
(1993) 04 AP CK 0038

In the Andhra Pradesh High Court

Case No : Writ Petition No. 8339 of 1992

Laxmi Starch Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-04-1993

Acts Referred:

Citation : (1994) 1 ALT 426 : (1993) 43 ECC 1 : (1993) 67 ELT 769

Hon'ble Judges : S.S. Mohammed Quadri, J;B. Subhashan Reddy, J

Bench : Division Bench

Judgement

Syed Shah Mohd. Quadri, J.—A common question regarding the constitutional validity of Central Excise and Customs Laws Amendment Act, 1991 (Act 40 of 1991) (for short "Amendment Act") arises in these Writ Petitions, therefore they were heard together and are being disposed of by a common judgment.

2. The question arises in different factual contexts in these Writ Petitions. We propose to refer to facts in Writ Petition No. 8339 of 1992 to deal with the common question. Facts in the Writ Petitions will be referred to wherever necessary.

3. The first petitioner is a Company registered under the Indian Companies Act and the second petitioner is a share-holder and the General Manager of the first petitioner-company (hereinafter the first petitioner will be referred to as "the company"). The company manufactures "Liquid Glucose" which is an excisable item under the Central Excises and Salt Act, 1944 (for short "the Central Excise Act"). The Company classified "Liquid Glucose under sub-heading 1702.19 in Chapter XVII which was approved by the Assistant Collector, Central Excise, Hyderabad Division (the third respondent). The Company was paying Basic Excise Duty (BED) at 15% and Special Excise Duty (SED) at 10% on BED. With effect from June 27, 1991, the Company revised the classification list and classified Liquid Glucose under sub-heading 1702.29. Under Rule 9B of the Central Excise Rules, 1944 (for short "the Rules"), provisional assessment was made and the said goods were cleared. On receiving chemical examiner's

analytical report, the revised list was also approved on 22-11-1991, classifying the liquid glucose under sub-heading 1702.20.

4. The benefit that the Company derived by the revised classification is that under sub-heading 1702.29 the Excise Duty payable is 10% BED plus SED at 10% on BED. The Company claimed that it paid excess Excise Duty for the period from 9-6-1991 to 14-10-1991. On 6-12-1991 the Company claimed refund of Excise Duty paid by it during the said period, from 9-6-1991 to 14-10- 1991, quantified BED at Rs. 14,53, 174/- and SED at Rs. 1,08,468/. The third respondent issued a show cause notice bearing No. V/17/18/19/91 (R), dated 25-5- 1992 calling upon the Company to show cause as to why the refund claim of Rs. 15,61, 742/- should not be rejected as being inadmissible in terms of Section 11D read with Section 11B of the Central Excise Act. On these facts the Company questioned the constitutional validity of Sections 11B and 11D of the Central Excise Act as amended by the Amendment Act, as being violative of Articles 265, 14 and 19(1)(g) of the Constitution.

5. The Assistant Collector of Central Excise filed counter- affidavit. It is stated that the goods manufactured by the Company were initially classified under sub-heading 1702.19 which attracted BED of 15% and SED equal to 10% of BED. It is admitted that on 27-6-1991, the Company filed revised classification list under sub-heading 1702.29. The reclassification was ordered for provisional assessment purposes on 15-10-1991. The Chemical Examiner by his report dated November 11, 1991, recommended the classification goods under sub-heading 1702.29 and consequently the classification list was approved holding that the goods were rightly classifiable under sub-heading 1702.29. Thereafter the Company filed refund claim of BED amounting to Rs. 14,53,174/- and SED of Rs. 1,08,408/- u/s 11B of the Central Excise Act on the ground that it paid excess Excise Duty for the period from 9-6- 1991 to 14-10-1991. A show cause notice bearing No. C. No. V/17/18/19/91 (R), dated 25-5-1992 was issued to the Company explaining that the refund claim was inadmissible in terms of Section 11D of the Central Excise Act read with Central Excise Hyderabad Collectorate Trade Notice No. 132 of 1991, dated 22-10- 1991 and Section 11B of the Central Excise Act, as the Company had already collected the Duty amount, subject matter of refund claim, from the buyers of the goods. It is stated that the reality of the world of business and commerce is that indirect taxes such as Excise Duty, Customs Duty, Sales Tax and Octroi Duty are the taxes on commodity. So in economic jargon, these taxes are also called as commodity taxes. The burden of these taxes has to be borne by the commodity and not by the individual who happens to pay the tax. Simply because an individual or a person pays the tax, he would not be entitled to claim refund in case excess levy collection, which is held to be illegal. In such cases there is nothing unjust if the amount is retained by the Government. The Company cannot claim the amount which does not actually belong to it. It is stated that the impugned Act is a valid legislation and is not liable to be struck down on any of the ground urged by the Company.

6. Mr. Subrahmanya Reddy, learned counsel appearing for the petitioner in this Writ Petition and in W. P. No. 10305 of 1991, contended, inter alia, that the Amendment Act amending Section 11B and adding Sections 11D, 12B and 12C in the Central Excise Act is beyond legislative competence of Parliament. Mr. Nankani, learned counsel for the petitioner in writ Petition No. 4937 of 1990, canvassed constitutional validity of Sections 11B, 11D, 12B, 12C and clauses (e) and (f) in Explanation `B' to section 11B. Mr. A Krishna Murthy, learned counsel for the petitioners in W. P. Nos. 7877 of 1987 and 12309 of 1988 and Mr. Y. G. Rama Murthy, learned counsel for the petitioners in Writ Petition Nos. 13666 of 1987, 13667, of 1987 and 3848 of 1988, adopted the argument of said learned counsel and urged further contentions both on the question of constitutional validity of the impugned Acts as well as on the merits of the case. The contentions of the learned counsel dealing with constitutional validity of the impugned provisions of the Act are:- the impugned Act, enacted with a view to do away with the supposed unjust enrichment of the manufacturer, insofar as it creates consumer welfare fund under Sections 12C of the Act and directs crediting of refundable excise duty to it, is beyond the legislative competence, the provisions of sub-sections (3) of Section 11B directing not to refund the excise duty collected by the Government to the manufacturer except in accordance with sub-section (2) of that section, notwithstanding any judgment, decree or order of the Tribunal or any Court, is an affront to the judicial verdict; the Amendment Act is violative of Article 14 of the Constitution, as there is no nexus between the provisions of the Act and the objective sought to be achieved and that the Amendment Act is colourable exercise of power; what cannot be collected under the law, cannot be directed to be retained, but Section 11B by a device authorises the same as such it is unconstitutional. u/s 11B when an application for refund is filed within limitation and is accompanied by the evidence establishing that the duty has not been passed on then only the other provisions of the Section would apply to pass an order of refund under sub-section (2) of that section and without such an application on order for crediting the refundable amount to the fund can be made; having regard to the conditions imposed in section 11B, firstly refund of the amount has become illusory and secondly sub-section (2) would never come into operation so as to credit the illegally collected amounts to the fund, consequently the same will remain with the State; it is only the ultimate consumer who is entitled to claim the same, but in no case will a consumer be benefited by the Act as the application for refund has to be made to the Assistant Collector collector having jurisdiction over the manufacturers and if the manufacturer is in a Northern State of India and the ultimate consumer is in southernmost part of India, for the sake of refund of small amount, he has to pursue the matter by going over to the northern part which would never happen and the question of ultimate consumer getting refund would be unworkable. With regard to clauses (e) and (f) of Explanation (B) to Section 11B, the contention is that filing an application within the statutory period with reference to clauses (e) and (f) is an impossibility as the manufacturer who would agitate the matter before the authorities, disputes the

payment of duty after, the date of payment and by the time the correct duty payable is determined, the period of six months would have expired from the date of payment of duty by the manufacturer as well as from the date of purchase by the ultimate consumer, and in such cases no application can be filed in time in view of the definition of `relevant date'.

7. It would be relevant to mention here that as a result of determination of correct duty payable, claims for refund were being preferred by the manufacturers; in such cases the contention of the revenue was that the excise duty being an indirect tax the burden of duty was passed on by the manufacturer to the wholesaler or the dealer or the consumer, as the case may be, and therefore the manufacturer was not entitled to any refund and if claim of refund was allowed, it would amount to unjust enrichment of the manufacturer. The contention of the manufacturer was under Article 265 of the Constitution, the State could not collect any tax except with the authority of law, where it was found by Court that collection of excise duty in a given case was not lawful the, State could not be permitted to retain the tax, otherwise it would amount to circumventing Article 265. There has been difference in the judicial opinion on the question as to whether unjust enrichment of the manufacturers should be avoided and that duty collected from them unauthorisedly, the burden of which was borne by the customers, should be denied the benefit of refund of the excess duty paid by them and that the State being concerned with the welfare of consumers, should be able to deal with the excess amount. To deal with situations arising out of unjust enrichment, the Central Excise and Customs (Amendment) Act 40 Act of 1991 was enacted by the Parliament, which received the assent of the President on 18-9-1991 and was Published on the same day. It is a short Act, containing three Chapters, comprising of fifteen sections. Chapter I deals with preliminaries viz short title and commencement of the Act. Chapter II contains II contains provisions for amending the Central Excise Act By section 2 of the Amending Act, clause (ee) defining "fund" is inserted after clause (e) in the Central Excise Act, Section 3 amends Section 11B of the Central Excise Act. Section 4 substitutes sub-section (2) Section 11C of the Central Excise Act. Section 5 inserts a new Section 11D after Section 11C of the Central Excise Act. Section 6 inserts a new Chapter IIA, Containing Sections 12A, 12B, 12C and 12D, after Chapter II of the Central Excise Act. Section 7 is a consequential Section re- numbering Section 12A in the Central Excise Act as Section 12E. Section 8 is also a consequential Section inserting clauses xxiii, xxiv, xxv and xxvi in sub-section (2) of section 37, Chapter III which contains sections 9 - 15, deals with the Amendment to the Customs Act, 1962. Section 9 inserts clause 21 A defining "fund" after clause 21 in Section 2 of the Customs Act. Section 10 substitutes a newly enacted Section 27 for the existing Section 27 in the Customs Act. Section 11 substitutes sub-section (2) of section 28A of the Customs Act. Section 12 inserts a new section, Section 28B, after Section 28A in the Customs Act. By Section 13, a new Chapter v-A after the Chapter V of the Customs Act, is inserted. Section 14 incorporates a consequential amendment in

Section 157 of the Customs Act by inserting clauses (aa) after clause (a) in sub-section (2) of that Section. In section 159 of the Customs Act for the word `rule` the words " rule or regulation" are substituted.

8. The first and the main contention of the learned counsel is that the Amendment Act is a colourable legislation and that Parliament has no legislative competence to enact Sections 11B, sub-section, (2) of section 11C, 11D, 12B, 12C, and 12D, of the Excise Act and Sections 27, sub-section (2) of section of Section 28A, 28A and 28D of the Customs, Act so they are unconstitutional and are liable to be struck down.

9. It will be useful to set out the impugned sections here.

"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, in such form as may be prescribed and the application shall be accompanied by such documentary or other evidenced (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 there an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been under this sub- section as amended by the said Act and the same shall be 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 six months shall not apply where any duty has been paid under protest.

EXPLANATION.- For the purposes of this section, -

(A) "refund" includes rebate of duty of exercise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves, or as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factor for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period on the basis of the rate fixed by the Central Government by notification in the official gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(f) in any other case, the date of payment of duty.

(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 is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the Assistant Collector of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufactured of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Collector of Central Excise,

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central

Government may, by notification in the official gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order of direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4). Every notification under clause (f) of the first proviso to sub- section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5). For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub- section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

10. a close reading of the amended provisions of Section 11B shows that the scheme of refund of excise duty has undergone a sea change. Now to claim refund of excise duty, sub-section (1) or Section 11B enjoins that the following requirements be complied with.

(i) the application in the prescribed form for refund of duty has to be made to the Asstt. Collector within six months from the relevant date;

(ii) it should be accompanied by such documentary or other evidence including the documents referred to in Section 12A, as the applicant may furnish; to establish -

(a) that the amount of duty of excise in relation to which the claim for refund is made, was collected from and paid by him; and (b) that the incidence of such duty has not been passed on by him to any other person.

11. It may be noticed that all applications made before the Amendment Act are deemed to be applications made under the amended provisions of sub-section (1) of Section 11B and will have to be dealt with under the provisions of sub-section (2) of that Section. There is only one exception to the rule of limitation and that is where duty has been paid under protest. Sub-section (2) of Section 11B lays down how the application for refund should be disposed of. If the

Assistant Collector is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he has to make an order accordingly and then to credit the amount held to be refundable to the "Consumer Welfare Fund", established u/s 12C of the Act. However in the following six cases the Assistant Collector has to pay the amount to the applicant instead of crediting the same to the fund.

(i) Where the amount to be refunded relates to rebate of duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India;

(ii) where the amount of refund relates to unspent advance deposits lying in balance in the applicant's account current maintained with the Collector of Central Excise,

(iii) where the refund relates to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued under the Central Excise Act;

(iv) where the amount of refund relates to the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(v) where the amount of refund relates to the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(vi) where the refund of duty relates to duty of excise borne by any other such claims of applicants as the Central Government may by notification in the official gazette specify.

12. The proviso imposes an embargo on the power of the Central Government of issue notification under the 6th category. It ordains the Central Government not to issue any notification under the last mentioned category unless in its opinion the incidence of duty has not been passed on by the person concerned to any other person. Sub-section (4) deals with requirement of laying such notifications before each House of Parliament and sub-section (5) declares the power of the Central Government to rescind the same.

13. Sub-section (3) of Section 11B commences with a non obstinate clause and enjoins that notwithstanding anything to the contrary contained in any judgment, decree or order or direction of the Appellate Tribunal or any court or any other provisions of the Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided under sub-section (2), explained above. The explanation appended to this Section defines 'refund' in Clause (A) and the expression 'relevant date' in Clause (B). We shall revert to the expression 'relevant date' presently.

14. It may be appropriate to notice here that Section 11B was inserted initially by the Amendment Act 25 of 1978 with effect from 11-7-1980. It required any

person claiming refund of any duty of excise to make an application for refund of such duty to the Assistant Collector of Excise, within the expiry of six months from the date of payment of duty. By Finance No. 2 Act, 1980 (Act 44/80) in sub-section (1) of Section 11B for the words "from the date of payment of duty" the words "from the relevant date" were substituted. By the same Act the explanation was also added inter alia defining the expression "relevant date".

15. Before the amendment in question, Section 11B contemplated two modes of refund of excise duty - (a) suo motu refund, and (b) refund on application. Where as a result of any order passed in appeal or revision under the Act refund of any duty became due to any person, the Assistant Collector was empowered to refund the duty suo motu to such person without his having to make any claim in that behalf. In other cases the application for refund had to be made within six months from the relevant date as defined therein. It was also enjoined that except as provided by or under the Act no claim for refund of any duty of excise shall be entertained. After the impugned amendment, there is no provision in Section 11B to make refund of duty which might become due to any person pursuant to an order passed in the appeal or revision under the Act. Further in the unamended provision there was no requirement of the applicant for refund satisfying the Assistant Collector that the burden of duty was not passed on to any other person. But after amendment the applicant has to satisfy that the incidence of such duty has not been passed on by him to any other person. For this purpose Section 12B raises a rebuttable presumption that the incidence of duty has been passed onto the buyer. Thus it is seen that by the impugned amendment, three major changes have been introduced by the impugned Amendment Act. Now the ultimate consumer or the person who has borne the burden of duty is unable to claim the refund of duty on the collection being found to be illegal. Yet another aspect to be noted is that sub-section (3) of Section 11B has taken away the right to claim refund of duty under a judgment or order or direction of the Appellate Tribunal or any other court. Now a person claiming refund of duty can get it only in accordance with the provisions of sub-section (2) of Section 11B.

16. Here we shall refer to the analogous provisions in the Customs Act. Section 27 of the Customs Act as amended by the Amendment Act is in the following terms :

"27. Claim for refund of duty :-

(1) Any person claiming refund of any duty -

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may take an application for refund of such duty to the Assistant Collector of Customs -

a) in the case of any import made by any individual for his personal use or by

Government or by any educational, research or charitable institution or hospital, before the expiry of one year:

b) in any other case, before the expiry of six months, from the date of payment of duty, in such form as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C) as the applicant may furnish to establish that the amount of duty 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 there an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been under this sub- section and the same shall be dealt with in accordance with the provisions of sub-section (2) :

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty has been paid under protest.

Explanation. - For the purposes of this sub-section, "the date of payment of duty, " in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

(2) If, on receipt of any such application, the Assistant Collector of Customs is satisfied that the whole or any part of the duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty as determined by the Assistant Collector of Customs under the foregoing provision of this sub- section shall, instead of being credited to the Fund, he paid to the applicant, if such amount is relatable to -

(a) the duty paid by the importer, if he had not passed on the incidence of such duty to any other person;

(b) the duty on imports made by an individual for his personal use;

(c) the duty borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(d) the export duty as specified in Section 26;

(e) drawback of duty payable under Sections 74 and 75;

(f) the duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub- section (2).

(4). Every notification under clause (f) of the first proviso to sub- section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5). For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to sub- section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

17. It may be immediately noticed that this Section is also brought in line with the amended Section 11B of the Central Excise Act to give effect to the legislative policy of dealing with the question of unjust enrichment of middlemen due to refund of the duty.

18. On the application for refund of duty made by the manufacturer or producer or the importer or the ultimate consumer or the person who has borne the burden of duty, if it is found by the concerned authority that the whole or any part of the duty is refundable, the authority will have to credit the amount of refundable duty to a fund called `Consumer Welfare Fund" constituted u/s 12C of the Excise Act unless the case falls within any of the six categories which are specified in the proviso to sub-section (2) of Section 11B of the Excise Act or sub-section (2) of Section 27 of the Customs Act for purpose of granting refund of duty.

19. The object of the Amendment Act in amending the provisions of the Central Excise Act and the Customs Act, is to regulate the refund of duty so as to prevent the unjust enrichment of middlemen like the manufacturers, producers, importers etc. and in the event of duty being found refundable, to credit the same to the Consumer Welfare Fund and to utilise the same for the welfare of the consumers, in accordance with the rules to be framed by the Central Government, and to enable the person who has borne the burden of Central Government, and to enable the person who has borne the burden of incidence of duty ultimately to claim the refund of duty paid by him. The requirements to claim refund of duty have already been pointed out above.

20. Section 12B of the Excise Act and Section 28D of the Customs Act raise a

rebuttable presumption of fact to the effect that the incidence of duty has been passed on to the buyer, are in the following terms :

"12B. Presumption that the incidence of duty has been passed on to the buyer.-"

Every person who has paid the duty of excise any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

"28D. Presumption that incidence of duty has been passed on to the buyer.

Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

21. It has already been stated above that the Consumer Welfare Fund is directed to be established u/s 12C of the Central Excise Act. Section 12D deals with utilisation of the fund which would be created u/s 12C. We may note here the said sections for ready reference.

"12C. Consumer Welfare Fund :-

There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed,-

(a) the amount of duty of excise referred to in sub-section (2) of Section 11B or sub-section (2) of Section 11C or sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in sub-section (2) of Section 27 or sub-section (2) of Section 28A or sub-section (2) of Section 28D of the Customs Act, 1962;

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

12D. Utilisation of the fund :-

(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India."

22. At this stage it may be advantages to elucidate the concept of colourable legislation. A legislation is said to be colourable when it is passed without legislative competence or on a prohibited subject or when incompetency or prohibition is cloaked to give a colour of permissiveness. It has nothing to do

with the bona fides or mala fides or malice or bad motive of the legislature.

23. In *K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa*, Mukherjea, J explained the doctrine of colourable legislation observing that the doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides" on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. The idea conveyed by the expression is that although apparently a legislature is passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.

24. In *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, speaking for the majority of the Constitution Bench of the Supreme Court, Krishna Iyer, J., described the doctrine of colourable legislation thus :-

"In the jurisprudence of power, colourable exercise of or fraud on legislative power of more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. If a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary power implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides."

25. To deal with the contention of colourable legislation and the validity of the impugned provisions it would be necessary to examine the relevant provisions of the Constitution and the Entries in the Seventh Schedule and record our answer to the questions--

Does the pith and substance of the Amendment Act fall within any Entry assigned to the Parliament or covered by the ancillary power implied in the entry?

If the answer to this question is in the negative, we may have to find out -

Can the relevant provisions of the Amendment Act be read down reasonably to bring it within the legislature's constitutional powers ?

26. Article 265 of the Constitution of India enjoins that no tax shall be levied or collected except by authority of law. Article 246 says that notwithstanding anything in clauses (2) and (3) of that Article, Parliament has exclusive power to make laws with respect to any of the matter enumerated in List I in the Seventh Schedule. Clause (2) of the Article lays down that notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the matters enumerated in List III in the Seventh Schedule. Clause (3) deals with the subject matter of laws made by the Legislatures of the States and this clause is not relevant for the present discussion.

27. Entry 84 in List I deals with duties of excise on tobacco and other goods manufactured or produced in India except - (a) alcoholic liquors for human consumption; and (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and other toilet preparations containing any of the substances mentioned in clause (a) and (b) above. A reading of Entry 84 of List I makes it clear that Parliament has competence to legislate regarding the levy of duties of excise on goods manufactured or produced in India. So also it is competent to legislate on levy of duties of customs including export duties under Item 83 of List I.

28. Section 3 of the Central Excise Act, the charging section, provides that duties of excise shall be levied and collected on excisable goods other than salt which are produced or manufactured in India or imported by land into any part of India at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. Thus it is clear that excise duty is leviable on the manufacture or production or import by land of the excisable goods, in India. Excisable goods means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise and includes salt. Section 2(f) of the Central Excise Act defines 'manufacture'. This is an inclusive definition; it includes any process which is incidental or ancillary to the completion of a manufactured produce and also the process which is specified in relation to any goods in the Section or Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985, as amounting to manufacture.

29. It is true that Article 265 of the Constitution enjoins that no tax shall be collected except by the authority of law. It is equally true that the tax collected by the State illegally, contrary to the provisions of the relevant Acts or unauthorised cannot be retained either directly or indirectly by adopting a device to circumvent the provisions of the Constitution and the relevant Acts. If the provisions of the Act have the effect of circumventing the provisions of Constitution and make permissive that which is prohibited by the Constitution, they will undoubtedly be within the pale of that expression. It is now fairly settled that Entry 84 and also Entry 83 of List I read with Article 246, which authorise enactment of levy and collection of duties of excise and customs equally empower the Parliament to legislate on matters which are incidental or ancillary to such powers.

30. Entry 81 of List I of Schedule VII of the Constitution is identical with Entry 45 of List I of Seventh Schedule to 1935 Act. That entry fell for consideration of the Federal Court AIR 1939 1 (Federal Court) The Federal Court has observed that it is a duty ordinarily levied on the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer who pays as he consumes or expends; and it continued to be an excise duty - a duty on home-produced or home-manufactured goods, no matter at what stage it is collected. It will obviously be imposed at the stage which the authority finds to be the most convenient and the most lucrative, wherever it may be, but that is a matter of the machinery of collection and does not affect the essential nature of the tax. There was in theory nothing to prevent the central legislature from imposing the duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away and that it was the fact of manufacture which attracted the duty even though it might be collected later. The same principles were reiterated by the Federal Court in *The Province of Madras v. Boddu Paidanna* - AIR 1942 F. C. 33 :1978 (2) E. L. T. (J 22)

31. In AIR 1945 98 (Privy Council) the Privy Council explained the meaning of the expression "excise duty" in Entry 45 of List of the Seventh Schedule to Government of India Act, 1935 as primarily a duty levied upon a manufacturer or producer in respect of manufacture or production, it is a tax upon goods not upon sales or proceeds of sale of goods.

32. In *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, , while dealing with the question of determination of price of excisable goods after amendment of the Central Excise Act the Supreme Court considered the concept of duty of excise and relied upon the above-said judgments of the Federal Court and the Privy Council and held that while the levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of manufacture process and that while the levy in our country has the status of constitutional concept, the point of collection is located where the statute declares it will be.

33. In *Empire Industries Limited and Others Vs. Union of India and Others*, , the Supreme Court while considering the validity of amendment of definition of the term "manufacture" in Section 2(f) of the Central Excise Act, has observed that the taxable event under the Excise Law is "manufacture and moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character use and name, whether be it the result of one process or several process, "manufacture" takes place and liability to duty is attracted and that the process of bleaching, dyeing and printing which have been incorporated by the amending Act in the definition of the term "manufacture" are not so alien or foreign to the concept of "manufacture" in Entry 84 of List I that these could not come within that concept.

34. In *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , the Paper Mill paid sales-tax on sales effected by it to dealers in other States. The order of assessment of tax had become final. The company filed a claim for refund of the tax paid on transactions of sale outside that State on the ground that under Article 286(1) of the Constitution the transactions were not taxable as laid down by the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . The claim was negated by the departmental authorities but was upheld by the High Court insofar as it was within limitation. On appeal to the Supreme Court it was brought to the notice of their Lordships that the Orissa Legislature inserted Section 14A in the Orissa Sales Tax Act with retrospective effect under which the company could not claim refund of tax; it was inter alia contended that the Act was beyond the legislative competence. The Supreme Court observed thus :

"By Item 54 of List II of Schedule 7 to the Constitution, the State Legislature was indisputably competent to legislate with respect to taxes on sale or purchase of papers and paper-boards. This power comprehends the power to impose the tax, to prescribe machinery by collecting the tax, to designate the officers by whom the liability may be enforced and to prescribe the authority, obligations and indemnity of those officers;

It further observed -

"The diverse heads of legislation in the Schedule to the Constitution demarcate the periphery of Legislative competence and include all matters which are ancillary or subsidiary to the primary head";

and held that -

The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected.

35. The Supreme Court posed the question, "if competence to legislate for granting refund of sales-tax improperly collected be granted, is there any reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales-tax or otherwise ?" and answered the question in the negative in the following words -

"The questions one of legislative competence and there is no restriction either express or implied imposed upon the power of the Legislature in that behalf."

36. In *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, the case arose under the Hyderabad General Sales Tax Act, 1940. In that case the appellant before the Supreme Court collected sales-tax from the purchaser in connection with the sale of betel leaves made by it, but did not pay the amount so realised to the government. On scrutiny of the accounts, the Revenue called upon the appellant to pay the amount realised by it as tax to the government. The appellant stated before the authorities that at the relevant date the tax was

exigible at the purchaser point on the purchaser but they rejected the plea. Before the High court it was contended by the appellant that the State Legislature was not empowered to enact a law by which a dealer who might have collected tax without authority was required to hand over the amount to the government; as any amount collected without the authority of law would not be a tax levied under the Act, so it was not tax on sales or purchase of goods. The High Court took the view that the Section in question was incidental to the taxing power under Entry 54 of List II and that even otherwise also the power conferred under that Section could be sustained under Entry 26 of List II. On appeal to the Supreme Court, it was held,

"the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State Legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision."

Rejecting the contention that as part of the incidental and ancillary power such a provision could be enacted, the Supreme court observed, -

"Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which in the present case is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded, are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the relevant entry, proceeds on the basis that the amount concerned is not a tax exigible under the law made under the entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected may be wrongly - by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11 has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary power which the legislature had got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We

are therefore of opinion that the provision contained in Section 11 cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry."

In regard to the plea that as the dealer had collected moneys purporting to be sales-tax and he had no authority to retain the same, it was pointed out. -

"If a dealer has collected anything from a purchaser which is not authorised by the taking 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. This cannot be done directly, for it is not a tax at all within the meaning of Entry 54 of List II nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. Section 11 is not, therefore, within the competence of the State Legislature under Entry 54 of List II."

37. *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, . In that case the constitutional validity of sub-sections 3, 4 and 5 of Section 20 of Bihar Sales Tax Act, 1959, was in question. The purport of these sub-sections was to recover from the dealer the amounts collected by him as tax though in law the dealer was not liable to pay the sales-tax on the transactions in respect of which he collected the tax. The Supreme Court held that under Entry 54, List II of the Seventh Schedule of the Constitution, the State Legislature was competent to enact a law in respect of matters necessarily incidental to "taxes on the sale and purchase of goods" and the provision contained in sub-sections (3), (4) and (5) compelling a dealer who had deliberately or erroneously recovered an amount from the purchaser on a representation that he was entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State, could not be regarded as necessarily incidental to the entry and that the impugned sub-sections were ultra vires the State Legislature. Following *Abdul Quader's* case (supra) the Supreme Court further observed that in effect the provision was one for levying the amount for tax when the State was incompetent to levy and that a mere device could not be permitted to defeat the provisions of the Constitution by clothing the claim in front of a demand for depositing the money with the State which the dealer has collected but he was not entitled to collect. The Supreme Court distinguished its earlier judgment in *Orient Paper Mills* case (supra) observing that that case did not support the plea that the State Legislature was competent to legislate for demanding payment of or retaining amounts recovered by registered dealer but which were not due as sales tax to the State.

38. *R. S. Joshi v. Ajit Mills* (supra). In that case Sections 37 and 46 of Bombay Sales Tax Act, as they were applicable to the Gujarat State, which provided the sums collected by dealers by way of sales-tax though not exigible shall be forfeited to the public exchequer punitively, were held by the Supreme Court to be not beyond legislative power conferred by Entry 54 read with Entry 64 of List

II and therefore not ultra vires. It was further held that the provisions could not also be challenged as flouting Articles 14 and 19(1)(f) and that there was no arbitrary or uncanalised power given to the authority. In that case the Supreme Court expressed its agreement with the ratio in Abdul Quader's case (supra) and observed that that case demarcated the constitutional watershed between merely laying hands upon collections by way of tax by traders although they were not exigible from traders (a provision for which the State is not empowered by Entry 54 of List, II, even expanding it by the doctrine of implied powers) and the policing by penalizing, including forfeiting to the public. In effect the distinction pointed out by the Supreme Court is that a provision which authorises the revenue to claim illegal collection of tax by a dealer would not be valid, but a provision which aims at prohibiting illegal collection and imposes penalty by forfeiture of the ill-gotten amounts, would be valid.

39. In *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, , the question before the Supreme court was constitutional validity of Section 23A inserted in Punjab Agricultural Produce Markets Act, which was questioned on the ground that it validated an illegal levy. The Supreme Court held that Section 23A could not be said to be an attempt at validating an illegal levy and that the primary purpose of that section, on the face of it, was to prevent the refund of licence fee by the market committee to dealers who had already passed on the burden of such fee to the next purchaser of the agricultural produce and who would be unjustly enriching themselves by obtaining refund from the market committee. It was really a law returning to the public what it had taken from the public by enabling the committee to utilise the amount for the performance of services required of it under the Act and that instead of allowing middleman to profiteer by ill-gotten amount, the legislature had devised a procedure to undo the wrong that was done by excessive levy by allowing the committee to retain the amount to be utilised thereafter for the benefit of the particular persons for whose benefit the marketing legislation was intended. With regard to the legislative competence it was observed that that case was akin to *Orient Paper Mills case* (supra) which disabled a dealer to get refund of fee paid by him, the burden of which he had already passed on to the next dealer and that that case was affirmed in *R. S. Joshi's case* (supra) and that therefore Section 23A was within the competence of Punjab Legislature.

40. In *Kasturi Lal Harilal Vs. State of U.P. and Others*, the constitutional validity of Section 29A of U. P. Sales Tax Act, 1948 was questioned before the Supreme Court, having lost in the High Court of Allahabad, by the appellants therein. They were carrying on business as dealers in coal and were as such registered under that Act. They paid the sales-tax on the sale of coal but after the order of assessment realised that the amount was wrongly paid and claimed refund of the sum paid as sales-tax. that was rejected in view of the provisions of Section 29A. They therefore questioned the constitutional validity of Section 29A as being beyond the competence of the said legislature before the High Court. This contention was negatived. After obtaining certificate of fitness from the High

Court, they preferred the appeal before the Supreme Court. Section 29A provided that where any amount was realised from any person by any dealer purporting to do so by way of realisation of tax on the sale of any goods to the said person, such dealer shall deposit the entire amount so realised into the government treasury within such period as may be prescribed, notwithstanding that the dealer was not liable to pay such amount as tax or that only a part of it was due from him as tax under this Act. Sub-clause (2) of Section 29A provided that where the amount was so deposited by the dealer so much amount which was not due as tax was held by the State Government in trust for the persons from whom it was realised by the dealer of the liability in respect thereof to the extent of the deposit. Sub-section (3) provided for refund of the amount to the person from whom the dealer has collected the amount. The impugned section was sought to be sustained on the basis of Entry 54 in List II of the Seventh Schedule. The Supreme Court observed that the question was no longer *res integra* as it was concluded by the judgment of the Supreme Court in *R. S. Joshi's* case was regarded as laying down the correct law on the subject and therefore Section 29A was held to fall within the legislative competence and was valid.

41. It was contended by the learned counsel for the petitioners that in *Kasturi Lal's* (supra) the Court did not make a distinction that in *R. S. Joshi's* case two points were decided one in favour of the State and another against the State. Therefore the judgment in *Kasturi Lal's* case is distinguishable. The ratio of the judgment in *Kasturi Lal's* case is where the legislature makes a provision for receiving of the amounts collected by a dealer purporting to be tax which was not payable by the purchaser with a view to refund the same to the purchaser such a power is incidental to the taxing power under the relevant entry.

42. In *New India Industries Ltd. v. Union of India* - 1990 (46) E. L. T. 23 - a Full Bench of the Bombay High Court has observed that where the collection of the excise duty results in unjust enrichment to the manufacturer the government also cannot be allowed to retain the same as the same principle would equally apply to the Government and in a such case a welfare fund can be created to avoid unjust enrichment. This is a clear authority for the proposition that a fund can be created for the benefit of the customers who ultimately bear the burden of tax.

43. From the above discussion the following principles emerge :-

(i) The power given to legislature by Article 246 read with the relevant Entries in the Three lists of the Seventh Schedule to the Indian Constitution, are field for legislation or legislative heads of fields of legislation and that the widest amplitude should be given to the language of entries and that each word should be held to extend on ancillary and subsidiary matters which can fairly and reasonably be comprehended in it;

(ii) a provision in a taxing statute conferring power to recover amounts collected

by a manufacturer/dealer or any other person purporting to be duty/tax where the amounts so collected cannot be collected as duty/tax under the relevant provisions of the Act, cannot be justified as one within the ancillary and incidental power of Entries 83 and 84 List I/Entry 54 List II of the Seventh Schedule to the Constitution; but a provision enacted to penalise a manufacturer/dealer or other person for collecting amounts purporting to be duty/tax unauthorisedly or illegally by forfeiting the amounts so collected or to recover the amounts so collected to reimburse the person from whom it was collected, is within the sweep of ancillary and incidental power.

(iii) the legislative is competent, in exercise of power under Entries 83 and 84 of List I/Entry 54 of List II to make provision with regard to granting refund of tax improperly or illegally collected and providing that refund shall be claimable by the manufacturer/dealer only when incidence of such duty/tax has not been passed on by him to other person and that the buyer of goods or notified persons shall alone be able to claim refund of duty if he had not passed on incidence of such duty/tax to any other person; and that the buyer of goods or notified persons shall alone be able to claim refund of duty if he had not passed on incidence of such duty/tax to any another person; and

(iv) the ancillary and incidental powers of legislature under taxing entry embraces power to create consumers benefit fund for crediting refundable duties/taxes where the refund cannot be granted under relevant provisions of the statutes to the person who paid duty/tax or who ultimately borne the incidence of tax which was found to be not exigible in law, and utilising the fund for the benefit of the consumers in accordance with the rules.

44. On examination of the impugned provisions in the light of the aforementioned discussion and applying the above-said principle we answer the first of the above-said question in the affirmative and hold that the Amendment Act amending the provisions of Section 11B, inserting sub-section (2) of Section 11C of the Central Excise Act and Section 27 and sub-section (2) of Section 28A of the Customs Act in regard to regulating refund of excise duty, Section 12C of the Central Excise Act and Section 28D of the Customs Act raising statutory rebuttable presumption with regard to passing of incidence of excise duty/customs duty, are ancillary and incidental to the main power in the taxing entries of the Seventh Schedule to the Constitution. Therefore, it follows that Section 11B, sub-section (2) of Section 11C, 12B, 12C of the Central Excise Act and Sections 27, sub-section (2) of Section 28A and 28D of the Customs Act cannot be held to be unconstitutional as being colourable legislation or lacking legislative competence.

45. The provisions that remain to be considered on the ground of legislative competence are Section 11D of the Central Excise Act and Section 28B of the Customs Act.

46. Section 11D is inserted by the Amendment Act which reads as follows :

"11D. Duties of excise collected from the buyer to be deposited with the Central Government.

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under sub- section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that Section in such cases shall be the date of the public notice to be issued by the Assistant Collector of Central Excise."

47 Sub-section (1) of Section 11D begins with non obstante clause and requires every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise to pay forthwith the amount so collected to the credit of the Central Government. This is notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any order of the Court or any provisions of the Act or rule made thereunder.

48. Sub-section (2) says that the amount paid to the credit of the Central Government as above, shall be adjusted against the duty of excise payable by the person on finalisation of the assessment and where any surplus is left after such adjustment the amount of surplus shall be credited to the fund or refunded to the person who has taken the incidence of such amount as the case may be in accordance with the provisions of Section 11B. For the purposes of this Section the relevant date for making an application under that section is the date of the public notice to be issued by the Assistant Collector of Central Excise.

49. The corresponding Section in Customs Act is Section 28B which reads as follows :

"28B. Duties collected from the buyer to be deposited with the Central Government, -

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under sub- section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment,

the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 27 and the an application under that Section in such cases shall be made before the expiry of six months from the date of the public notice to be issued by the Assistant Collector of Customs."

50. The provisions of sub-section (1) of these two sections are identical and aim at recovering the duty collected by every person from the buyer of any goods in any manner as representing duty of customs.

51. The power to levy and collect excise duty is contained in Entry 84 of List I of Seventh Schedule to the Constitution. It has been noticed above that the power to regulate refund of duty is incidental and ancillary to the power under this entry. The duty is imposed on the manufacture or production of the goods. There is a distinction between the levy of excise duty which is at the stage of manufacture or production of goods in India and the collection of duty which may be in accordance with the terms of the statute. If the duty has already been assessed and is sought to be collected from persons as mentioned in Section 11D the position might have been different. But under this sub-section any amount received by any person by way of excise duty from the buyer is directed to be paid to the credit of the Central Government without there being determination of liability of excise duty on manufacture or production of particular goods. Under Entry 84 the taxable event (levy of excise duty) being manufacture or production, if the duty is sought to be collected not with reference to manufacture or production of goods, but with reference to receipt of money by any person as excise duty it would certainly be beyond the legislative competence of the parliament to enact such a provision as sub-section (1) of Section 11D.

52. As indicated above the purport of sub-section (1) of Section 11D of Central Excise Act and sub-section (1) of Section 28B of the Customs Act is not only to collect the amount from the manufacturer or producer with reference to manufacture or production but from every person which means even persons other than the manufacturers or producers from whom excise duty keynote otherwise be collected having regard to the working of the relevant entries in Seventh Schedule and the charging sections. It has been noticed above that the excise duty and the customs duty being indirect taxes can be passed on to others. From the stage of manufacture or production to the stage of ultimate consumption goods may pass from manufacturers/ producers to the agents dealers and from them to the wholesales and from them to the retailers before they reach the consumers. Excise duty can properly be levied and collected from the manufacturers/producers but not from all those who happen to sell or purchase the goods till they reach the ultimate consumer for the taxable event is only one and that is manufacture or production of particular goods. Excise duty can be collected only once at the point of collection declared by the statute but not on multiple points. Thus, it is clear that on the ground of persons other than

manufacturers or producers or importers receiving the amounts as excise duty, they cannot be made to credit the same to the Central Government. As the Ambit and scope of the above-said provisions is beyond the scope of relevant legislative entry and relevant charging sections, they cannot be said to be within incidental and ancillary power of the legislature. In view of the above discussion and applying principle No. (2) aforementioned, sub-section (1) of Section 11D of the Central Excise Act and sub-section (1) of section 28D of the Customs Act cannot but be held to be beyond the legislative competence. Therefore the answer to the aforesaid first question will be in the negative.

53. This takes us to the consideration of the second question. Can the above-said provisions be read down reasonably to bring them within the legislature's constitutional power? Though we have already discussed above that the purport of sub-section (1) of Section 11D of the Central Excise Act and sub-section (1) of Section 28B of the Customs act is not only to collect the amount received by manufacturers, producers, importers etc. in the form of excise duty/customs duty but also from persons other than the manufacturers or producers, importers etc. from whom excise duty/customs duty cannot otherwise be collected. Yet on examination of provisions of sub-section (2) of Section 11D of the Central Excise Act and sub-section (2) of Section 28B of Customs Act, it is clear that they deal with adjustment of the amount payable by the person on finalisation of the assessment and crediting of the surplus to the fund or refunding of the surplus to the person who has borne the incidence of such amount in accordance with the provisions of Section 11B of the Central Excise Act or Section 27 of the Customs Act, as the case may be. Therefore, if the expression "every person" in sub-section (1) of the above-said sections is read down as every person liable under the respective charging sections, namely manufacturer/procedure/importer the vice pointed out above, would not invalidate the impugned provisions and they would be with the parliament's legislative power. This question is accordingly answered.

54. Other contentions in regard to the validity of the impugned sections remain to be examined. Section 11B of the Central Excise Act and Section 27 of the Customs Act have been challenged on various grounds; it is violative of Article 14 of the Constitution being arbitrary as there is no nexus between the amended provisions and the object sought to be achieved by the Amendment Act; the impugned provisions are only a device to enable the State to continue to retain the excise duty/customs duty illegally levied or collected in breach of Article 265, since unless and until a person who had paid duty but has not passed on the incidence of duty, claims the refund of duty within the prescribed time and the refundable amount is either granted to him or credited to the Customer Welfare Fund, the question of refunding the duty so collected does not arise. The Amendment Act adopts different standards inasmuch as at the time of levy the manufacturer/producer/importer is made to pay the duty but at the time of refund of duty illegally collected, his claim is rejected on the ground of unjust enrichment and the ultimate consumer is given the right to claim the refund, so

it is discriminatory; cases where refund was already granted on the disposal of the applications, are left untouched but the cases where applications are pending, are directed to be dealt with under the amended provisions, consequently the right of the manufacturer/producer/importer to claim refund is getting defeated; the Act seeks to perpetuate the illegalities as in the event of illegal levies and collections of duty, the manufacturer/producer/importer will not question the illegality for he is not entitled to refund and the consumers cannot question the same as no machinery is provided for them to question the levy. In support of the contention that the Amending on the observations of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . It is also contended that the doctrine of unjust enrichment is not a universally accepted doctrine but a questionable doctrine, so on the basis of this doctrine provisions of Section 11B cannot be sustained.

55. It has been discussed above that the object of amending Section 11B is to prevent unjust enrichment of the middleman and to ensure that the person who has ultimately borne the burden of duty gets the refund of the duty and if that cannot be done, then to utilise the amount for the benefit of that class of persons in terms of Section 12D of the Central Excise Act after crediting the refundable amount to Consumers Welfare Fund created u/s 11C of the Excise Act for that purpose. From the scheme of the provisions of Section 11B, as noticed above, it is evident that any person who has borne the burden of duty, illegally levied and collected, is entitled to recover the same; be it the manufacturer, the wholesaler or the retailer or the ultimate consumer. Conditions for claiming the refund of duty as pointed out above, are : the application for refund should be filed within six months from the relevant date, the applicant should have actually paid the duty, and he should not have passed on the burden of the duty to other persons. Section 12B raises a statutory presumption that the incidence of duty has been passed on to the buyer. However, it is a rebuttable presumption and it would be upon to nay person who is claiming the refund of duty, including the manufacturer, producer and importer to rebut this presumption by producing necessary evidence that the burden of duty, refund of which is claimed, has not passed on to any other person.

56. It has already been mentioned above that excise duty is on manufacture or production of goods and that liability of payment of duty is on the manufacturer/producer (See *Collector of Central Excise, Chandigarh Vs. Decent Dyeing Co.*, . Therefore, for payment of duty the manufacturer/producer is made liable. Indeed this proposition is not disputed. What is stressed before us is that the manufacturer/producer alone should be grated refund as he is the one who pays the duty to the Government. Generally speaking if tax is collected from any person and the collection is found to be illegal or unauthorised by law he is entitled to the refund of the same, because the State cannot collect any tax in contravention of Article 265 and therefore it cannot also retain tax illegally collected. But in the case of indirect taxes like excise duty, customs, sales-tax etc. the incidence of tax can be passed onto the consumer though it is not

essential so to do, the manufacturer/producer, importer etc, gets himself reimbursed by passing on the incidence of tax/duty to the purchaser from him, be it a wholesale dealer, a retailer or a consumer, so he has no justifiable claim for the refund of the tax for that would result in paying once and getting twice - once from the consumer, having regard to the nature of indirect taxation, and again from the State which collected the tax illegally by way of refund. This is what is termed as unjust enrichment of the manufacturer/producer, importer etc. Then the State also cannot be allowed to retain tax/duty which it cannot collect having regard to the mandate of Article 265 of the Constitution. To meet such a situation, the parliament has passed the Amendment Act making the necessary amendments in the Central Excise Act and the Customs Act to regulate refund of tax/duty whereby a manufacturer/producer importer can claim refund only when he satisfies the authority that he had paid the duty and that the incidence of duty has not been passed on to others. By the Amendment Act manufacturers/producers/importers are classified into two groups - those who suffered the burden of duty but have passed on the same and got themselves reimbursed. This classification is reasonable and has nexus with the object sought to be achieved, namely, to prevent unjust enrichment of the middleman. Further having regard to the scheme of the amended provisions of Section 11B to grant refund of duty illegally collected only to those who having suffered the duty did not pass on the incidence to others, the contention of discrimination between the manufacturers/producers/importers etc. and the ultimate consumer is devoid of merit.

57. It is further urged that as for receiving refund of duty illegally collected the consumer who suffered incidence of duty ultimately is made entitled, so if there is a short levy of duty, the same may also be directed to be collected from the ultimate consumer. Inasmuch as the question as to who is liable to pay the duty short levied, whether the manufacturer, producer, importer or the ultimate consumer, does not arise for our consideration in these cases, we do not propose to express any opinion on this aspect but prefer to leave this question open.

58. The contention that disposed of refund applications are kept out of the reach of the amended Section 11B and pending applications alone are governed by the said provisions as such the said provisions are discriminatory and arbitrary is in our view devoid of substance for the simple reason that the Amendment Act is prospective in operation so it applies only to pending cases but not to cases which were already disposed of and were closed on the date of coming into force of the Act.

59. The first proviso to sub-section (1) of Section 11B which provides that where an application for refund has been made before the commencement of the Amendment Act, such application shall be deemed to have been made under sub-section (1) of Section 11B as amended and the same shall be dealt with in accordance with the provisions of sub-section (1) as amended is assailed as

arbitrary. We are unable to accept the contention. From a reading of the proviso which has already been extracted and discussed above, it is obvious that this provision is prospective. It deals with the applications which were pending on the date of coming into force of the Act i.e. September 20, 1991, and treats them as if they have been filed under sub-section (1) of Section 11B and are required to be dealt with under sub-clause (2) of the said Section as it is stood amended. Here also it is apparent that the Act has classified applications which were disposed of before the Act came into force and those which were pending on the date of the enforcement of the Act. The classification has also nexus with the object sought to be achieved, namely, to regulate refund of duty in accordance with the amended provisions of the Act. The provision is prospective so on the ground that earlier transactions which have been completed are not dealt with under the Act, it cannot be said to be arbitrary.

60. The contention that the Act seeks to perpetuate the illegalities as in the even of illegal and collection of duties being passed on to the consumer, he cannot question the same as no machinery is provided for the consumer to question the illegal levy, is misconceived. This submission appears to have been made on the assumption that under the scheme of the Act no person other than the manufacturer/producer can appeal against an order of the Central Excise Officer with regard to levy or collection of excise duty. Section 35 of the Central Excise Act which provides appeal to the Collector against any decision or order under the Act by a Central Excise Officer lower in rank than a Collector of Central Excise, provides a right of appeal to any aggrieved person. Therefore the premises that there is no machinery under the Act for the consumer to question the illegal levy is factually incorrect, consequently the contention fails. It is, however, further contended that in the case of illegal levy and collection of duties it would be too much to expect that an individual consumer would come to know of the illegality in imposition of the levy and would challenge the same. In our view this by itself cannot be a ground to hold that Section 11B of the Central Excise Act/Section 27 of the Customs Act is unconstitutional and invalid. We may observe here nowadays it is being noticed that different forums and associations representing different classes are coming into existence and any association of the consumers can challenge a wrong levy or collection of duty. Even otherwise also merely because there has been an illegal levy and collection of duty from the manufacture/production/import of goods which has been passed on by the manufacturer/producer/importer to the consumer, the provisions of the Act denying refund to the middleman like manufacturer/producer/importer of goods cannot be said to be illegal and arbitrary on the ground that the ultimate consumer would not challenge the illegality attached to the levy and collection and the same would continue to exist. Inasmuch as we have held that the impugned provisions are neither discriminatory nor arbitrary, the ratio of the judgment of the Supreme Court in *Ajay Hasia v. Khalid Mujib* (supra) is not helpful to the petitioners. For the above reasons the provisions of the Amendment Act which result in denying refund of duty to such of the

manufacturers/producers/ importers etc. who have passed on the incidence of duty to others and got themselves reimbursed and which enable the manufacturers or wholesale dealers, retailers or ultimate consumers who have suffered the duty without passing on to others to claim the refund of duty, cannot be said to be violative of Article 14 of the Constitution and unconstitutional.

61. Another contention advanced by the learned counsel for the petitioner to question the validity of Section 11B is that right to get refund is property and in view of Article 300A of the Constitution that right cannot be taken away without providing for compensation. We are not impressed by this argument. As and when a particular order for levy and collection of duty is adjudged by competent authority under the Act as illegal, the manufacturer/producer/importer gets a right to refund in accordance with the provisions of the Act concerned. The Act which provides for levy and collection of the duty also provides for refund of the duty collected unauthorisedly or illegally. So the right to claim refund is not an absolute right but a right subject to the provisions of the Act. It arises by virtue of an order passed under the Act and is controlled by the provisions of the Act. The contention that the deprivation of the right of property is violative of Article 300A, is without any substance. Firstly, there is no deprivation of the right to property; the right to claim refund is regulated by the provisions of the Act which does not amount to deprivation of the right. Secondly Article 300A prohibits deprivation of the property otherwise than by authority of law and when the right to claim refund of duty is regulated by the provisions of the Act, it cannot be legitimately contended that there has been deprivation of the property without the authority of law. Further Article 300A does not provide for payment of any compensation even when there is deprivation of property, it only ordains that no person shall be deprived of his property save by authority of law.

62. Then the contention that Mr. Mankarni advanced before us is that the last portion of sub-section (3) of Section 11B is in the nature of ouster clause which ousts the jurisdiction of this Court, therefore it has to be declared as illegal and unconstitutional.

63. This sub-section is part of the scheme of regulating the refund of duty. Sub-section (2) provides a complete code of procedure for claiming refund and the circumstances under which and limitation subject to which refund can be granted. It begins with the non obstante clause and directs that no refund shall be made except as provided under sub-section (2) notwithstanding anything contrary contained in any judgment, decree, order or direction of the appellate tribunal or any other provisions of the Act or the rules made thereunder or any other law for the time being in force. There is no question of ousting the jurisdiction of this Court by this clause. The word `court' therein, in our view, does not include `High Court'. The power of the High Court under Article 226 is not controlled by this sub-section. But as has been pointed out above, the jurisdiction under Article 226 is a discretionary jurisdiction and the High Court

will not exercise its jurisdiction in such a way as to make the provisions of a valid Act nugatory. Be that as it may, we do not find anything in this provision to support the contention that it ousts the jurisdiction of this Court under Article 226 of the Constitution.

64. We shall deal with the rule of limitation and the definition of "relevant date". We have already seen that an examination of Section 11B discloses that two limitations are imposed on every claim for refund of duty -

(i) that the refund does not result in unjust enrichment; and

(ii) that the claim for refund must be made within six months of the relevant date.

65 With regard to the first limitation we have already dealt with above and held that it is not arbitrary or unconstitutional.

66. The second limitation is a rule of limitation and provides that the claim for refund of duty should be made within six months from the relevant date as defined in Explanation B to Section 11B of the Central Excise Act. We are concerned with sub-clauses (e) and (f) of the definition of "relevant date." They are as follows :

(e) in the case of a person, other than the manufacturer the date of purchases of the goods by such person;

(f) in any other case, the date payment of duty.

67. From a perusal of the clauses extracted above it is clear that if the claim of refund is made by a person other than the manufacturer it has to be made within six months from the date of purchase of the goods by such person and in any other case, not covered by sub-clauses (a) to (e), the claim should be made within six months from the date of payment of duty. We shall presently, examine the scope of sub-clauses (e) and (f) of the definition of "relevant date" and application of rule of limitation of six months. However, we may note here that only exception to this rule of limitation is provided in the second proviso to sub-section (1) of Section 11B which says that the limitation of six months shall not apply where any duty has been paid under protest. There is a special procedure of payment of duty under protest. This is not relevant for the present discussion.

68. What is contended before us is that the question whether the duty has been rightly collected or not, can only be known after prolonged litigation and that would be long after the date of purchase of goods or the date of payment of tax as the case may be. So in such cases no claim can be made within the period of limitation as contemplated under the Act.

69. The right to claim refund of tax/duty illegally collected by the State, submits the learned counsel, may arise under any of the following : (i) under Article 265 of the Constitution apart from any statute which may or may not, confer a right of refund; (ii) under a statute dealing with collection and refund; and (iii)

common law right dealt with u/s 72 of the Contract Act; and that Section 11B does not apply to a case where duty has been collected without authority of law or under mistake of law.

70. It is conceded that where refund is claimed under any statute, it is subject to such terms and conditions as the legislature may Provide also it is not disputed that right u/s 72 of the Contract Act is subject to the Limitation Act and other procedural requirements. However it is contended that where duty is collected in violation of Article 265, for granting refund under Article 226 of the Constitution Section 11B will not be a bar. We cannot accede to this contention. Article 226 of the Constitution confers wide powers on the High Court to issue to any person, or authority including the government, writs in the nature of Habeas Corpus, mandamus, prohibition, co-warrant to or certiorari or any one of them for the enforcement of any rights conferred by Part III and for any other purpose. The power conferred under this Article is a discretionary power. It is meant to be exercised to enforce the fundamental rights or constitutional rights or any legal rights. In exercising this discretionary power the High Court would act in accordance with the law of the land but not in violation of the law of the land. The power is meant to give effect to rights conferred under various Acts but not to defeat the constitutionally valid provisions of the statutes. Here it would be pertinent to bear in mind the distinction between a case where no remedy is available to a person under the law of the land or where the remedies provided thereunder are inadequate and a case where remedy sought is prohibited or regulated by a statute. While in the former case it would be open to a party to invoke the jurisdiction of this Court under Article 226 of the Constitution, in the latter case it would be wholly erroneous to think that if a particular remedy is prohibited by any Act which is constitutionally valid so the relief cannot be obtained by adopting ordinary course of law, the same could be sought under Article 226 of the Constitution. If such an approach is adopted it would practically abrogate the entire judicial system and the machinery set up for administration of justice. Therefore, it follows that if refund of duty cannot be obtained by having recourse to the forum available under the law of the land, in view of the provisions of Section 11B of the Central Excise Act or Section 27 of the Customs Act, as the case may be, where the provision of any statute applies, the same cannot be obtained even by invoking the jurisdiction of the High Court under Article 226 of the Constitution for that power is never meant to override or ignore the constitutionally valid statutory provisions.

71. For purposes of application of rule of limitation we shall consider various circumstances under which duty is paid; (1) where the duty is paid under mistake of law; (ii) where the duty is paid under coercion and (iii) where the duty is paid for reasons where the claim of refund is relatable to the circumstances mentioned in sub-clauses (a) to (d) of Clause B of the Explanation to Section 11B. The period of limitation of six months appears to apply only to cases falling under categories (ii) and (iii) aforementioned. Regarding category (iii) which relates to claim for refund falling under specified cases of the

Explanation, the period of limitation of six months as prescribed in the Act will undoubtedly be applicable, Regarding category (ii), for recovery of money paid under coercion, the position under the Limitation Act is that period of limitation as prescribed under Article, 24, three years from the date of payment of money, will apply. But if the duty is paid under coercion of the machinery functioning under the Central Excise Act or the Customs Act,. the Amendment Act has taken care of such a situation and prescribed an alternative period of limitation of six months by defining the relevant date" in sub-clause (d) of Clause B of the Explanation to Section 11B. So refund claim made on the ground of payment of duty under coercion has to be made within six months.

72. The case relating to payment of duty under mistake of law, falling under category (i), which can be known only on declaration being made by the Court / Tribunal to that effect is, under the Limitation Act, three years from the date when the right to sue accrues as prescribed under Article 113 read with 17(1) (c) of the Limitation Act. Our present enquiry is concerned with finding out as to whether for this situation also period of limitation of six months as prescribed under the amended provisions of Section 11B applies.

73. Where right to claim refund of money paid under mistake of law arises under any Act and that Act specifies a period of limitation for claiming refund, the special statutory rule of limitation applies and it cannot be allowed to be subverted by calling in aid the provisions of the Limitation Act but where the special rules does not apply, the period of limitation contained in Section 113 of the Limitation Act will apply. [See *Salonah Tea Company Ltd. etc. v. Superintendent of Taxes, Nowgong* . It follows that for purposes of claim of refund of the excise duty or customs duty collected illegally and unauthorisedly whether due to lack of authority or mistake of law, has to be dealt with only under the machinery provided and within the period of limitation prescribed u/s 11B of the Central Excise Act or Section 27 of the Customs Act. But it will be well to remember that when collection of duty is under a void provision of an Act or an Act which is ultra vires the power of the Legislature, the provisions relating to refund of the duty in that Act, would have no application and as a corollary of that proposition the restriction on the refund and the rule of limitation provided herein will have no application to cases arising thereunder. The same will be the position where refund is claimed consequent upon declaration of the correct position of law either by any order in appeal or revision or in reference under the Act and no limitation for claiming refund of duty in such cases is prescribed under the Act. In such cases the general rule of limitation contained in the Limitation Act will apply and the rule of limitation as contained in Section 11B will have no application.

74. We shall now refer to the decisions relevant on this aspect.

75. *K.S. Venkataraman and Co. Vs. State of Madras*, . That case arose under the Madras General Sales-Tax Act. The appellants therein were assessed to sales-tax on the basis that the contracts executed by them were works contracts. The High

Court held that the relevant provisions of the Madras General Sales-tax Act empowering the State of Madras to assess indivisible building contracts to the sales tax, were ultra vires the power. The appellants filed a suit in civil court for recovery of the tax levied and collected from them illegally and for other incidental reliefs. The State took the defence that Section 18A of the Sales-tax Act was a bar to the suit as it ousted jurisdiction of civil court. The Supreme Court (per majority) held -

"If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may by necessary implication, bar the maintainability of a Civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction in the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a Civil Court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a Civil Court."

76. In view of the fact that the relevant provisions of the Madras General Sales Tax Act were held to be ultra vires, the Supreme Court further observed that -

"The sales-tax authorities had acted outside the Act and not under it in making an assessment on the basis of the relevant part of the charging section which was declared to be ultra vires by the Supreme Court. It cannot be said that the expression "Under this Act" in Section 18A refers only to the power of the Officer to make an assessment and the procedure to be adopted by him and not to the content of the assessment. "Under this Act" refers both to procedural and substantive provisions of the Act and as the relevant part of the charging section was held to be ultra vires, Section 18A is not a bar to the maintainability of the suit for the refund of sales-tax assessed under the provisions declared to be ultra vires the powers of the State Legislature".

77. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , the question before the Supreme Court was whether Section 17 of the Madhya Bharat Sales Tax Act excluded the jurisdiction of a civil court to entertain the suit for declaration that provisions of law relating to assessment were ultra vires and for a consequential relief of refund of tax illegally collected.

78. Section 17 of the Act provided that no assessment made and no order passed under that Act or the Rules made thereunder by the assessing authority, appellate authority or the Commissioner, should be called into question in any court and save as was provided under Sections 11 and 12 no appeal or application for revision should lie against any such assessment or order. While laying down the principles regarding the exclusion of jurisdiction of civil court,

Hidayatullah, Chief Justice, held, on the facts and in the circumstances of the case, that the suit in question for declaration that the provisions of the law relating to assessment under the M. B. Sales Tax Act were ultra vires and for refund of the amount of the tax illegally collected, was not barred by section 17 of the Act.

79. In *Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar*, the Supreme Court laid down that for refund claims made before the departmental authority limitation provided under the Customs Act/Central Excise Act or the rules made thereunder would be applicable and those authorities were bound by their provisions. It was held that when duty was levied without the authority of law or without reference to any statutory authority or specific provisions of the Act or the rules framed thereunder the rule of limitation contained thereunder would have no application and that the decision would be guided by the general law and the date for computing the period of limitation would be the starting point when the mistake or the error came to light. But in making claims for refund before the departmental authority an assessee is bound within the four corners of the statute and the period of limitation prescribed in the Act would prevail. It was observed that it might however be open to the department to initiate proceedings in civil court for recovery of the amount due to the department in case such a remedy was open on the ground that the money received by the assessee was not in the nature of refund. In that case certain amount was sanctioned to the respondent as incentive for the excess production. Later it was discovered that the amount was wrongly paid to him. Proceedings were initiated for recovery of the amount from the respondent under the provisions of the Act but after expiry of the Statutory time limit prescribed under the Act. It was in that context the above observations were made.

80. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, the relevant provisions of Madhya Bharat Sales Tax Act were held to be void. Proceedings for recovery of tax paid were initiated. Some of the claims were made within the period of 3 years but some claims were made beyond the period of three years. Declaring the provisions as void, the High Court granted a direction for refund of the tax illegally collected. In so far as the claims granted by the High Court were within the period of three years from the date of declaration of the Act as ultra vires, the Supreme Court upheld the claim but in regard to the claims made beyond three years, the Supreme Court made the following observations :

"Learned Counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. 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. If the mistake was known in these cases on or shortly after January 17, 1956 the delay in making these applications should be considered unreasonable. If, on the other hand, as Mr. Andley seems to argue, that the mistake discovered much later this would be a controversial fact which cannot conveniently be decided in writ proceedings. In either view of the matter we are of opinion, the orders for refund made by the High Court in these seven cases cannot be sustained".

81. Now reverting to the scope of sub-clauses (e) and (f) of Clause B of the Explanation to Section 11B of the Central Excise Act defining 'relevant date'; in cases of refund of duty paid under mistake of law, it is correct that when dispute arise as to payment of proper duty in law, the correct position would be known upon adjudication and the final determination by the forum under the Act. It would take years so it will be impossible to make claim for refund within six months 'from the date of purchase of goods' or 'the date of payment of duty', as the case may be.

82. The unamended provisions of sub-section (3) of Section 11B dealt with refund of duty as a result of any order passed in the appeal or revision under the Act. In such a case the Assistant Collector of Central Excise had power to refund the amount of duty to the person entitled to its refund without his having to make any application in that behalf. After the amendment of Section 11B there is no corresponding provision in the present scheme and definition of expression 'relevant date' in Explanation B to this section. Thus the Act does not provided special period of limitation in Section 11B in the definition of 'relevant date' for claiming refund of excise duty consequent upon the decision rendered by the authorities under the Act that the collection of duty is illegal.

83. If the manufacturer/producer/importer challenges validity of levy and/or collection of duty and succeeds, he cannot be deprived of the fruits of litigation. In such cases it is open to the adjudicating authority including the Court acting under the Act to order consequential refund of duty. If it is not so done, it is equally open to the party to the lis whether manufacturer/producer/importer to claim refund of duty by filing application claiming refund of duty pursuant to order holding that collection of duty from him was illegal.

84. We have already held above that if the special period of limitation prescribed u/s 11B has no application to a case, provisions of Limitation Act will apply and that sub- clauses (e) and (f) of Clause B of Explanation to Section 11B do not apply to a case of claim for refund on the ground of payment of duty under mistake of law as found in the case of the applicant in appeal, revision or reference under the Act as such it follows that in such a case the manufacturer/producer/importer can claim refund within three years under Article 113 of the Limitation Act.

85. To sum up Sections 11B, 11C, 12B, 12C and 12D of the Central Excise Act and Sections 27 and 28A to 28D of the Customs Act are constitutionally valid. However, the period of limitation prescribed in sub-section (1) of Section 11B has no application to a case where refund is claimed pursuant to an order passed by the appellate authority or appellate tribunal or revisional authority or the Court, as the case may be, holding that levy and collection of the duty was illegal/unauthorised. We further hold that the expression "every person" in sub-section (1) of Section 11D of the Central Excise Act is to be read down as the manufacturer/producer; so also the expression "every person" occurring in Section 28B of the Customs Act has to be read down as the importer.

W. P. No. 8339 of 1992.

86. For the foregoing reasons, the Writ Petition fails and it is accordingly dismissed without costs. Advocate's fee Rs. 500/-.

W. P. Nos. 3612/87, 3629/87, 2153/88, 4705/88 & 8611/88.

87. In these four cases the facts are identical. The Central Government issued notification granting exemption of central excise duty on the goods in question. Due to inadvertence the petitioners paid excise duty. After realising that the duty was not payable on the goods in view of the exemption granted by the Central Government, they claimed refund of the duty already paid. The claim was preferred after a period of six months from the date of payment of the duty. The Assistant Collector rejected the claim as barred by limitation. That order was confirmed by the Collector in appeal and on further appeal by the CEGAT in the first four cases. However, in W. P. No. 8611 of 1988 no appeal was preferred before CEGAT. The petitioners now claim a direction to the respondents to refund the duty paid by the petitioners.

88. Inasmuch as validity of Section 11B of the Central Excise Act is upheld by us, the petitioners are not entitled to claim refund of excise duty after the claim is barred by limitation u/s 11B of the Act. From the reasons aforementioned and in view of the judgment of the Supreme Court in *Miles India Ltd. v. Assistant Collector of Customs* 1987 (30) E. L. T. 641 and *Union of India and others Vs. Jain Spinners Ltd. and another*, these Writ Petitions are dismissed, but in the circumstances without costs. Advocate's fee Rs. 500/- in each.

W. P. Nos. 7877/87 and 12309/88.

89. These two writ petitions are by the same petitions and arise out of the same facts.

90. The petitioners is manufacturing and selling grooved rubber sole plates (Rail pads) of vulcanised unhardened rubber and other products. It has been paying central excise duty under Tariff Item No. 68. It is stated that the tariff item applicable is 16- A(2) of the Central Excise Act but not Tariff Item No. 68. The said Item 16-A(2) was exempted from excise duty by notification issued on 1-5-1968 by the Central Government. On these facts the petitioner claims refund

of excise duty for the period from 11-5- 1984 to 11-11-1985 in W. P. No. 7877/87 and in W. P. No. 12309/88 for the period from 28-6-1985 to 25- 9-1985 and seeks a direction to the respondents to refund the same.

91. It filed W. P. M. P. No. 21089/91 in W. P. No. 7877/87 praying this Court to receive additional affidavit and permit it to raise additional grounds. The W. P. M. P. is ordered. In the additional grounds it challenges the constitutional validity of Section 11B.

92. We have already upheld the validity of Section 11B. The petitioners has not approached the Assistant Collector for revised classification. It is not his case that the revised classification under Item 16A(2) has been approved by the excise authority. In any event in view of the above discussion and following the judgments of the Supreme Court in *Miles India Limited v. Assistant Collector of Customs* (supra) and *Union of India v. Jain Spinners Ltd.* (supra), the petitioner has to claim the refund only u/s 11B. For these reasons the Writ Petitions fail and are accordingly dismissed, but in the circumstances without costs. Advocate's fee Rs. 500/- in each.

W. P. Nos. 13666/87 and 13667/87.

93. The petitioner in these Writ Petitions, claims that his business is executing jobs and contracts ranging from fabrication of steel and iron materials and loading, transporting and unloading of materials including fabrications at the site of the customer and/or helping the customer in fixing, fitting, installing fittings, fixtures, equipments or plant at site for contractual remuneration and that is is not liable to payment of excise duty because the work done by it does not amount to manufacture or production of the goods. It challenges the validity of the order passed by the Collector, Central Excise, Guntur, in proceedings. No. C. No. V/Ch. 84/15/38/86-Adj. 3/O. R. No. 1/87 Adj. Order No. 1/87 dated 16-6-1987, by praying for a writ of Certiorari to call for records relating to the said order and to quash the same and for a declaration that Section 11B of the Central Excise Act is unconstitutional and for consequential direction to refund the duty.

94. We have already upheld the constitutional validity of Section 11B of the Central Excise Act.

95. As a right of appeal is available to the petitioner against the impugned order of the 2nd respondent dated 16-6-1987 and indeed it was so mentioned in the impugned proceedings of the 2nd respondent and in view of the fact that we have taken the same view in W. P. No. 17814 of 1990 dated 22-12-1992 and that in all cases where alternative remedy is available we have directed the parties to exhaust the same, we do not find any reason to take a different view. Accordingly in these Writ Petitions were grant four weeks time from today to the petitioner to file appeals before the CEGAT. Subject to this relief the Writ Petitions are dismissed, but without costs. Advocate's fee Rs. 500/- in each case.

W. P. No. 3848 of 1988.

96. In this Writ Petition the petitioner-company seeks a writ of Certiorari to call for record relating to the order in Appeal No, C. D. (SB) (T). 1522/81-C, Order No. 13/85-C, dated 9-1-1985 passed by the CEGAT/7th respondent and to quash the same and for a further declaration that the customs duty was payable by the petitioner under Customs Tariff Heading 3801/06 instead of under Customs Tariff Heading 3801/19 during the period from 1-11-1976 to 28-2-1978, and that collection of the duty was illegal and unauthorised under the Customs Act read with the Customs Tariff Act and violative of Article 265 of the Constitution and for a consequential direction to refund a sum of Rs. 5,29,311-17 ps.

97. The petitioner-company imports 'polyols' which are known in trade parlance as polyesters and polyethers during the period from 1-11-1976 to 28-2-1978. On those goods customs duty was wrongly collected under Tariff Heading 3901/06 treating them as 'rexins' instead of 3801/19. this is not in dispute before us. The petitioner filed a refund application before the Assistant Collector of Central Excise the 1st respondent herein, who admitted part of the claim and rejected the claim for the period above-referred to as being barred by time in July, 1980. On appeal the Collector of Customs, the 6th respondent herein, took the view that what had been collected in excess was no duty under the Act so the statutory limit would not apply and accordingly allowed the appeal on 23-1-1981. However, on 2-11-1981 the Government of India issued a show cause notice u/s 131(3) of the Customs Act to revise the said order of the Collector. While so, the 7th respondent-Tribunal, CEGAT was constituted on 11-10-1985 and the case was transferred to CEGAT. The CEGAT by order dated 9-1-1985 reversed the order of the 6th respondent. It is the validity of this order that is assailed in this Writ Petition.

98. The petitioner filed an additional affidavit praying for a declaration that Section 27 of the Customs Act which corresponds to Section 11B of the Central Excise Act is ultra vires and that the same is not retrospective in operation and that the consumer and not an excise on the goods.

99. Mr. Y. G. Ramamurthy, the learned counsel for the petitioner mainly urged three contentions before us, viz.-

(i) that the amendment Act is ultra vires of the Constitution more particularly Article 265 of the Constitution and violative of Article 14 and that Section 27 of the Customs Act is not retrospective;

(ii) that the transfer of the revision to the 7th respondent was itself illegal and that the 7th respondent has no power to dispose of the case; and

(iii) that the period of limitation u/s 27 of the Customs Act is not retrospective in operation.

100. Insofar as the constitutional validity of the Amendment Act and Section 27 of the Customs Act is concerned, we have already upheld the same above.

101. We shall now examine the second contention which relates to the jurisdiction of the CEGAT to entertain the transferred proceedings and dispose of the same. Pursuant to the show cause notice issued by the Government of India to revise the order of the Collector (Customs), revision was pending before the Central Government. Under sub-section (2) of Section 131B of the Customs Act, the revision was transferred to CEGAT, which reads thus :

" (2) Every proceeding which is pending immediately before the appointed day before the Central Government u/s 131, as it stood immediately before that day, and any matter arising out of or connected with such proceeding and which is so pending shall stand transferred on that day to the Appellate Tribunal and the Appellate Tribunal may proceed with such proceeding or matter from the stage at which it was on that day as if such proceeding or matter were on appeal filed before it:

Provided that if any such proceeding or matter relates to an order where-

(a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation u/s 125; or

(b) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(c) the amount of fine or penalty determined by such order,

does not exceed ten thousand rupees, such proceeding or matter shall continue to be dealt with by the Central Government as if the said Section 131 had not then substituted :

Provided further that the applicant or the other party may make a demand to the Appellate Tribunal that before proceeding further with that proceeding or matter, he may be re-heard."

102. From a perusal of the above provision, it is evident that every proceeding which was pending immediately before the appointed day before the Central Government u/s 131, as it stood before that day, and any matter arising out of or connected with such proceeding and which was so pending, stood transferred on that day to the Appellate Tribunal. The Tribunal was empowered to proceed with such proceedings or matters from the stage at which it was on that day as if such proceeding or matter were on appeal filed before it. The first proviso excepts, however, gives the right to the parties to the proceedings to have a rehearing of the whole case. The expression `appointed day' is defined in clause (a) of Section 131C to mean the date of coming into force of the amendments to the Customs Act specified in Part I of the Fifth Schedule to the Finance (No. 2) Act, 1980 (Act 44 of 1980). The amendment came into force on 21-8-1980 and as on that day the revision was pending before the Government of India, under sub-section (2) of Section 131B, it stood transferred to the CEGAT. However, Mr.

Ramamurthy contends that unless the order falls within one of the enumerated orders u/s 129A, the CEGAT will have no power to hear the appeal. We are unable to accept this contention; firstly because sub-section (2) of Section 131B does not confine the proceedings which would stand transferred to the CEGAT to those falling u/s 129A and secondly because the order which was the subject matter of the revision falls under clause (b) of sub-section (1) of Section 129A. Therefore the transfer of the revision pending before the government of India to the CEGAT and the dismissal of the appeal by the CEGAT can be said to be illegal and without jurisdiction.

103. The last contention relates to the question of limitation. In view of our finding on the first point the order of the CEGAT holding that the rule of application u/s 27 would govern the application cannot be said to be an error of law apparent on the face of the record as so as to warrant interference of this Court under Article 226 of the Constitution of India; therefore the Writ Petition is dismissed, but in the circumstances without costs. Advocate's Fee Rs. 500/-

W. P. No. 4937 of 1990.

104. In this case consequent upon the approval of the revised classification list with regard to different types of cement, the petitioner preferred a claim for refund of excise duty paid by it for the following periods on 7-11-1989 - a) from 1-6-1986 to 28-2-1989; b) from 1-3-1989 to 8-5-1989; and c) from 10-5-1989 to 31-10-1989.

105. The Assistant Collector granted refund for the period (c) from 10-5-1989 to 31-10-1989. For the periods mentioned in Items (a) and (b) the refund claim was rejected. Stating that an appeal to the authorities under the Excise Act would be futile, the petitioner filed this Writ Petition for a direction to respondents to grant refund for the above-said periods mentioned in (a) and (b).

106. The petitioner filed W. P. M. P. No. 1153/92 praying to permit the petitioner to amend the prayer in the Writ Petition by allowing him to challenge the validity of the Amending Act which is allowed.

107. We have already upheld the validity of the Amendment Act. For the aforementioned reasons the Writ Petition fails and is accordingly dismissed, but in the circumstances without costs. Advocate's fee Rs. 500/-

W. P. No. 10305 of 1991.

108. In this case the petitioner filed a price list under Tariff Item 16B of the First Schedule of the Central Excise Act in respect of Flush Doors which was approved by the Assistant Collector. Later he contended that the said item did not fall under Item 16B but fell under a residuary Item 68 and claimed refund of duty from March, 1975 to March, 1981. The claim was rejected by the Assistant Collector as being barred by limitation. Thereafter the petitioner carried the matter in appeal to the Collector. The Collector also dismissed the appeal and on further appeal, the CEGAT upheld the order of the Collector (Appeals) and

observing that in view of rule of limitation of six months prescribed in section 11B the claim was barred by limitation, dismissed the appeal.

109. As the validity of Section 11B has been upheld by sum the petitioners are not entitled to claim excise duty after the claim is bated by limitation u/s 11B of the Act. For the above reasons and in view of the judgments of the Supreme court in Miles India Ltd. v. Assistant Collector, Custom (supra) and in Union of India v. Jain Spinners Ltd. v. Assistant Collector, Customs (supra) and in Union of India v. Jain Spinners Ltd. (supra) this Writ Petition is dismissed, but in the circumstances without costs. Advocate's fee Rs. 500/-

W. P. No. 8339/92.

110. Immediately after pronouncement of the judgment, Sr. K. Subrahmanya Reddy, the learned counsel for the petitioner in this Writ Petition made an oral application to grant leave to appeal to the Supreme Court against the judgment in the Writ Petition. In our opinion no substantial question of law of general importance which needs to be decided by the Supreme Court, arises in this case. Application for leave is therefore rejected.

111. Learned counsel requests that the operation of the judgment be suspended to enable the petitioner to approach the Supreme Court. Inasmuch as the petitioner has approached this Court against the show cause notice to explain as to why refund claim made by it should not be rejected and no immediate action which would cause irreparable injury would follow from the judgment, we do not consider it just and appropriate to suspend the operation of this judgment.