
(1981) 12 AP CK 0013

In the Andhra Pradesh High Court

Case No : Write Petition No. 650 of 1980

Kesoram Cements, Basantnagar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 31-12-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 173J, 9

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 4, 40

Citation : (1982) 10 ELT 214

Hon'ble Judges : Ramanujulu Naidu, J; Alladi Kuppuswami, J

Bench : Division Bench

Advocate : K. Srinivasa Murthy, for the Appellant; K. Subrahmanya Reddy, Standing-Counsel for Central Government, for the Respondent

Judgement

Ramanujulu Naidu, J.—In this Writ Petition the legality of levy of exercise duty in a sum of Rs. 22,55,795.76 on the cost of jute bags in which excisable commodity of cement manufactured by the petitioner-company, hereinafter referred to as the Company, was packed and sold between 1-10-1975 and 8-1-1976 is questioned and refund of the amount of excise duty paid by the Company under protest prior to or at the time of the removal of the commodity is prayed for.

2. In W.P. No. 1532 of 1976 filed by the K.C.P. Limited, engaged in manufacture of cement at Macherla, Guntur District, an identical question was raised and answered in favour of the assessee therein by a Division Bench of this Court consisting of one of us and Sri Kondaiah, the former Chief Justice. The said Writ Petition was disposed of along with a batch of Writ Petitions filed by some other assessees in which the scope of Section 4 of the Central Excise and Salt Act, 1944 as amended by the Central Excise and Salt (Amendment) Act, 1973 which came into force on 1-10-1975, was canvassed. The decision of the Division Bench was reported in Indo-National Limited, Nellore-4 and others vs. Union of India and others, 1979 ELT 334 (AP). In paragraph 63 of the judgment, which disposing of the batch of Writ Petitions, the Division Bench observed :

".....the only question raised by the petitioner-company is the legality of levy of excise duty on the cost of jute bags in which the excisable goods manufactured by the Company were packed and sold between 1-10-1975 to 8-1-1976. Admittedly, even after the amended Section 4 came into force, till 4-12-1975, the excise authorities did not include the cost of jute bags in the assessable value. However, from 5-12-1975 to 9-1-1976, the excise authorities made a demand in a sum of Rs. 2,08,791.05 towards excise duty on the cost of jute bags. The petitioner objected to the demand, but, however, paid the amount under protest. For the earlier period between 1-10-1975 and 4-12-1975, a demand was subsequently made by the 3rd respondent in a sum of Rs. 3,85,835.46 towards excise duty on the cost of jute bags on the ground that by mistake the sum was not collected earlier. For the reasons assigned by us, while dealing with the claim of exclusion of the cost of packing in Writ Petition No. 5948 of 1975, we hold that the cost of jute bags in which the goods of the company were packed and sold is not liable to be included in the assessable value of the goods. We may also observe that, realising the mistake committed by the excise authorities, the Government of India also issued the notification dated 9-1-1976 exempting payment of excise duty on the cost of jute bags in which cement is packed and sold by the manufacturers of cement. The petitioner-company is, therefore, entitled to refund of the amount of excise duty on the cost of jute bags levied and collected between 5-12-1975 and 8-1-1976. The demand dt. 31-3-1976 made upon the petitioner for payment of excise duty in a sum of Rs. 3,85,835.46 on the cost of jute bags for the period from 1-10-1975 to 4-12-1975 is, therefore, liable to be quashed."

Following the decision of the Division Bench, we quash the order dated 11-8-1978 passed by the 3rd respondent confirming the levy of excise duty, in a sum of Rs. 22,55,795.76 on the cost of jute bags in which the excisable duty of cement manufactured by the Company was packed and sold between 1-10-1975 and 8-1-1976.

3. Sri K. Srinivasamurthy, learned counsel for the Company submits that the Company is entitled to the consequential relief of refund of the amount of excise duty paid under protest. Sri K. Subrahmanya Reddy, learned counsel appearing for the respondents strenuously contends that the entire amount of excise duty levied and collected from the Company was passed on by the Company to its consumers and that any refund of the amount of excise duty to the Company, if ordered, would amount to unjust enrichment of the Company. The plea put forward on behalf of the Union of India and founded upon the doctrine of unjust enrichment was not advanced in the batch of writ petitions disposed of by the Division Bench referred to supra.

4. Before we advert to the decisions cited in support of the rival contentions advanced before us we may extract Rule 11 of the Central Excise Rules, 1944 providing for refund of duties or charges erroneously paid. It runs thus :

"11. No refund of duties or charges erroneously paid, unless claimed within three

months. - No duties or charges which have been maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded (unless the claimant makes an application for such refund under his signature and lodges it with the proper officer) within three months from the date of such payment or adjustment, as the case may be."

The above rule was omitted by the Central Excise (Fifteenth Amendment) Rules, 1980 by reason of insertion of Section 11-B in the Act by Finance (No. 2) Act, 1980 which runs 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 Collector of Central Excise before the expiry of six months from the relevant date :

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

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

....."

5. In *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, it was held by their Lordships of the Supreme Court :

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

.....

To hold that tax paid by mistake of law cannot be recovered under S. 72 will be not to interpret the law but to make a law by adding some such words as

"otherwise than by way of taxes" after the word "paid".

Their Lordships also added that merely because the State had not retained the monies paid as Sales Tax by the Assessee, but had spent them away in the ordinary course of business of the State would not make any difference to the position and under the plain terms of Section 72 of the Contract Act, the assessee would be entitled to recover back the money paid by him to the State under mistake of law and that equitable consideration could scarcely be imported when there was a clear and unambiguous provision of law which entitled the assessee to the relief claimed by him.

6. In *Patel India Private Limited Vs. Union of India and Others*, excess levy of duty levied by the Customs authorities under the Sea Customs Act on some of the goods imported by the appellant-company therein on the ground that the invoice price was not the real value of the imported goods was held to be without authority of law. The Union of India refused to refund to the appellant-company therein the amount of excess duty paid on the ground that no such claim was made within three months from the date of payment. Reliance was placed upon Section 40 of the Sea Customs Act, which is in pari materia with Rule 11 of the Central Excise Rules, 1944. Adverting to the said plea, their Lordships of the Supreme Court observed :

"Section 40 on which the Union of India relied in its return, provides that no customs duties or charges which have been paid, and of which repayment wholly or in part, is claimed in consequence of the same having been paid through inadvertance, error or misconstruction, shall be returned, unless such claim is made within three months from the date of such payment. The section clearly applies only to cases where duties have been paid through inadvertence, error or misconstruction and where refund application has to be made within three months from the date of such payment.

As rightly observed by the High Court, the present case was not one where the excess duty was paid through any of the three reasons set out in S. 40. The excess duty was demanded on the ground that the invoice price was not the real value of the imported goods and payment under protest was also made on that footing. The ultimate result in the appellant-company's revision was that charging of excess duty was not warranted under the Act, and that the value on which duty should have been assessed was the invoice price and nothing else. That being the petition, Section 40 did not apply and could not have been relied upon by the customs authorities for refusing to refund the excess duty unlawfully levied on the appellant-company.

From the fact that the customs authorities refunded the excess duty on items 22 to 29 and 33-35, it follows that the customs authorities had fully realised that the excess duty had been levied without the authority of law, for otherwise they would not have agreed to refund it, and further that they could not lawfully retain it. If the customs authorities were not entitled to levy the excess duty and

retain it, they were bound to return it to the appellant-company who had paid it under protest and only with a view not to incur demurrage charges, unless there was some provision of the Act which debarred the appellant-company from recovering it.

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

7. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, Sales Tax assessed and paid by the dealers in the State of Madhya Bharat was declared by the High Court of Madhya Bharat to be invalid in law. In some cases refund of the amount of sales tax paid was also ordered. Questioning the decision of the High Court of the State of Madhya Bharat, the State of Madhya Pradesh preferred appeals to the Supreme Court. Their Lordships of the Supreme Court held that the payment of tax was one made under a mistake within the meaning of section 72 of the Contract Act and so the Government to whom the payment was made by mistake was bound to repay it and that the High Court had, in exercise of its jurisdiction under Art. 226 of the Constitution of India, power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law. Their Lordships, however, added :

"At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made a clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, whereas, in these cases, a person comes to the court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances, it is not easy nor is it desirable to lay down any rule for universal application. I may however state as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation, the court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution.

.....It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. This court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this 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 is three years from the date when the mistake is known."

8. In *State of Kerala vs. Aluminium Industries Limited* - 16 STC 689 a Bench of seven judges of the Supreme Court while affirming the view laid down in *State of Madhya Pradesh vs. Bhailal Bhai* (Supra) added :

.....Where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice) to refund the tax. If refund is not made, remedy

through court is open subject to the same restrictions and also the period of Limitation (See Art. 6 of the Limitation Act, 1908). Namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake (See State of Madhya Pradesh Vs. Bhailal Bhai and Others,). In this view of the matter it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund of mistake was proved and the claim was made within the period of Limitation."

9. In Suganmal vs. State of Madhya Pradesh - 16 STC 389 their Lordships of the Supreme Court reaffirmed the view taken in State of M.P. vs. Bhailal Bhai (supra).

In the said case, the appellant, therein was the Managing Proprietor of Bhandari Iron and Steel Co., which had its foundry at Shilnath Camp, Indore, where it carried on the business of mechanical engineers, iron, brass and malleable iron founders and re-rollers in steel. There was in force in the Indore State, the Indore Industrial Tax Act, 1927, for the imposition of industrial tax on cotton mills. Excess profits duty was payable under the Indore Excess Profits Duty Order, 1944. The company did not run any cotton mill. Still, when the company was called upon to submit its returns and to deposit industrial tax whenever its balance-sheet showed profits, it did so. In all, the company paid a sum of Rs. 18,234.52 in 1944 in advance on account of industrial tax prior to the tax being provisionally assessed by the Assessing Officer. The provisional assessment for the years 1941-43 was made in 1945 and for the years 1945-46 in 1946. The tax was assessed at Rs. 62,809.52. Deducting the amount of Rs. 18,234-5-2 deposited in advance in 1944 an amount of Rs. 44,575 was deposited by the appellant on or before June 9, 1948. The tax for different years was finally assessed in 1951 and 1952. The appellant filed appeals against the various assessment orders to the appellate authority. The appeals were decided in June 1955. The appeals against the assessment of industrial tax were allowed on the ground that the company was not liable to pay industrial tax as it did not carry on any business which was liable to be assessed to that tax and the various assessment orders under appeals were quashed. No direction was, however, given by the appellate authority for the refund of tax which had been realised from the company. Thereafter the company approached the various officers of the State Government of Madhya Bharat for the refund of tax amounting to Rs. 2,37,770-14-2 after appropriating Rs. 37,951-7-0 to excess profits duty from Rs. 1,75,722-5-2 paid by the company towards the tax and excess profits duty. The Government adjusted the amount due for excess profits duty as requested by the company and refunded Rs. 74,961-9-0 paid subsequent to January 26, 1950 when the Constitution came into force. It, however, refused to admit the claim for refund of the amount of Rs. 62,809-5-2 which had been realised from the company prior to that date and, therefore, refused to refund that amount, the company thereupon filed a writ petition praying for the issue of a writ of mandamus against the State of Madhya Bharat and the other respondents, directing them to perform their statutory duty and/or to refund or cause to be refunded to the appellant the amount of Rs. 62,809-5-2 which, it was alleged

they were entitled in law to receive. The respondents contested the claim and the High Court dismissed the writ petition holding that there was no statutory obligation on the State to refund the amount, that the order of the appellate authority did not necessarily imply an order the State to refund the amount and that the writ of mandamus could not be issued for the purpose of refund of the tax wrongly realised as held by the appellate authority as that would amount to ordering the execution of the decisions of the appellate authority. The order of the High Court was assailed by the company in the Supreme Court. Two questions arose for determination by the Supreme Court in the Appeal. The first was whether a petition under Art. 226 of the Constitution praying solely for the refund of money alleged to have been illegally collected by the State as tax was maintainable under Art. 226 adverting to the first question, their Lordships of the Supreme Court observed :

"We are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Art. 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 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 Art. 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 orders 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 Art. 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 claim a right."

In the view expressed above, the appeal preferred by the Company was dismissed and the order of the High Court was confirmed.

10. It may be noted that in the present case not only the legality of levy of excise duty on the cost of jute bags is questioned but also refund of the same paid under protest is prayed for. There is also no delay whatsoever on the part of

the company in seeking refund of the amount of excise duty paid under protest. The claim of the company even if it were enforced by way of a suit could not have been resisted by the respondents by raising any plea of limitation as the same having been made well within the period of limitation.

11. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, the appellants therein sought refund of amounts of Education Cess paid under a mistake of law, by way of writ petitions filed before the High Court of Mysore under Art. 226 of the Constitution of India, the Act authorising payment of Educating Cess was struck down by the High Court of Mysore in an earlier proceedings. Refund of amounts of Education Cess levied and paid was not prayed for in the earlier proceeding. The High Court of Mysore declined to exercise its jurisdiction under Art. 226 of the Constitution of India and the writ petitions were dismissed. The appellant thereupon moved the Supreme Court. The Supreme Court confirmed the decision of the High Court. Their Lordships of the Supreme Court quoted with approval the principles laid down in *State of M.P. vs. Bhailal Bhai (Supra)* and *State of Kerala vs. Aluminium Industries Limited (Supra)* and added in paragraph 10 of their judgment :

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

12. In *R.C. Jall Vs. Union of India (UOI)*, , the vires of Section 22(2) of the Hyderabad General Sales Tax Act, 1959 which laid down that any amount collected by way of tax by any person otherwise than in accordance with the provisions of the Act must be paid over to the Government and in default of such payment, the said amount would be recovered from such person as if it were arrears of land revenue, was challenged. Their Lordships of the Supreme Court held that the impugned Section 11(2) of the Act was not within the competence of the State Legislature under Entry 54 of List II of Schedule VII of the Constitution and that the provisions of Section 20(2) being consequential to Section 11(2) would also fall along with it. Their Lordships added :

"If a dealer has collected anything from purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer."

13. In *Sales Tax Officer vs. Tata Oil Mills Co. Limited - 36 STC 232 (SC)* their Lordships of the Supreme Court held :

"It would not, however, be permissible for the State Legislature to enact a law under entry 54 for recovery by the State of an amount which could not be recovered as Sales Tax or purchase tax in accordance with the law on the subject and which was wrongly realised by a dealer as sales tax or purchase tax. Such a law plainly would not be a law relating to tax on the sale or purchase of goods but would be one in respect of an amount wrongly realised by a dealer as sales tax or purchase tax. It looks perhaps odd that a dealer should recover in the course of business transactions certain sums of money as sales tax or purchase tax payable to the State and that he should subsequently decline to pay it to the State on the ground that the same amount is not exigible as sales tax or purchase tax. Whatever might be the propriety of such a course, the question with which we are concerned is whether the State Legislature is competent to enact a law under entry 54 for recovery by the State of an amount, which though not exigible under the State law as sales tax or purchase tax was wrongly realised as such by a dealer. The answer to such a question has to be in the negative."

The decision in *Abdul Quader & Co. vs. Sales Tax Officer (Supra)* was quoted with approval.

14. In *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, , their Lordships of the Supreme Court while setting aside the assessment to excise duty made by the excise authorities on the dye-stuffs manufactured by the appellants wherein directed the respondents to refund to the appellants forthwith the amount collected in excess of the correct duty of excise leviable in accordance with the principles laid down in the judgment delivered therein.

15. In *Annapuran Match Industries, Cudapah Vs. The Union of India and Another*, . The legality of imposition and collection of excise duty on matches manufactured by Annapurna Match Industries was assailed in a proceeding instituted under Article 226 of the Constitution of India. Refund of the excise duty so collected was also prayed for. A Division Bench of this court declared the imposition and collection of excise duty to be without jurisdiction and not authorised by law. Adverting to the claim of refund of the excise duty asked for, the Division Bench observed :

"The respondent cannot be allowed to appropriate the duty so collected. As the duty was collected under a void provision the petitioner is also entitled to an Order for refund of the duty collected from him by the respondents."

16. In *Union of India vs. Mansingka Industries Pvt. Ltd. - 1979 ELT 158 (Bombay)*, Mansingka Industries Private Limited, a company incorporated under the Indian Companies Act filed a suit in the Court of the Civil Judge, Senior Division at Jalgoan contending that the Union of India illegally recovered from it certain monies purported to be excise duties under the Central Excises and Salt Act. The suit was decreed. The decree was assailed by the Union of India in the

High Court of Bombay of the ground that Section 40 of the Central Excises and Salt Act excluded the jurisdiction of Civil Court to recover duty illegally collected by the Government. Repelling the contention, Mukhi J., held that Section 40 of the Central Excises and Salt Act merely enacted immunity or protection against claims for damages against the Government itself or any of its officers for acts done in good faith and that questions of collection of illegal duty and/of its recovery or refund were not questions covered by the said section and that Section 40 of the Central Excises and Salt Act did not bar the jurisdiction of civil or criminal courts from recovery of duty illegally collected. In result, the appeal preferred by the Union of India was dismissed.

17. In *Associated Bearing Company Limited vs. Union of India and another* - 1980 ELT 415 (Bombay), following the earlier decision of the Division Bench of the High Court of Bombay in *Union of India vs. Mansingka Industries Private Limited* (Supra), a Division Bench of the High Court of Bombay held that the jurisdiction of the authorities under the Central Excise Act was to recover duty according to law, that if any duty was recovered on post-manufacturing expenses or on a price which was not permissible in law, such a levy clearly amounted to exercising excess of jurisdiction or acting without jurisdiction and could not be held merely an error of jurisdiction that it could not, therefore, be construed as resulting due to any inadvertance, error or misconstruction on the part of the Department for purposes of limitation as contemplated under Rule 11 of the Central Excise Rules, 1944, that once the recovery of the excise duty by the Department was held to be illegal, the provisions of Rule 11 would not be attracted, that a claim for such a refund could be entertained within three years from the date when the mistake of law was discovered and that there was no provision in the Central Excise Law under which a manufacturer could be denied the refund of duty illegally collected from him even though he had recovered it from the customers and had no intention to refund it to them and that the claim of refund of duty illegally collected by the Department could be entertained even in a proceeding under Article 226 of the Constitution.

The Division Bench of the High Court of Bombay placed reliance upon paragraph 10 of the judgment of the Supreme Court in *D. Cawasji & Co. vs. State of Mysore* (Supra), extracted earlier.

18. In *Maharashtra Vegetable Products Pvt. Ltd. and another vs. Union of India and others* - 1981 ELT 468 (Bombay) a Division Bench of the High Court of Bombay again held, following the earlier decisions of its two Division Benches in *Union of India vs. Mansingka Industries Private Limited* (Supra) and *Associated Bearing Company Limited vs. Union of India and another* (Supra), that the excise authorities had no jurisdiction to take into account any post-manufacturing expenses for purpose of chargeability of excise duty, that if excise duty was wrongly collected on post-manufacturing expenses, it clearly amounted to exercising of powers without jurisdiction and outside the provisions of the Central Excises Act, that it would not attract the bar of limitation prescribed under Rule

11 of the Central Excise Rules, 1944 for purposes of refund, that the amount of duty illegally collected was refundable even though it was recovered from the consumers by the manufacturers and might result in unjust enrichment, that where the constitutional validity of a levy was in question and the departmental action amounted to recovery of tax without authority of law, it could not be said that a suit was a remedy equally expeditious, efficacious and adequate as a proceeding under Article 226 of the Constitution and that the period of limitation for filing a proceeding under Art. 226 of the Constitution was three years from the date of the court declaring the law under which the duty was paid to be invalid.

19. The Union of India applied to the Supreme Court for special leave to appeal against the decision in Maharashtra Vegetable Products Pvt. Ltd. and another vs. Union of India and others (Supra) and leave was refused by their Lordship of the Supreme Court consisting of the Chief Justice and Mr. Justice Eradi on 3-4-1981.

20. In Paper Products Ltd. vs. Union of India - 1981 ELT 538 (Bombay), a single Judge of the Bombay High Court held that if duty paid by mistake was declared by a competent Court to be invalid in law, it would fall within the purview of Section 72 of the Contract Act and the Government would be under an obligation to refund it.

21. In Madras Fertilisers Ltd. vs. Assistant Collector of Central Excise, Madras & others - 1981 ELT 194 (Madras) it was held by Varadarajan J., that the Government was not entitled to retain the excess duty recovered or collected as there was a legal obligation on its part to return the same and as there was a corresponding legal right in the assessee to recover the same.

22. In Prem Cables Pvt. Ltd. vs. Assistant Collector (Principal Appraiser) Customs, Bombay and Others - 1981 ELT 440 (Raj.) it was held by a Division Bench of the High Court of Rajasthan that the High Court could issue a direction for enforcement of fundamental rights to give constitutional relief by way of refund of money paid under a mistake of law and realised by the Government without the authority of law and that if a proceeding under Article 226 of the Constitution of India was instituted within three years from the date the mistake of law became known to the assessee, the amount could be refunded by issuing a writ of mandamus and institution of a suit in a Civil Court was not necessary for the purpose.

23. In I.T.C. Limited and Others vs. Union of India and Others (Supra) it was held that the revenue had no right to retain taxes of any kind illegally levied and collected if the same were not authorised by law and the aggrieved assessee claiming refund of such duties could not be denied the remedy under Art. 226 of the Constitution.

24. In Assistant Collector of Customs : Madras and Others vs. Premraj and Ganapat Raj and Co. (P) Ltd. - 1978 ELT 630 (Madras) a Division Bench of the Madras High Court directed refund of excise duty to the assessee on the ground

that the recovery of duty was without the authority of law.

25. In *Vazir Sultan Tobacco Co. Ltd. vs. Union of India and Others* 1981 ELT 140 (Delhi) a single Judge of the Delhi High Court held that any duty realised in excess of what was permissible under the Central Excise Act, would be realisation outside the provisions of the Act and the time limit laid down for refunds in Rule 11 read with Rule 173J of the Central Excise Rules, 1944 would not apply in such cases and that where the Government realised the duty in contravention of the law the court was fully competent to allow the refund of the excess amount of duty under Art. 226 of the Constitution even though the claim of refund had been held to be time barred by the departmental authorities.

26. In *Hyderabad Asbestos Cement Products Ltd. vs. State of Andhra Pradesh* - 24 STC 487 the appellant therein was a public limited company carrying on the business manufacturing and selling asbestos cement sheets and other products with its factory situated at Sanatnagar, Hyderabad in the State of Andhra Pradesh. For the year 1959-60, the Commercial Tax Officer, in assessing the turnover of the Company allowed a deduction of Rs. 57,590.37 in respect of railway freight on articles supplied to outstation customers. The Deputy Commissioner of Commercial Taxes later revised the assessment and directed that the railway freight paid in respect of the goods sold be included in the turnover. In appeal the Appellate Tribunal set aside the order passed by the Deputy commissioner of Commercial Taxes. But the order passed by the Tribunal was set aside by the High Court of Andhra Pradesh and the order passed by the Deputy Commissioner was restored. A writ petition moved by the Company challenging the assessment was also dismissed. The company thereupon moved the Supreme Court. The Supreme Court held that under the terms of the contract there was no obligation on the part of the company to pay the freight and the price received by the Company for the sale of the goods was the invoice amount less the freight. In that view the appeals preferred by the Company were allowed by the Supreme Court. Adverting to the plea put forward on behalf of the State that the Company realised sales tax on the freight from its customers, their Lordships observed :

"If, apprehending that it may have to pay sales tax on the freight, the Company collected sales tax on the freight, the true nature of the contract between the Company and the purchasers cannot on that account be altered. The Company may be liable to refund the amount of excess sales tax to its purchasers. But that is a matter between the Company and the purchasers and the State cannot seek to levy tax on railway freight if it is not made a part of the price".

27. To sum up, the excise authorities have no jurisdiction to levy excise duty except in conformity with and as empowered by the provisions of the Central Excise Act and the rules made thereunder. Any duty collected otherwise is without authority of law and is liable to be refunded to the assessee. The Union of India has no right to retain the duty so illegally levied and collected. In a proceeding instituted under Art. 226 of the Constitution of India questioning the

levy of such illegal excise duty, the assessee is entitled to the consequent relief of refund of the duty so illegally collected when the illegal levy is quashed in the said and same proceeding, unless a plea of limitation is available to the Union of India in case the claim were to be enforced by way of a suit. The assessee's claim for refund of excise duty illegally levied any paid by him under protest stands on a still higher footing. (The discretionary jurisdiction of the High Court under Art. 226 of the Constitution cannot, however, be exercised merely for the purpose of obtaining refund of the duty declared to have been collected illegally in an earlier or a different proceeding). Even if the assessee passed on to his consumers, the duty illegally recovered from him, it is a matter between him and his consumers and the High Court cannot deny refund of the illegally levied and collected duty, to the assessee even if it results in unjust enrichment of the assessee.

28. On behalf of the Union of India, reliance is placed on the decision in Madras Aluminium Company Ltd. and Another vs. Union of India, 1981 ELT 478 (Madras). The petitioners therein filed writ petitions before the High Court of Madras questioning levy of excise duty on aluminium properzi rods and praying for refund of the duty paid under mistake of law. Adverting to the claim of refund of excise duty, Division Bench of the High Court of Madras observed :

"There is one other impediment in the way of the petitioners claiming refund of excise duty in this case. The petitioners, after paying the excise duty as per the classification made ny the excise authorities, have passed on the same to the actual consumers and in fact, the actual consumers have borne the entire liability towards excise duty. The petitioners admit that they are not able to trace at this stage as to who are the ultimate consumers in respect of the goods which have suffered excise duty, in respect of which refund is now sought for by them. Though excise duty is levied at the production or manufacture of goods for home consumption, in substance it is a tax on consumption, and therefore, if at all it is the consumer who can claim the refund of the excise duty paid in respect of the article purchased and consumed by him and not the petitioners who produced the articles and who have recouped themselves to the extent of the excise duty paid to the State.

.....

In respect of sales tax paid by the dealers and which has been passed on to the consumers courts have held that the money paid as tax primarily belonged to the consumers who paid it and not to the dealers (vide 16 STC 973 - IS, C.R. 735 and 30 STC 120). Therefore, the petitioners having passed on the excise duty, paid by them to the state, to the consumers, they cannot have any beneficial interest on the excise duty if and to be refunded by the State and the beneficial interest is vested only if all the consumers who had ultimately borne that burden. As pointed out by the Supreme Court in R.C. Jall vs. Union of India, 1962 Supp. 3 SCR 436 at page 451.....

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. If the ultimate incidence of the excise duty is on the consumer than the ultimate benefit of the refund of excise duty should also go to the consumer and not to the producer or manufacturer. Thus, even in the event of the court being satisfied that excise duty is not excisable on the molten aluminium which is aluminium in crude form, the court is not bound to direct refund of the duty if it ultimately results in the unjust enrichment of the producer and unfair deprivation of the benefit to the consumers. As already stated, the petitioners are not in a position to say as to who are the ultimate consumer who had in fact borne the excise duty. Therefore, there is no question of the petitioners refunding the excise duty pro rata to the actual consumers. It is true this court can in its discretion direct refund of the excise duty illegally collected from the petitioners. But in the circumstances of this case, where the petitioners cannot in their turn refund the excise duty pro rata to the actual consumers, such a refund will result in their unjust enrichment to the extent of the amount directed to be refunded and the court will be justified in refusing to exercise its discretionary jurisdiction to direct the refund of the excise duty collected from the petitioners.

It is well established that the right of the petitioners to get a refund of the excise duty is subject to questions of estoppel, limitation and the like. If peculiar circumstances existed and they showed that the amount the State has to refund really belongs not to the petitioners but to the consumers, then the court will be justified in refusing to direct refund. In this case, any direction to refund the excise duty to the petitioners will result in their retention of the duty collected by them from the consumers and the court will be siding an unjust enrichment by the petitioners by such a direction. Admittedly the petitioners have passed on the excise duty to the consumers and this was done on the basis that they have paid excise duty to the State. But for the payment of excise duty to the State the petitioners will not be entitled to or enabled to pass on the duty to the consumers. Therefore, if there is no possibility of excise duty being refunded to the actual consumers, the petitioners will have the benefit of both the collection of excise duty from the consumers and the benefit of refund from the State. Thus the court will indirectly and unjustly be enriching the petitioners by directing a refund of the excise duty paid by them. We are, therefore, satisfied that having regard to all the circumstances the petitioners are not entitled to get a refund of the excise duty if they are not in a position to trace the actual consumers and pay back the excise duty collected from them. The discretionary jurisdiction of this court under Art. 226 of the Constitution should be exercised for public good and not to facilitate the petitioners to make an unlawful gain at the instance of the public (consumers) on the one hand and the State on the other, and the exercise of the extraordinary jurisdiction of this court must advance the cause of justice and not subserve the object of the petitioners to enrich themselves

unjustly by getting a refund of the excise duty from the State and retaining the same without refunding in to the consumers.

..... "....." The Division Bench added :

"If, in fact the petitioners have no beneficial interest in the amount paid to the State as excise duty, as they have already recouped themselves to that extent from the consumers the claim for refund can in law be taken to be a claim made on behalf of the consumers. As already pointed out, it is impracticable to trace the actual consumers of the goods produced by the petitioners with reference to which excise duty was collected and therefore the court is justified in not directing the refund of the amount to the petitioners but directing the retention of the amount by the State as a deposit with a view to ultimately refund the same pro rata to the actual consumers, as otherwise, a direction to refund the exercise duty to the petitioners will result in their unjust enrichment, and the court will be actually giving an unjust benefit to them. In this view, even if there is any excess collection of excise duty in this case as contended by the petitioners, the petitioners are not entitled to get a refund. The excess collections, if any, will be retained by the State as deposit for the purpose of payment out at pro rata to the actual consumers who come forward and prove their claim for refund".

It may be noticed that the various decisions rendered by the Supreme Court and referred to earlier, recognising the right of the assessee to claim refund of duties or taxes illegally levied from him and the corresponding legal obligation on the part of the Union of India or the State to refund the same to the assessee were not noticed by the Division Bench of the High Court.

29. Reliance was also placed upon the decision of a Division Bench of this court in *G.S.G.A. & Co. vs. State of A.P.* - 30 STC 120 wherein, adverting to a claim for refund of sales tax which was held to be illegally collected, it was held :

"Even if the court is satisfied having regard to all the circumstances that the petitioners are entitled to refund of the tax, the petitioners may still not be granted this discretionary relief if it results in retention of the sales tax collected by them from the public and imposes the burden of refunding the tax on the State which it had collected under a valid assessment order. The discretionary jurisdiction of this court should be exercised for public good and not to facility the individual to make an unlawful gain at the expense of the public on the one hand and State on the other. The extraordinary jurisdiction of the High Court under Art. 226 must advance the cause of justice and not subserve the ends of the individual for retaining the sales tax illegally collected by him.....

More than anything else, one fact which must strongly weigh against the claim of the refund of sales tax by the petitioners is that the petitioners have already collected the tax and any direction in these writ petitions to refund such tax as they have paid would result in allowing them to retain the tax illegally collected from the consumers and thus make an unauthorised gain for themselves, while

the State which is in charge of the public funds and which has collected the tax as per the final orders of assessment, would be now obliged to return the same for the personal benefit of the dealer at the expense of the public from whom he has collected the tax. The extraordinary jurisdiction of this court must not be allowed to be invoked and the discretionary relief granted for the benefit of a private individual in this manner at the expense of the public and the State. The discretionary jurisdiction of this Court under Article 226 of the Constitution must not be allowed to be exploited to defeat the ends of justice."

It may be noted that in the above case sales tax collected from the dealers and sought to be refunded was levied under valid assessment orders which became final. That circumstance weighed with the Division Bench in refusing to grant the discretionary relief. The following observations of the Division Bench are pertinent :

"If the assessment order is not void but is only erroneous in law, the assessee is obliged to get the assessment order set aside. Otherwise as laid down in *State of Vindhya Pradesh vs. Raghunath Mannulal* - 1952 - 3 STC 256), "if the sales tax authority has jurisdiction, and has exercised it, may be wrongly, then the aggrieved party cannot go to the civil court, but should go to the Tribunal mentioned in the Sales Tax Statute itself, if, on the other hand, this authority had acted without jurisdiction, then the aggrieved party must go to the civil court, because its grievance is a general grievance and not one under the special law. If the assessment order is merely erroneous in law, the assessment cannot claim refund without getting the assessment order quashed by availing himself of the alternative remedy provided under the statute. He cannot invoke the jurisdiction of a civil court for questioning the legality or propriety of the assessment order and if that order cannot be questioned, then the amount paid or recovered pursuant to that order cannot be directed to be refunded by a civil court. If that be so then this court exercising jurisdiction under Article 226 of the Constitution must necessarily take into account whether a party who has by his own laches has not chosen to avail himself of the alternative remedy provided by the statute for questioning the erroneous decisions of the assessing authorities by taking the matter in appeal or in revision and also by reference to this court and has allowed the assessment orders to become final, which assessment orders are not allowed by the statute to be questioned even by way of a civil suit, should be granted the indulgence to invoke the extraordinary jurisdiction of this court of the grant of the discretionary relief. Even this court cannot direct refund of tax paid in pursuance of such orders without quashing the assessment orders themselves. If the assessment orders have to be quashed, this court cannot shut its eyes to the long interval between the orders of assessment and the writ petitions".

30. In *Hyderabad Asbestos Cement Products Ltd. and another vs. Union of India and others* - 1980 ELT 735 (Delhi), the legality of levy of excise duty on asbestos fibre was questioned and refund of the duty paid was prayed for in the Delhi High

Court. A Division Bench of the Delhi High Court held that the imposition was valid. Having recorded the said finding, the Division Bench observed in paragraph 32 of the judgment :

"In the petition there was also a claim for the refund of duty which had been paid. In view of my finding on the validity of imposition of the excise duty that question does not arise. Even if I had found otherwise a question may well have arisen whether an order of refund could be passed in favour of the petitioners. The reason is that excise duty and additional duty which has been imposed and as has been recognised by the Supreme Court is ultimately passed on to the consumers..... The benefit if any of the refund of illegally levied excise duty and additional duty should in all fairness normally belong to the consumers. In such a situation a question may well be raised that the petitioners cannot be allowed to unjustly enrich themselves by obtaining refund of the excise duty and additional duty which amount they have already recovered from the consumers when asbestos fibre was disposed of. This is on the equitable plea that if there is illegal levy and some refund is due the same should be disbursed to the buyers from whom the excise duty and additional duty was realised and not appropriated by the petitioners who in equity are not entitled to it".

We are of the opinion that the above observations of the Division Bench of the Delhi High Court are obiter dicta.

31. In *Ogale Glass Works Ltd. vs. Union of India and others* - 1979 ELT (J 468) Bombay, the questions that arose for consideration were whether the cost of packing and packing materials could be included in the assessable value of glass and glassware manufactured by Ogale Glass Works Limited and whether the assessee was entitled to refund of the amounts of duty paid on the cost of packing and packing material. A Division Bench of the High Court of Bombay held that the cost of packing and packing materials could not be legally included in arriving at the wholesale cash price of the excisable goods manufactured by the assessee. The Division Bench, however, declined to grant refund to the assessee of the amounts excess duty collected from the assessee without the authority of law Mukhi J., speaking on behalf of the Bench observed :

"It requires to be noticed that the amount comes to nearly Rs. 12 lakhs and the result of an order in their favour would be that the petitioners would be enriched to that extent without any real claim to that money in so far as the record shows that the moneys were recovered by the petitioners from their customers and then passed on to the respondents.

.....

In the petition before us, I am unable to persuade myself that justice lies on the side of the petitioners and that this court will be doing justice in ordering the respondent to refund the amount of Rs. 12 lakhs to the petitioners when, to begin with, that money never came from the petitioner's pocket. It is true that

the respondents may not have the legal right to retain that money, but in the circumstances of the case justice does not require that moneys moneys should be transferred from the respondents (who have no right to it) to the petitioners who also have no right to it".

It may be noted that the decision of the Division Bench of the High Court of Bombay suffers from the same comment levelled against the decision in Madras Aluminium Company Ltd. and another vs. Union of India (supra).

32. In Hindustan Pilkington Glass Works Ltd. vs. Superintendent, Central Excise, Asansole & others - 1978 ELT (J 229) (Cal.) a single Judge of the Calcutta High Court held that refund of duty, though paid under a mistake, but without a protest, could not be granted in a proceeding under Art. 226 of the Constitution of India. The decision in Ogale Glass Works vs. Union of India (supra) was relied upon by the learned Judge.

33. In Electric Lamp (India) Pvt. Ltd. vs. Collector of Central Excise, Calcutta and Orissa and others - 1978 ELT 84 (Calcutta) a single Judge of the Calcutta High Court held that a manufacturer who had already collected the excise duty alleged to have been paid in excess by mistake could not be allowed to have an unjust enrichment by claiming again refund of the same amount.

34. In Union Carbide Co. Ltd. vs. Assistant Collector of Central Excise and others - 1978 ELT 180 (Calcutta), a single Judge of the Calcutta High Court held that refund of duty paid under mistake of law could be claimed by way of a petition under Art. 226 of the Constitution, provided such petition was filed within three years. The decision in Electric Lamp (India) Pvt. Ltd. vs. Collector of Central Excise, Calcutta and Orissa and others (supra) was relied upon on behalf of the Union of India for negating the claim of refund of excise duty on the ground that the assessee passed on the same to the actual consumers. Adverting to the said plea, the learned Judge observed :

"Of course the facts of the instant case are different from the facts in that case, inasmuch as there was positive evidence that the manufacturer had realised duties from the consumers. Such evidence is not available in the instant case but it may be presumed that though as a matter of law excise duty is payable by the manufacturer, as a matter of fact it is passed on to the consumers. But that in my opinion is no ground to invoke the theory of unjust enrichment. If unjust enrichment is not to be permitted to a litigant, it should not also be permitted to the State. The State has no right to collect unauthorised tax or illegal tax. Good fiscal administration enjoins that all lawful taxes should be properly collected and taxes which are not due if realised by the State should be refunded. Such fiscal administration alone ensures the atmosphere of tax compliance. But a question of limitation also arises in this case."

35. In Birla Jute Manufacturing Company Ltd. vs. Union of India and others - 1980 ELT 593 (M.P.) two writ petitions were filed in the High Court of Madhya Pradesh by the manufacturers of Portland Cement questioning levy of excise duty

on the cost of packing of cement in gunny bags from 1st Oct., 1975 to 8th Jan., 1976 and praying for refund of the excess excise duty paid by them under protest. A Division Bench of the High Court while holding that the cost of packing of cement in gunny bags was not includible in the assessable value of cement u/s 4 of the Central Excises and Salt Act, 1944, also directed refund to the assessee, the amounts of excise duty paid by the assessee under protest. Adverting to the decision of the Division Bench of the Bombay High Court in Ogale Glass Works Ltd. vs. Union of India and others (Supra) relied upon by the Union of India in support of its contention that the assessee were not entitled to refund, it was observed :

"It is not disputed that the duty on the cost of packing was paid by the petitioners under protest. If the petitioners are not liable to pay duty, they are also not liable to recover it from the parties to whom they sold the cement. The purchasers from the petitioners are entitled to recover that amount from them. The learned Standing Counsel for the respondents relied upon a judgment of the Bombay High Court in the Ogale Glass Works Limited vs. Union of India and others - (1979 ELT 468) in support of his submission that justice does not lie on the side of the petitioners in seeking refund. It does not appear whether in that case the petitioner had paid the duty under protest. When the petitioners in the instant case had paid the duty under protest and when the purchasers from them can claim recovery of the amount of duty which they may have paid as price to the petitioners, we fail to understand why justice does not lie in directing refund of that amount to the petitioners from the Government".

We are in complete agreement with the view expressed by the Division Bench of the Madhya Pradesh High Court. We may add that the facts of, and the questions raised in, the present case are identical with those in the case referred to supra.

36. In Wipro Products Ltd. and another vs. Union of India and another - 1981 ELT 531 (Bombay) a division bench of the Bombay High Court expressly dissented from the decision of the Division Bench of the Madras High Court in Madras Aluminium Co. Ltd. and another vs. Union of India (supra) and preferred to follow the earlier decision of a Division Bench of the said Court in Maharashtra Vegetable Products Pvt. Ltd. and another vs. Union of India and Others (supra). The observations made by the Division Bench of the Delhi High Court in Hyderabad Asbestos Cement Products Ltd. and another vs. Union of India and others (supra) in paragraph 32 of the Judgment of the Division Bench were relied upon on behalf of the Union of India. Adverting to the same, the Division Bench of the Bombay High Court held :

"In the first instance it must be noted that the claim for refund of duty was turned down by the Delhi High Court on the ground that the imposition was perfectly valid. The learned Judge observed that the benefit, if any, of the refund of illegally levied excise duty should in all fairness normally belongs to the consumers and therefore a question may well be raised that the petitioners cannot be allowed to unjustly enrich themselves to obtain refund. The learned

Judge declined to record any conclusive finding as the question did not specifically."

The following principles were laid down by the Division Bench of the Bombay High Court :

(1) Since the excise duty is leviable on the manufacture or production of goods, the expenses and profits attributable to post-manufacturing and non-manufacturing operation are not includible in the assessable value u/s 4 of the Central Excises Act.

(2) If the levy of Central Excise is totally without jurisdiction and outside the provisions of Section 4 of the Central Excises Act, the bar of limitation prescribed under rule 11 of the Central Excise Rules is not applicable.

(3) If the recovery is illegal and without jurisdiction, the claim for refund will not be governed by the Limitation Act.

(4) if the duty is recovered without authority of law, the Government is bound to refund it even if the benefit is not passed on to the consumer.

(5) If the recovery of duty is constitutionally illegal it would be futile to drive the citizen to a Civil Court instead of approaching the High Court under Art. 226 of the Constitution.

37. Examined from a different angle, the plea of unjust enrichment of the Company put forward on behalf of the Union of India does not also merit acceptance. If only the Company had rushed to this Court questioning the levy of duty on the cost of jute bags and obtained a direction from this Court restraining the respondents from collecting the said duty, the respondents could not have collected the same, in which case the question of refund of duty would not have arisen. The Union of India could not have recovered the same from the company under any provision of law on the ground that the Company passed on the same to its consumers. The Company cannot be placed in a disadvantageous position by reason of payment of the illegally levied duty under protest.

38. It must also be noted that under Sub-Section (5) of Section 11-B of the Act inserted by Finance (No. 2) Act, 1980, the assessee is entitled to claim refund of any amount collected as duty of excise on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty. It is further enacted therein that no Court shall have any jurisdiction in respect of such claim. u/s 11-B(1) of the Act the claim for refund must be made to the Assistant Collector of Central Excise before the expiry of six months from the relevant date. The period of limitation does not, however, apply where any duty has been paid under protest. There is no provision in Section 11-B of the Act entitling the Assistant Collector of Central Excise to deny refund of the illegally collected duty of excise on the ground that the assessee passed on the same to his consumers. In other words, the doctrine of unjust enrichment is not recognised and embodied in the Act. We are, however, aware of the fact that

Section 11-B of the Act does not govern the claim of the Company, as the impugned levy related to the period prior to coming into force of section 11-B of the Act. The only provision in force during the relevant period is that contained in Rule 11 of the Central Excise Rules, 1944 providing for refund of duties or charges erroneously paid. Rule 11 cannot be invoked by the Union of India where duty was collected without the authority of law, as noticed earlier.

39. Sri K. Subrahmanya Reddy, learned counsel for the Union of India places strong reliance upon the decision in *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, for negating the relief of refund of the illegally collected excise duty to the Company. In the said case, the price of sugar was controlled by the State of Uttar Pradesh by a notification. Several sugar millers writ petitions in the High Court of Allahabad challenging the notification and obtained stay of operation of the notification, on their furnishing bank guarantee to the Court for the excess price. Ultimately the millers failed in their challenge of the notification and the impugned notification was upheld by the High Court. But, crores of rupees were funnelled into the millers' tills during the period when the writ petitions were pending by virtue of stay of operation of the notification. While dismissing the writ petitions, the Division Bench of the Allahabad High Court made the following directions :

"We, therefore, direct that the Registrar will take immediate steps to encash the security and recover the amount so over-charged by the petitioners and pay the same to the State Government which will keep it in a separate account. The petitioners will furnish to the State Government, within a period of six weeks of this order, a list of all such persons to whom they sold the levy sugar of 1971-72 season, together with their addresses, quantity of such sugar sold to and the amount of excess price charged from each of them. The State Government will then refund to the persons concerned the excess amount realised from each of them, if necessary, after verifying the claim for refund of such amount made by such persons."

Aggrieved by the above direction, the millers appealed the Supreme Court. All the pleas put forward on behalf of the millers were negated by the Supreme Court and the following directions were made by the Supreme Court to benefit the ultimate consumers :

"A. The security by way of bank guarantee furnished by every appellant will be encashed by the registrar of the High Court and kept in short-term deposit in the State Bank of India.

B. The Appellant will be given complete immunity from liability to any sugar buyer, wholesaler or other to whom sugar has been sold by the appellants at higher prices during the period covered by the High Court's stay order. If any exceptional case of claim were to be made by any buyer, it should be done by motion before the High Court which will be justly disposed of.

C. The Registrar, under orders of the High Court, will directly or by making over

to the State Government, receive and dispose of claims from the ultimate consumer for excess price paid on proper proof. If the State Government is to undertake this task, a proper, easy and cheap machinery for distribution to the real, last buyers will be produced before the High Court and orders obtained. The process should not be too expensive or too formalised.

D. Wide publicity will be given about the project and method of returning small claims and the money sent by post or otherwise. The claims also would be received by post or otherwise and verified without delay.

E. The interest accruing from the bank deposits will be used for the incidentals to work out the distribution.

F. It will be open to the wholesaler to prove by vouchers the retailers and the latter in turn may prove who the ultimate buyers are the High Court may devise modifications of this scheme or direct the State Government to act on any scheme subject to the moneys reaching the real small buyers from the retailers.

G. If any further directions in the mechanics of the scheme are felt necessary, the High Court will report to this court.

H. If, within one year from today, any amounts remain unclaimed they will go into a separate deposit in the High Court to be operated on application by any claimant.

I. If any legislation dealing with the subject were to be made before the amounts are disbursed, the legislative scheme will pro tanto prevail over the directions given above."

It may be noted that in the aforesaid case, crores of rupees were funnelled into the millers' tills on account of the orders passed by the High Court staying operation of the notification whereunder the price of sugar was fixed and controlled. That circumstance fully weighed with the High Court and the Supreme Court in making the Directions extracted above, lest there should be no judicial sanction of unjust enrichment of the millers.

40. The learned counsel for the Union of India also places strong reliance on the decision in *Shiv Shanker Dal Mills vs. State of Haryana* - 1980 SC 1037. The appellants therein paid market fee at the increased rate of 3 per cent under the Haryana Act No. 22 of 1977. The levy was challenged by the appellants and the Supreme Court by its judgment delivered on 4-5-1979 ruled that the excess 1% over the original rate of 2% was ultra vires. The decision of the Supreme Court case a consequential liability on the market committees to refund the excess amounts levied and collected. No such order was, however, passed by the Supreme Court presumably because the ultimate persons from whom the market was collected could not be identified. Subsequently the appellants sought suitable directions to the concerned market committees for refund of the excess amounts or market fee collected. It was argued on behalf of the market committees before a bench of three judges of the Supreme Court that although

refund of excess collections might be legally due to the traders, many of the traders had themselves recovered the excess percentage from their next purchasers and that the traders themselves had no percentage from their next purchasers and that the traders themselves had no more right to keep such small sums than the market committees themselves. Their lordships of the Supreme Court adopting the procedure laid down in *N.S. Mills vs. Union of India* (Supra), devised a scheme of refund by the market committees and redistribution of small amounts to those from whom unwarranted collections had been made and the following directions were given :

"I. Subject to the directions given below, all the sums collected by the various market committees who are respondents in these various writ petitions or appeals shall be liable to be paid into the High Court of Punjab and Haryana within one week of intimation by the Registrar of the amount so liable to be paid into the court.

II. A statement of the amounts collected in excess (1%) shall be put into this court by the dealers with copies to the various market committees aforesaid and furnished to the writ petitioners and appellants within 10 days from today, and if there is any difference between the parties it shall be brought to the notice of this court in the shape of miscellaneous petitions. On final orders, if any, passed thereon by this court, those amounts as so determined shall be treated as final.

III. The Registrar of the High Court shall issue public notice and otherwise given due publicity to the fact that dealers who have not passed on the liabilities to others and others who have contributed to or paid the excess one per cent covered by these writ petitions and appeals may make claims for such sums as are due to them from him within one month or such other period as he may fix. The Registrar shall scrutinise such claims and ascertain the sums so proved. He will thereupon demand of all the market committees concerned payment into the Registry of such sums in regard to which proof of claims have been made. On such intimation, the market committees shall pay into the Registry the amounts so demanded by the Registrar within one week of such intimation. The amount shall be paid together with interest at 10 per cent per annum from today upto the date of deposit with the Registrar.

IV. It shall be open to the Registrar to make such periodical claims on appropriate proof by claimants on the line stated above.

V. He will devise the mechanics of processing the claims as best as he may and, in the event of dispute, may refer to the High Court for its decision of such disputes, if he thinks it necessary. Otherwise, he may dispose of the objections finally.

VI. If any further directions regarding the mechanics of the claim of refund or otherwise are found necessary from this court, the High Court will report about such matter to this court and orders made thereon will bind the parties.

VII. If parties eligible for repayment of amounts do not claim within one year from today the Registrar will not entertain any further claims. It will be open to such parties to pursue their remedies for recovery for any sums that may be due to them.

VIII. Each State Marketing Board will deposit within 10 days from today a sum of Rs. 5000/- before the Registrar for the preliminary expenses of publicity and other incidentals for the implementation of the directions given above. Any unexpended amount, at the end of one year, will be repaid to the respective State Marketing Board.

IX. We further direct that the unclaimed amounts, if any, shall be permitted to be used by the respective marketing committees for the purposes falling within the statute as interpreted by this court in C.A. No. 1083/77."

While making the aforesaid directions, Krishna Iyer, J., speaking on behalf of the Bench observed :

"Article 226 grants an extraordinary remedy while is essentially discretionary, although founded on legal injury. It is perfectly open for the court, exercising this flexible power, to pass such order such as public interest dictates and equity projects."

"Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations as of public interest....."

It may be noted that refund of the excess amounts of market fee collected was not claimed in the proceeding in which the levy of the excess market fee was questioned and held to be ultra vires but was prayed for only in a subsequent proceeding. That circumstance must have weighed with their Lordships of the Supreme Court in making the directions extracted above.

41. It may be recalled that in Sales Tax Officer vs. Kanhiya Lal (supra) a Bench of five Judges of the Supreme Court held that under plain terms of section 72 of the Contract Act the assessee would be entitled to recover back the money paid by him to the State under mistake of law and that equitable considerations could scarcely be imported when there was a clear and unambiguous provision of law which entitled the assessee to the relief claimed by him.

42. As observed by us earlier, on 3-4-1981 their lordships of the Supreme Court consisting of the Chief Justice and Mr. Justice Eradi, refused special leave to the Union of India to appeal against the decisions of a Division Bench of the Bombay High Court in Maharashtra Vegetable Products Pvt. Ltd. and another vs. Union of India and others (supra) wherein the doctrine of unjust enrichment put forward by the Union of India was rejected.

43. We, therefore, quash the order dated 11-8-1978 passed by the 3rd respondent confirming the levy of excise duty in a sum of Rs. 22,55,795.76 on the cost of jute bags in which excisable commodity of cement manufactured by the petitioner-company was packed and sold between 1-10-1975 and 8-1-1976. A writ of mandamus shall also issue directing the respondents to refund the same amount to the petitioner-company.

44. The learned counsel appearing for the Company also submits that the Company undertakes to reimburse its consumers or the ultimate consumers in respect of the amounts of excise duty collected from them on the cost of jute bags as and when claims are made by them without driving them to institute suits for recovery of the same. This undertaking given on behalf of the Company by the learned counsel for the Company, recorded by us in this judgment rules out any unjust enrichment of the Company at the expenses of its consumers. We, however, direct the company to take appropriate steps to see that this undertaking is made known to all purchasers of cement on whom the ultimate burden has fallen, so that they can avail themselves of the offer made by the Company to refund to them excess duty collected from them.

45. The writ petition is accordingly allowed. There shall be no order as to costs.

46. As oral application for leave to appeal to Supreme Court is made on behalf of the Central Government. We consider this to be a fit case for granting leave to appeal to the Supreme Court as the following questions are involved :

1. Whether the post-manufacturing expenses are liable to be excisable to excise duty ?
2. Whether the petitioner is entitled to refund of the amount of excise duty collected, in the circumstances ?

An oral application for suspension of the operation of this judgment is made. We do not see any reason to grant stay. The amount will be refunded to the petitioner on condition that the petitioner executes a bank guarantee for the said amount in a nationalised bank.