as traded in the international market and the burden of cess and royalty payable to Government of India is on the seller. In the impugned order, the adjudicating authority has brushed aside the certificate dated 20-11-2014 issued by the Senior Finance Manager of IOCL merely on the ground that such certificate was issued at the request of the claimant. As has rightly been stated in the above letter dated 29-7-2015, in the ordinary course, the petitioner would not be required to obtain such a certificate and it is only in the peculiar facts of the present case, where it is called upon to prove that it has not passed the incidence of the Education Cess and Secondary and Higher Secondary Education Cess paid by it to the buyer, that the petitioner was required to obtain such a certificate. Under the circumstances, the adjudicating authority was not justified in not giving due weightage to the letter dated 20-11-2014 issued by the IOCL. In the opinion of this court, the material on record clearly establishes that the incidence of Education Cess and Secondary and Higher Secondary Education Cess has not been passed on to the buyer and hence, the question of any unjust enrichment on the part of the petitioner does not arise.

17.4 On behalf of the respondents, reliance has been placed on the decision of the Supreme Court in *Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs* (supra), wherein it has been held as follows :

"25. It was also argued that the authorities below could not have invoked the provisions of Section 11B of the Act for denial of the benefit of notifications.

Section 11B was inserted in the Act by the Amendment Act of 1978 (Act 25 of 1978) with effect from 17-11-1980. It provided for refund of duties in certain cases of excess payment. The section was further amended by the Amendment Act of 1991 (Act 14 of 1991) with effect from 19-9-1991."

"45. From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in the absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner-appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss."

17.5 Applying the above decision to the facts of the present case, the petitioner has clearly shown that it has paid the amount for which relief is sought and has not passed the burden on the consumer and that if such relief is not granted, it would suffer loss. The said decision, therefore, does not in any manner come to the aid of the respondent. In the aforesaid premises, there is no need to remit the matter to the adjudicating authority for examining the aspect of unjust enrichment.

18. On behalf of the respondent, a contention has been raised as regards the very maintainability of the petition on the ground that there is an efficacious alternative remedy available under Section 35 of the Central Excise Act. Since the very existence of an alternative statutory remedy was in dispute, and connected issues were required to be decided for the purpose of deciding this issue, instead of deciding the question of maintainability at the very outset, the same is being decided at this stage. It has been vehemently contended on behalf of the respondents that this petition is not maintainable and that the petitioner should be relegated to avail of the remedy of appeal under Section 35 of the Central Excise Act, 1944. In support of such contention, reliance was placed upon the decision of the Supreme Court in CIT v. Chhabil Dass Agarwal, (supra) :

"11. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to

invoke the extraordinary jurisdiction under Article 226.

12. The Constitution Benches of this Court in *K.S. Rashid and Son v. Income Tax Investigation Commission*, AIR 1954 SC 207, *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425, *Union of India v. T.R. Varma*, AIR 1957 SC 882, *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86, and *K.S. Venkataraman and Co. (P) Ltd. v. State of Madras*, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted."

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case*, AIR 1964 SC 1419, *Titaghur Paper Mills*, (1983) 2 SCC 433 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. v. State of Haryana*, (1985) 3 SCC 267, this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility."

18.1 Reliance was also placed upon the decision of the Supreme Court in *Suganmal v. State of M.P.*, AIR 1965 SC 1740, wherein the court held thus :

"6. On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under

Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only order for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore could take action under Article 226 for the protection of their fundamental right, and the courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and therefore hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right."

"9. We therefore hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction."

18.2 On the other hand, it is the case of the petitioner that it has no alternative efficacious remedy but to approach this court since the present case pertains to levy of Education Cess and Secondary and Higher Secondary Education Cess on Oil Cess, which is far removed from the scope of the Central Excise Act which pertains solely to the levy and collection of excise duty. Hence, there is no question of preferring any appeal to the Commissioner (Appeals) under Section 35 of the CE Act, since the said authority is a functionary acting under the said Act and has no jurisdiction to entertain cases pertaining to levy of Education Cess and Secondary and Higher Secondary Education Cess on Oil Cess. Moreover, the levy itself being unconstitutional, the said challenge is beyond the scope of the jurisdiction of the Commissioner (Appeals) to decide under Section 35 of the CE Act. In support of such submission reliance has been placed on the decision of this court in *Panoli Intermediate India Pvt. Ltd. v. Union of India*, 2015 (326) E.L.T. 532 (Guj.), wherein it has been held thus :

"(A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that -

(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

(B) Resultantly, there is failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge."

18.3 In the earlier part of the order, this court has held that Crude Oil Cess is not in the nature of excise duty and consequently, the Education Cess and Secondary and Higher Secondary Education Cess computed thereon, also does not bear the character of a duty of excise, but is merely an amount paid under a mistake of law. As a necessary corollary, it follows that the provisions of the Central Excise Act, 1944 would not be applicable for refund of such amount paid by mistake. Moreover, since there was no liability to pay Education Cess and Secondary and Higher Secondary Education Cess, the provisions of the Central Excise Act as incorporated in the OID Act would also not apply to the amount paid by mistake. Therefore, the alternative remedy suggested by the respondents cannot be said to be an efficacious remedy inasmuch as the amount paid by way of mistake is neither a duty of excise nor is it Crude Oil Cess to which the provisions of the OID Act apply, and consequently, the machinery provisions under the Central Excise Act, 1944 would not apply to refund of such amount. In *Geojit BNP Paribas Financial Services Ltd. v. C.C.E., Customs & Sales Tax, Kochi* (supra), it was contended on behalf of the Department that the petitioner had an alternative remedy and therefore, the writ petition was not maintainable. The court held thus :

"10. The question of alternative remedy would arise if Service Tax is otherwise leviable under the Central Excise Act. Herein, in this case, there is no dispute with regard to the fact that no Service Tax is leviable for the service extended by the petitioner to the Muscat Bank SAOG. Thus, the writ petition is maintainable when the amount is arbitrarily withheld without any justification under law as the refund claimed by the petitioner is not relatable to Section 11B of the Central Excise Act. Similar view was also taken by the Karnataka High Court in *K.V.R. Constructions v. Commissioner of Central Excise (Appeals)* and *Another* [(2010) 28 VST 190 (Karn.) = 2010 (17) S.T.R. 6 (Kar.)] and by the Madras High Court in

Natraj and Venkat Associates v. Asst. Commr. of S.T., Chennai-II [2010 (249) E.L.T. 337 (Mad.) = 2010 (17) S.T.R. 3 (Mad.)]."

The above statement of law would also apply on all fours to the present case.

18.4 In the light of the above discussion, this court is of the view that the contention that the petition is not maintainable in view of there being an alternative statutory remedy of appeal available to the petitioner, does not merit acceptance.

19. Insofar as the claim of interest is concerned, the amount admittedly had been paid by the petitioner by way of a mistake. The position of law in this regard was not clear and hence, no fault can be found in the approach of the revenue authorities in retaining such amounts till the time the Circular dated 7-1-2014 came to be issued, clarifying the issue. It has been held herein above, that the amount in question is not in the nature of a duty of excise and hence the provisions of the Central Excise Act for refund would not be applicable. Consequently, the provisions of Section 11BB of the Central Excise Act, which provides for interest on delayed refund, would also not be applicable. It is settled legal position that in the absence of a statutory provision entitling the assessee to interest, a mandamus cannot be issued to the revenue to pay interest. Though the petitioner has claimed interest at the rate of 18%, the same is not backed by any statutory provision and hence, the relief prayed for in the petition to that extent cannot be granted.

TO SUMMARISE :-

Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra).

In the Circular dated 7th January, 2014, reference to sugar cess and tea cess levied under the Sugar Cess Act, 1982, and the Tea Act, 1953, respectively, is merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Departments are not chargeable to Education Cess and Secondary and Higher Secondary Cess chargeable under the provisions of the Finance Acts, 2004 and 2007, respectively.

Education Cess and Secondary and Higher Secondary Education Cess being cesses levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case Oil Cess is not a duty of excise and hence, the basic requirement of levy of such

cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the Oil Cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.

Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under Section 11B of the Central Excise Act, 1944.

Since the provisions of Section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the

period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in *Swastik Sanitary wares Ltd. v. Union of India* (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.

If the adjudicating authority was not satisfied with the Chartered Accountant's certificate and the other material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

The material on record clearly establishes that the incidence of Education Cess and Secondary and Higher Secondary Education Cess has not been passed on to the buyer and hence, the question of any unjust enrichment on the part of the petitioner does not arise. In the aforesaid premises, there is no need to remit the matter back to the adjudicating authority for examining the aspect of unjust enrichment.

Crude Oil Cess is not in the nature of excise duty and consequently, the Education Cess and Secondary and Higher Secondary Education Cess computed thereon, also does not bear the character of a duty of excise, but is merely an amount paid under a mistake of law. As a necessary corollary, it follows that the provisions of the Central Excise Act, 1944 would not be applicable for refund of such amount paid by mistake. Moreover, since there was no liability to pay Education Cess and Secondary and Higher Secondary Education Cess, the provisions of the Central Excise Act as incorporated in the OID Act would also not apply to the amount paid by mistake. Therefore, the alternative remedy

suggested by the respondents cannot be said to be an efficacious remedy inasmuch as the amount paid by way of mistake is neither a duty of excise nor is it Crude Oil Cess to which the provisions of the OID Act apply, and consequently, the machinery provisions under the Central Excise Act, 1944 would not apply to refund of such amount.

The amount in question is not in the nature of a duty of excise and hence the provisions of the Central Excise Act for refund would not be applicable. Consequently, the provisions of Section 11BB of the Central Excise Act, which provides for interest on delayed refund, would also not be applicable. It is settled legal position that in the absence of a statutory provision entitling the assessee to interest, a mandamus cannot be issued to the revenue to pay interest. Though the petitioner has claimed interest at the rate of 18%, the same is not backed by any statutory provision and hence, the relief prayed for in the petition to that extent cannot be granted.

20. For the foregoing reasons, the petition partly succeeds and is, accordingly, allowed to the following extent :

The order-in-original dated 24th November, 2014 is hereby quashed and set aside. The second respondent is directed to forthwith sanction and grant the petitioner refund of Rs. 73,60,061/- as claimed vide application dated 17-7-2014. Rule is made absolute, accordingly, to the aforesaid extent, with no order as to costs.

21. At this stage, Mr. R.J. Oza, learned Senior Standing Counsel for the respondents has requested that the operation of the judgment be stayed for a period of six weeks from today. The said request is strongly opposed by Mr. Harsh Parekh, learned advocate for the petitioners.

22. Having regard to the facts and circumstances of the case, the request is declined.