
(1979) 11 MAD CK 0046

In the Madras High Court

Case No : Writ Petition No's. 4629 to 4631 of 1975

Madras Aluminium Co. Ltd. and Another

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 27-11-1979

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 11, 173J, 27, 9
Central Excises and Salt Act, 1944 — Section 26B(2), 3(1)
Constitution of India, 1950 — Article 19(1), 19(6), 226, 265, 301
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27
Finance Act, 1969 — Section 30
Finance Act, 1970 — Section 32
Limitation Act, 1908 — Article 96
Tariff Act, 1934 — Section 2A

Citation : (1980) CENCUS 50 : (1990) ECR 607 : (1981) 8 ELT 478

Hon'ble Judges : Ramanujam, J; Padmanabhan, J

Bench : Division Bench

Advocate : V.K.T. Chari, for the Appellant; U.N.R. Rao, for the Respondent

Final Decision : Dismissed

Judgement

Ramanujam J.

1. The first two writ petitions have been filed by Messrs Madras Aluminium Co. Ltd., hereinafter referred to as Malco, engaged in the business of manufacture and sale of wire rods. The third writ petition has been filed by M/s Industrial Cables (India) Ltd., manufacturer and seller of power cables and conductors made out of aluminium wire rods purchased from Malco and other manufacturers of wire rods.

2. Malco started manufacturing E.C. Grade aluminium wire rods of 3/8" diameter popularly known as Properzi rods since January 1967, in the Properzi plant imported by them in the year 1966. The rods are machine wrung in nature and the process of manufacture of these rods is as under-

"Liquid aluminium produced in electrolytic pots after degasification and fluxing is fed through a cast iron tube into a rotating water cooled copper vessel, which is also water chilled on the outside. The cast rod is approximately triangular in shape and is continuous and is fed into a series of rollers having reducing diameter. The cross section of the emerging rod is now approximately circular and the diameter is 3/8." This is then wound into a coil and sent to cable and wire manufacturers for final drawing and stranding into cables of wire."

3. By its letter dated 20-1-1967 Malco informed the Inspector of Central Excise, Salem, that they were commencing manufacture of properzi rods shortly and requested him to inform them of the excise duty payable on the above-mentioned rods. The Inspector of Central Excise by his letter dated 30-1-1967 replied that the Superintendent of Central Excise has given the following orders-

"Extruded rods of aluminium are assessable under Tariff Item No. 27- Aluminium- Extruded rods-which will pay duty at the rate of 10 % ad valorem or Rs. 300 per tonne whichever is less plus the special excise duty of 20% on E.C.D.

To determine the exact duty amount realisable on rods the duty on the basis of ad valorem assessment and that based on concession rate of Rs. 300 per tonne has to be worked out and shown in the AE-1 itself to satisfy that basic duty is collected on extruded rods besides S.E.D.

4. By further letter dated 27-2-1967, the Inspector of Central Excise wrote to Malco stating that the Government of India, Ministry of Finance, by their Notification No. 13/67 dated 21-1-1967 has prescribed the Tariff value of Rs. 6500 per metric tonne for aluminium extruded shapes and sections other than extruded hollow sections including pipes and tubes and that this tariff value be incorporated in the AR 1 in future. By a still further communication dated 5-5-1967, the Inspector of Central Excise wrote to Malco stating that as per Government of India; Ministry of Finance Notification No. 48/67-X dated 1-4-1967, extruded aluminium rods in straight lengths with a circular arc like (part of a circle) cross section only are assessable at Rs. 300 per tonne plus usual special excise duty ; otherwise the assessment shall be at 10 % ad valorem plus the usual Special excise duty, based on the tariff value of Rs. 6500 per tonne already fixed by the Government of India. On 30-5-1967 Malco wrote to the Assistant Collector of Central Excise, IDO, Salem, seeking his decision regarding the classification of excise duty on Properzi rods and stating that they are manufacturing 3/8" diameter rod out of the aluminium produced in their factory and this was only a raw material for the manufacture of cables and wires. On 30-5-1967 the Assistant Collector of Central Excise IDO, Salem classified properzj rods and aluminium ingots for purposes of assessment as" follows-

Tariff Item No. Rate of duty Properzi Rod 27(d) of the Central Excise 20 % ad valorem as Tariff basic duty and 20 % special excise duty Aluminium Ingot 27(a) of the Central Excise Rs. 950 per metric Tariff tonne and 20 % special excise duty.

The Inspector of Central Excise, Mettur Dam, also informed Malco on 30-5-1967, that the following rates of duty were effective from 16-5-1967-

1. 27(a) Aluminium in any crude form including ingots bars etc.-basic excise duty Rs. 950 per M. Tonne plus special excise duty 20 % of basic excise duty.

2. 27(d) Extruded rods-basic excise duty 20% ad valorem plus special excise duty 20% of basic excise duty."

5. By its communication dated 31-7-1967 Malco wrote to the Collector of Central Excise, Madras, stating that Properzi Rods 3/8" diameter can be classified only under Tariff Item No. 27(a) and therefore suitable instructions may be issued to the Central Excise authorities at Salem for assessing Properzi rods under item 27(a) of the Tariff instead of under item 27(d). On 11-8-1967, the Inspector of Central Excise Mettur Dam has informed Malco that properzi rods of 3 x 8" diameter manufactured by them are classified under item 27(a) of the Central Excise Tariff. Later by letter dated 9-10-1968, the Senior Superintendent (Tech) Salem wrote to Malco stating that though according to Eoard"s orders Properzi rods produced out of bauxite alumina or both were non-excisable as those rods did not fall in any of the sub-items of item No. 27, of the Central Excise Tariff and Properzi rods manufactured out of imported ingots in admixture with or without bauxite or alumina or both were also non-excisable, where aluminium in crude form e.g. ingots had suffered the appropriate duty, under item 27(a) should continue to be recovered on the crude aluminium contents of such rods, and called upon them to send an amended classification list accordingly for necessary aption and approval. Accordingly Malco submitted the classification list in the revised form on 20-2-1969. On the same day, the Superintendent (Tech) IDO, Salem had sent a communication stating that the original classification list was duly approved, that the question of excisability or non-excisability of the properzi rods is under examination by higher authorities that the question of extending. the concessional assessment under notification No. 24/68 in respect of products produced out of bauxite or imported ingots is also under examination and that an intimation will be sent later regarding the classification of properzi rods. But later no communication was received by Malco from any of the authorities. In the circumstances, set out above, Malco was manufacturing and supplying orproperzi rods and realised excise duty from its customers on the basis of the classification made by the authorities originally under item 27(d) and later under item 27(a).

6. One of Malco"s customers to whom Properzi rods were sold is the petitioner in W. P. No. 4631 of 1975. It purchased from Malco 67098 M. Tonnes of EC Grade Electrolytic aluminium rods other than extruded and paid thereon excise duty of Rs. 5,96,845.26. Similarly Malco had supplied these rods to other constituents and paid excise duty on the supplies so made by them between January 1967 to 28th February, 1969 amounting to Rs. 1,24,28,992.92.

7. Later the High Court of Gujarat by its judgment dated 18-3-1972 in Special Civil Appln. Nos. 909 to 911 of 1970 (Prem Conductors Pvt. Ltd. v. Asstt.

Collector of Customs) held that "in respect of electrolytic aluminium rods other than extruded, no excise duty was payable under the Central Excise Tariff and that as such they were not, on import, liable to countervailing duty u/s 2-A of the Indian Tariff Act, 1934". Taking advantage of the said decision of the Gujarat High Court, the petitioner company in W.P. 4631 of 1975 made a claim on Malco its seller, for the refund of the excise duty which it had paid as part of the price of the aluminium properzi rods. Apprehending that it will be exposed to similar claims from all the purchasers of Properzi rods in view of the judgment of the Gujarat High Court, Malco claimed on 24-11-1972, refund of a sum of Rs. 1,24,28,992-92 being the excise duty paid for the period prior to the introduction of sub-item (aa) in item 27 of the First Schedule to the Central Excises and Salt Act, 1944 by the Finance Act of 1969.

8. By show cause notice dated 14-9-1974, the Assistant Collector of Central Excise called upon Malco to show cause why the claim for refund of the excise duty paid should not be rejected as time barred, on the ground that the claim for refund had not been, presented within three months as prescribed under rule 11 of the Central Excise Rules or within one year under Rule 173-J of the said rules. On 4-11-1974 Malco submitted its reply to the aforesaid show cause notice wherein it contended that the provisions of Rule 11 or Rule 173-J of the Central Excise Rules had no application to the refund claimed by it as the levy and the payment of excise duty was illegal, without jurisdiction and without the authority of law. Malco was also given a personal hearing with reference to its claim for refund. At the personal hearing, on behalf of Malco it was submitted that the claim for refund being for the amount which was collected illegally unauthorisedly and without the authority of law, the provisions of the rules providing limitation were not applicable, that the normal period of limitation for filing a suit for obtaining refund of money paid under a mistake of law was three years from the date of the detection of the mistake, that Rule 11 or Rule 173-J of the Central Excise Rules would apply only to correct certain clerical errors and would not cover cases of tax collected illegally.

9. The claim for refund was, however, rejected by the Assistant Collector of Central Excise, Salem, by his order dated 24-2-1975 on the ground that the claim for refund was belated. Aggrieved against the rejection of the claim for refund, Malco preferred an appeal to the Appellate Collector. The Appellate Collector went into the question of limitation as well as into the merits of the case. On the question of limitation he agreed with Malco but on merits he was of the view that the excise duty has rightly been levied on the crude aluminium content of the properzi rods though to all appearances duty was charged on properzi rods, that in the course of manufacture of aluminium rods starting with the raw materials, viz. bauxite or alumina or both, as the case may be, there arrived a stage when molten aluminium which is nothing but aluminium in crude form which is admittedly assessable to duty under item 27(a) of the Central Excise Tariff is produced and therefore properzi rods have rightly been subjected to excise duty under item 27(a). Aggrieved against the order of the Appellate

Collector, Malco took the matter in revision to the Government of India. The Government of India gave a personal hearing to Malco and after hearing its counsel ultimately passed an order upholding the order of the Appellate Collector taking the view that the quantity of crude aluminium, whatever may be its form, before it is converted into proper rods, should suffer excise duty under item 27(a). On the question of limitation also the Government of India took the view that the bar of limitation contained in Rule 11 of the Central Excise "Rules would apply to the facts of this case. The Government of India ultimately held that the claim for refund deserves rejection both on merits as well as on the question of limitation.

10. In the meanwhile Malco had also filed W.P. Nos. 4629 and 4630 of 1975 before this court, the first one to quash the order of the Assistant Collector rejecting the claim for refund on the ground of delay and the other one for a writ of mandamus directing the respondent to refund the excise duty of Rs. 1,24,28,992-92. After the disposal of the revision petition by the Government of India, the prayer for certiorari originally sought for in W.P. No. 4629 of 1975 was amended with the permission of the court as one for certiorari to quash the order of the Assistant Collector dated 24-2-1975 as ultimately confirmed by the Government of India by its order dated 8-3-1978.

11. Thus the three issues that arise for consideration before us are: (1) whether the claim for refund made by Malco is barred by time as provided in Rules 11 and 173-J of the Central Excise Rules, (2) whether the aluminium proper rods manufactured by Malco are liable to excise duty for the period prior to the introduction of Sub-clause (aa) in item 27 of the Central Excise Tariff and (3) if they are liable to excise duty, under what sub-item of item 27 they are to be assessed.

12. Rule 11 is as follows-

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

As per the above rule no duty which has been paid and of which repayment is claimed in consequence of the same having been paid through inadvertence, error or misconception shall be refunded unless a written claim is lodged with the proper officer within three months from the date of such payment. Rule 173-J is as follows-

"The provisions of Rules 10 and 11 shall apply to the assessee as if for the expression "three months" the expression "one year" were substituted in those rules."

13. This rule fixes the period of one year for claiming a refund of the excise duty paid. In this case the refund is not claimed on the basis of any error or inadvertence or misconstruction on the part of Malco. The excise duty is said to have been paid on a mutual mistake. It will be clear from the facts stated above that even at the initial stages of production of properzi rods Malco wanted the excise authorities to classify the goods for tariff purposes and it is based on that classification excise duty has been paid. It cannot also be disputed that at one stage the authorities themselves felt that excise duty is not payable on aluminium properzi rods. At a later stage they have applied different sub-items of item 27 to aluminium properzi rods at different periods. Malco which was purely guided by the advice and instructions given by the excise authorities now find that the excise duty levied from it by the authorities is not warranted by law. Therefore, Malco contends that it is entitled to claim a refund of the amount paid under a mutual mistake at any time within three years from the date of the discovery of the mutual mistake as "money had and received" and that in this case, the discovery of the mistaken payment of excise duty was when Malco was made aware of the judgment of the Gujarat High Court which held that aluminium properzi rods are not taxable to excise duty at all.

14. According to the respondent, however, whatever be the basis for the claim of refund of excise duty paid, the claim should have been made within three months in cases coming under Rule 11 and within one year in respect of cases coming under Rule 173J and that there is no scope for bringing in the provisions of the Limitation Act of the common law for seeking the refund from the excise authorities.

15. The question of refund of tax paid under a mistake has come up before, the Supreme Court in a series of decisions. In *Sales-tax Officer v. Kanhayalal Mukundlal Saraj*, 9 S.T.C. 747, the Supreme Court had observed-

"On a true interpretation of Section 72 (of the Contract Act) the only two circumstances that entitle the party to recover the money back are that the moneys must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the moneys and the party receiving the same is bound to repay or return them irrespective of any consideration whether the moneys had been paid voluntarily...."

16. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, there was imposition of sales-tax on the sale of imported tobacco in the State of Madhya Bharat while there was no such tax on the sale of indigenous tobacco. On the basis that the sales tax imposed on the sale of imported tobacco was violative of Article 301 of the Constitution, a writ of Mandamus was sought for refund of the sales tax paid on imported tobacco as having been paid under a mistake of law u/s 72 of the Indian Contract Act. The High Court held that the tax levied was unconstitutional and therefore the writ petitioner was entitled to the consequential relief of refund of the tax paid. The decision of the High Court was challenged before the Supreme Court. The Supreme Court agreed with the High

Court that the levy of sales tax in that case was unconstitutional. On the question whether the High Court was justified in granting a writ of mandamus for refund of the amount illegally collected, the Supreme Court observed that the High Courts have power, for the purpose of enforcement of fundamental and statutory rights to grant consequential reliefs by ordering the refund of money realised by the Government without the authority of law, that the sales tax paid in that case has been so paid under a mistake within Section 72 of the Indian Contract Act, that though the provisions of the Limitation Act do not as such apply to the grant of relief under Article. 226 of the Constitution, the maximum period fixed by the Legislature as the time within which relief by a suit in a civil court must be claimed may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured and that the period of limitation prescribed for recovery of money paid under a mistake under the Limitation Act is three years from the date when the mistake is known. It is true, the Supreme Court in that case did not consider the scope of a statutory provision fixing a specific period during which the claim for refund is to be made such as the one we have to consider in this case and it merely dealt with the general principles governing the issue of a writ of mandamus and the time before which an application for a mandamus for refund of the tax should be made. However, the Supreme Court has clearly observed that the tax collected without the authority of law can be taken to be one paid under a mistake within Section 72 of the Indian Contract Act and so the Government is liable to refund it and that liability can be enforced within three years not only in an action in a : civil court but also in writ proceedings under Article 226 of the Constitution. In a later decision in *State of Kerala v. Aluminium Industries Ltd.*, 16 STC 689 SC, the Supreme Court has

"Money paid under a mistake of law comes within the word "mistake" in Section 72 of the Contract Act, and there is no question of estoppel when the mistake of law is common to both the assessee and the taxing authority... If refund is not made, remedy through court is open, subject to the same restrictions and also to the bar of limitation under Article 96 of the Limitation Act, 1908, namely, 3 years from the date when the mistake becomes known to the person who has made the payment by mistake. It is the duty of the State to investigate the facts when the mistake is brought to its notice and to make a refund if the mistake is proved and the claim is made within the period of limitation."

The above decisions of the Supreme Court clearly lay down that the refund of the amount paid under a mutual mistake can be claimed either before the civil court or under writ proceedings provided the claim is made within 3 years from the date of the discovery of the mistake. Rule 11 contains an interdiction on the excise authorities not to refund the tax if a written claim has not been lodged with the proper officer within three months and a similar interdiction is therein Rule 173 J if the claim has not been made within one year. It may be that in view of the above provisions providing for a limit of time for making claims for refund the authorities functioning under the Act may not be entitled to direct refund, but

that will not prevent the court from ordering refund if it finds that the duty collected is not warranted by law or the same is due to a mutual mistake. Once it is held that the duty paid without the authority of law is to be treated to have been paid under a mistake as contemplated by S. 72 of the Contract Act, then the same is to be refunded by the department as "money had and received" within three years from the date of the discovery of the mistake. In a recent Bench decision of this court in *Asst. Collector of Customs, Madras v. Premraj and Ganapatraj Co., Madras Electrical Conductors Pvt. Ltd.*, 90 L.W. 719=1978 E.L.T. J 630, wherein a claim made for refund of duty unlawfully collected was dismissed by the department on the ground that the claim was barred u/s 27 of the Customs Act which provided for six months time for making the application for refund, the court took the view that where the collection of duty was without the authority of law, the court can exercise jurisdiction under Article 226 and give effect to what is provided in Article 265 of the Constitution which says that no tax can be levied or collected except by authority of law, without being inhibited by the period provided by Section 27 of the Customs Act. This decision was on the basis that the provisions of the Constitution should prevail over other statutory provisions providing for limitation for making claims such as Section 27 of the Customs Act.

17. Therefore notwithstanding Rules 11 and 173J, the petitioners will be entitled to get a refund of the excise duty paid if it is found that excise duty is not payable on properzi rods. We have to therefore hold on the first issue that the claims for refund put forward by the petitioners cannot be rejected merely on the ground that they are barred under Rules 11 and 173J. In this case, the petitioners exhausted all remedies open to them before the excise authorities and then filed these writ petitions within the time within which they could have filed a suit. Merely because another remedy by way of suit was available to the petitioners on the date when they filed these writ petitions, these petitions cannot be dismissed; because to do so would be throwing them back on to their remedy of filing a suit which is now barred by limitation.

18. Coming to the second issue as to whether the aluminium properzi rods manufactured by Malco is liable to excise duty at all, it will be clear from the facts set out above that originally in May 1967 the Assistant Collector of Central Excise, Salem classified properzi rods as coming under item 27(d) of the Central Excise Tariff providing for 20 per cent ad valorem as basic duty and 20 per cent special excise duty, that later in August 1967 the same item was classified as coming under item 27(a) providing for a duty at 950 per metric tonne and 20 per cent special excise duty, and that on 15-9-1967 a decision was given by the Central Board of Excise and Customs that the aluminium wire rods other than extruded ones are not covered by any of the items of Central Excise Tariff and, therefore, they are not liable to excise duty. In or about October 1968 the Senior Superintendent, Salem took up the stand that though according to the Board's orders properzi rods produced out of bauxite or alumina or those manufactured out of imported ingots in admixture with or without alumina were non-excisable

as the rods do not fall in any of the sub-items of item 27, the aluminium in crude form, when produced out of bauxite or alumina wherein the appropriate duty has not been paid, a duty under sub-item (a) of Item 27 should continue to be recovered on the crude aluminium contents of such rods. Thus the question of excisability or non-excisability of properzi rods manufactured by Malco had been in doubt right from the very beginning and as such Malco has been supplying properzi rods manufactured by them realising excise duty from its customers as per the classification made by the Central Excise authorities themselves from time to time. Between 1-1-1967 and 11-7-1967 Malco has been collecting excise duty from its customers on the properzi rods manufactured and sold by them under item 27(d) of the Tariff as classified by the excise authorities. Between 12-8-1967 to 28-2-1969, excise duty has been collected and paid by Malco as per item 27(a) of the Tariff, as per the revised classification made by the excise authorities. The total amount so collected and paid as excise duty between 1st January-, 1967 to 20th February, 1969, came to Rs. 1,24,28,992.92. It is this amount which is claimed by Malco from the excise authorities by way of refund on the ground that properzi rods manufactured by them are not liable to excise duty at all. Though during the relevant period excise authorities have proceeded to collect duty on the basis that properzi rods manufactured by Malco fell within item 27(d) of the Tariff or item 27(a), as the case may be, the stand taken before us by the respondents is that the properzi rods as such are not excisable as they do not fall either under Rule 27(a) or under Rule 27(d) but that aluminium in any crude form being liable to duty under item 27(a), aluminium content of the properzi rods is liable to excise duty under item 27(a). This is the stand taken by the Appellate Collector in his appellate order and the Government of India in its revisional order. According to the respondents in the course of manufacture of properzi rods, from the raw materials namely bauxite or alumina a stage is reached when molten aluminium which is nothing but aluminium in crude form, from which, if the assessee had so chosen, aluminium bars and billets etc., could have been obtained which are admittedly assessable to duty under item 27(a). Thus the present stand taken by the respondents is that properzi rods are liable to excise duty with reference to its aluminium content under item 27(a). The question is whether the properzi rods are liable to duty with reference to its aluminium content under item 27(a) as contended by the respondents.

19. For a proper appreciation of the rival contentions it is necessary to scan through item 27(a) of the Central Excise Tariff as it existed before 1-3-1969 which was as follows:-

"Item 27(a). Aluminium in any crude form including ingots, bars, blocks, slabs, billets, shots and pellets."

The following sub-item (aa) was introduced by Section 30(xxi) of the Finance Act, 1969 with effect from 1-3-1969 :-

"(aa) Wire bars, wire rods and castings not otherwise specified."

By Section 32 of the Finance Act of 1970 a new item 27 was substituted in the place of the old item 27 and under the amended item 27 (a)(ii), wire rods and castings not otherwise specified were made excisable at 25 per cent ad valorem. At this stage, it is necessary to refer to a few provisions of the Indian Tariff Act, 1934. Section 2-A of that Act provided for a levy of countervailing duty on articles which is imported into India equal to the excise duty leviable on a like articles if produced or manufactured in India. Item 66(a) of the First Schedule deals with aluminium manufactures such as plates, sheets, circles, strips and foil, including foil in any form or size ordinarily used as parts and fittings of tea chests and they are liable to standard rates of duty at 40 per cent ad valorem. Item 66(b) relates to other manufactures not otherwise specified which are liable to the standard duty at 60 per cent ad valorem.

20. The question whether properzi rods are liable to excise duty was dealt with for the first time by the Gujarat High Court in S.C.A. No. 909 to 911 of 1970. That was a case for refund of the customs duty paid under item 66 of the Indian Tariff Act, 1934, in respect of R.C. Grade electrolytic aluminium rods which the party imported for the purpose of manufacturing aluminium conductors, steel reinforced and hard drawn standard aluminium conductors for the purpose of overhead transmission of electric power. The case of the petitioner in that case was that the customs duty was collected as countervailing duty while in fact he was not liable to pay any such duty. The defence was that the duty levied was not countervailing duty but was customs duty, which the petitioner was liable to pay on his imports. The Court held that the levy in that case was in fact countervailing duty but that no countervailing duty was payable on the aluminium rods imported and, therefore, the levy of countervailing duty cannot be sustained in law. The learned Judges, after referring to item 27 of the Central Excises and Salt Act, came to the conclusion that none of the sub-items (a) to (d) of that item as it stood at the relevant time will be applicable to the goods and it is only for the first time by the Finance Act of 1969 sub-item (aa) was added to item 27 covering wire bars, wire rods and castings nor otherwise specified and levied upon them the excise duty at the rates mentioned against the said item. In this view, the court held that there was no liability for the importers of electrolytic aluminium rods to pay any countervailing duty u/s 2-A because there is no excise duty leviable on that kind of goods manufactured in India under the Central Excises and Salt Act, 1944. In that connection the learned Judges also referred to the following decision of the Central Board of Central Excise and Customs taken on 18th September, 1967-?

"E.C. Crude aluminium wire rods, other than extruded are not covered by any of the items in the Central Excise Tariff and accordingly they are not, on import, liable to additional duty u/s 2-A of the Indian Tariff Act."

21. In a subsequent decision of the Kerala High Court in O.P. No. 4027 of 1973 in which the Indian Aluminium Co. Ltd. is the petitioner, the question arose whether the aluminium properzi rods manufactured by that company were dutiable. After

considering the scope of item 27 of the Central Excise Tariff in detail, the court took the view that they were not liable to pay excise duty till Clause (aa) was introduced by the Finance Act of 1969 with effect from 1-3-1969 and, therefore, the excise duty collected on the properzi rods manufactured by them has to be refunded. A contention similar to the one advanced in this case that duty is not collected on properzi rods as such but the levy is made on the aluminium content in the crude form under item 27(a) was put forward in that case. But the court did not go into the feasibility of such a contention on the ground that such a contention was not open to the Revenue in view of the fact that the Government of India in revision in that case held that the properzi rods as such are not dutiable under item 27(a) and directed refund of excise duty collected by properzi rods, it is not possible for the Revenue to go against that order. In that case also the plea of limitation under Rule 11 of the Central Excise Rules was raised. But the court observed that so long as there is an order of the Government of India directing refund,, the respondents cannot urge the plea of limitation at all.

22. The decisions of the Gujarat High Court and the Kerala High Court above referred to are strongly relied on by the learned counsel for the petitioners, in support of his stand that the aluminium properzi rods are not liable to excise duty at all, that such a declaration has also been made by the Central Board of Excise and Customs in connection with the levy of countervailing duty under S. 2-A of the Indian Tariff Act, 1934, and that therefore it must be held that the levy of excise duty on properzi rods in this case was unauthorised. Whatever was the stand taken by the Central Excise authorities at the initial stages, after the matter reached the Appellate Collector, the stand taken by the department is that even though aluminium properzi rods are non-excisable as they do not fall in any of the sub-items of item 27, as it stood at the relevant time, excise duty is leviable on the aluminium content of the properzi rods for, in the process of manufacturing properzi rods, aluminium crude in a molten form comes into existence and aluminium in crude form being liable to excise duty under item 27(a), the petitioners cannot escape payment of that duty merely because they do not sell aluminium in molten or crude form. Now that the respondents proceed on the basis and have conceded that aluminium properzi rods per se are not excisable as they do not fall in any of the sub-items of item 27, it is not necessary for us to consider whether the properzi rods as such are excisable or not. That was the issue that arose for decision before the Gujarat and Kerala High Courts. In those decisions the question whether aluminium content of properzi rods are liable to duty as aluminium in crude form under item 27(a) was not considered. The question has been raised for the first time in this case and therefore we have to consider the tenability of the said contention of the department in detail. It is necessary in this connection to note the various stages in the production of aluminium properzi rods, and the nature of the manufacturing process.

23. The process of manufacturing properzi rods: was invented by an Italian

Engineer Sig. Ilari Properzi and now this is generally followed in all countries of the world including India. The said rods are manufactured by Malco by use of the properzi plan imported by them in the year 1966. The rods are machine wrought in nature and the process of production of these rods is as under- Properzi rods are manufactured either out of imported aluminium ingots in admixture with or without bauxite or alumina or both, or out of bauxite or alumina ore directly. Malco is manufacturing properzi rods not out of imported ingots but out of alumina ore. Initially the alumina ore is put into the furnace and converted into liquid form, and subjected to degasification and fluxing. After removing the impurities the aluminium in a molten form is collected in electroli pots and thereafter the said liquid aluminium produced is fed through a cast iron tube into a rotating water-cooled copper wheel, which is also chilled on the outside. The cast rod is approximately triangular in shape and is fed into a series of rollers having reducing diametres. The cross section of the emerging rod is approximately circular and the diameter of 3/8" and then this is wound into a coil and sent to cable and wire manufacturers for final drawing and standing into cables or wires.

24. Taking note of this process under which aluminium in liquid form is produced from alumina at a certain stage of the process, the stand taken by the respondents is that though aluminium properzi rods per se fall outside the tariff prescription of item 27(a), molten aluminium produced by Malco during the process of manufacturing of properzi rods is liable to duty under item 27(a) as molten aluminium is aluminium in crude form. After molten aluminium is cooled and is made to take a solid form that could definitely be aluminium in crude form. The fact that the manufacturing process is a continuing one and the molten aluminium is not removed from the machine or that molten aluminium is not stored separately will not mean that there is no actual production of crude aluminium. According to the respondents, though the end product manufactured by Malco is aluminium properzi rods, at the intermediate stage aluminium is produced in molten form and the same can be subjected to duty at that stage. Thus the general submission of the respondents is that in the process of manufacture of dutiable goods, another dutiable product is brought into existence at the intermediate stage, the same is liable to duty even though the same is not sold by the manufacturer in that form at that stage. This proposition is disputed by the petitioners stating that only the end product is liable to excise duty and not every intermediary product which comes into existence in the course of the manufacture of the end product, and which is used as a raw material.

25. As regards the said question reference has been made to the following decisions- In Union of India v. Delhi Cotton and General Mills, 1963 1 SCR 586, the Supreme Court had to consider the question as to whether the manufacturers of vegetable products known as Vanaspathi are liable to be assessed to excise duty under item 23 of the Excise Tariff on the "refined oil" which comes into existence at an intermediate stage in the process of

manufacture of Vanaspathi. The manufacturers of Vanaspathi purchase groundnut oil from the market and subject them to different processes before applying hydrogenation to produce Vanaspathi. According to the excise authorities, before finally producing Vanaspathi the manufacturers produce at an intermediate stage what is known as "refined oil" in the market and although they may not sell it and although Vanaspathi when produced was liable to excise duty under another item, the manufacturers are liable to pay duty under item 23 of the excise tariff which refers to "vegetable non-essential oils, on such refined oil. The Supreme Court in that case held that the processes to which the oils purchased in the market are subjected to before applying hydrogenation cannot be equated to a manufacture, which means bringing into existence a new substance, therefore, the manufacturers of Vanaspathi cannot be taken to have produced, or manufactured refined oil at the intermediate stage, that the so-called refined oil said to be produced by the manufacturer at the intermediate stage is not refined oil as known to the market, for what is known as refined oil in the market has undergone the process of deodorisation and that in that particular case as the process of deodorisation had been applied only after hydrogenation was complete the manufacturers could not be said to produce "refined oil" at any stage. However, the Lordships of their Supreme Court expressed the view that the excise duty being leviable at the manufacture of goods and not on the sale, the manufacturers will no doubt be liable, if they produce refined oil as known in the market at an intermediate stage and the payment of duty on the end product will not prevent the levying of duty on an excisable article produced at the intermediate stage. The following observations will be relevant:-

"Excise duty is on the manufacture of Igcods and not on the sale. Mr. Pathak is therefore right in his contention that the fact that the substance produced by them in an intermediate stage is not put in the market would not make any difference. If from the raw material has been brought into existence a new substance by the application of processes one or more of which are with the aid of power and that substance is the same as "refined oil" as known to the market an excise duty may be leviable under item 23 (the present item 12)."

26. In *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, , the Supreme Court had to consider whether the mixture of two gases was kiln gas or compressed carbon dioxide covered by item 14H of the Excise Tariff. The Excise authorities have levied excise duty on the content of carbon dioxide in the mixture of gases. The court held that the mixture of the two gases is EOt known to the trade as carbon dioxide but is known only as kiln gas whicli is not marketable as such, that kiln gas is neither carbon dioxide nor compressejd carbon dioxide known to the trade community and that therefore it is not assessable under item 14H of the Excise Tariff. In the course of the judgment the Supreme Court observed that excise duty being on the manufacture and not on the sale the mere fact that kiln gas generated by the sugar mills in that case is not actually sold and would not make any difference if what they generate and

use in their manufacturing process is carbon dioxide. Therefore as per the above two decisions the dutiability of the goods cannot be tested with reference to their actual sale in the market. In *Commissioner, Corporation of Madras v. Asst. Collector, C.E., I.D.O.* (1972 2 MLJ 244), a Division Bench of this court to which one of us was a party, had ruled that Section 3(1) of the Central Excises and Salt Act which is the charging section does not make any distinction between the goods manufactured for one's own use and consumption, and those manufactured for sale. Therefore, these decisions seem to suggest that even though the molten aluminium produced by the petitioners are not actually sold in market but are only used as raw material for manufacturing properzi rods, the same has to bear excise duty if there is in fact a manufacture of aluminium in crude form which is covered by item 27(a).

27. In *Messrs Geep Flashlight Industries Ltd. v. Union of India* (1979 E.L.T. (J 674)= 1979 T.L.R. 19), a Division Bench of the Allahabad High Court had to consider whether the flat form of zinc is covered by item 26B(2) of the Central Excise Tariff. In that case there was manufacture of dry cell batteries and in the process of manufacture, zinc cans manufactured out of zinc ingots were needed. The process of manufacture of dry cell batteries involved melting of zinc ingots in a furnace and then pressing the same into moulds to form zinc slabs. These slabs are heated and rolled into a flat form. with the help of rollers out of which callots were punched. From these callots cans were made by the impact extrusion process. These flat forms of zinc were not removed from the premises in which dry cell batteries were manufactured but were immediately put to use by feeding them while hot into punching process. The excise authorities levied excise duty at the appropriate rate on the zinc sheets produced during the process of manufacture of dry cell batteries. The question was whether such a levy could be sustained under item 26 B(2). The court held that the demand of excise duty on the flat of form of zinc sheets produced in the factory as an intermediate product during the process of manufacture of dry cell batteries by it on the basis that it fell within the description of "zinc sheets" or "strips" was not contrary to law. The principle laid down in that case is applicable to the case before us. There also the flat form of zinc produced was not sold in the market but the same was used! for production of the end product.

28. As already stated, the manufacture of properzi rods can be made by adopting two processes (i) by using aluminium ingots or aluminium in crude form purchased in the market and (2) by first manufacturing aluminium in crude form from alumina and bauxite and then making the properzi rods therefrom. In the former case there is only one manufacturing process involved and there is no process of manufacturing of aluminium in crude form. But in the second case there was manufacture of both aluminium in crude form and aluminium properzi rods. It is true, the molten aluminium which is directly fed into a cast iron tube to undergo a process of cooling without the same being removed from the properzi machine for purposes of levy duty under item 27(a) as aluminium in crude form. The production of aluminium rods directly from the alumina or

brenkite ore is a continuous process. Molten aluminium which has undergone degasification and fluxing through the electrolytic process is retained in the machine for purposes of being fed directly into the cast iron tubes. This molten aluminium is definitely aluminium in any crude form. Item 27(a) refers to "aluminium in any crude form" including ingots, bars etc. The expression "in any crude form" will take in definite aluminium in liquid form. Therefore, molten aluminium in any crude form will also fall within the phrase "aluminium in any crude form". That molten aluminium can be taken to be aluminium in crude form is not disputed by the learned counsel for the petitioners. But what is pointed out by him is that the molten aluminium is not removed from the properzi machine but it is used in the continuous process of the manufacture of properzi rods and as such the petitioners cannot be taken to be manufacturing aluminium in crude form: It is true, molten aluminium is not removed from the machine and stored either for the purpose of sale or for the purpose of levy of duty thereon. But the fact remains that during the process of manufacture of properzi rods, crude aluminium is manufactured at a certain stage and the same is "retained in the manufacturing plant. Since the manufacture of properzi rods is a continuing process and molten aluminium cannot be removed from the machine at an intermediary stage without causing serious and considerable inconvenience to the manufacturers, the aluminium in crude form which is produced at the intermediate stage as represented by the end product namely aluminium properzi rods can be taken for the purpose of excise duty under item 27(a). In other words, this is a case of postponement of duty from the stage of manufacture of crude aluminium to the stage of manufacture of properzi rods so as to suit the convenience of the manufacturers, having regard to the fact that the process involved in the manufacture of properzi rods is a continuous process and any stoppage of the process at an intermediary stage will cause serious inconvenience.

29. On the facts we are of the view that the manufacture of aluminium properzi rods by Malco involves two processes, one manufacture of aluminium in crude form and the other manufacture of aluminium properzi rods therefrom. If these two processes had been undertaken by two different individuals, the production of aluminium in crude form would have been subjected to duty under item 27(a) and the production of properzi rods will not be subjected to duty under item 27(a) as it stood at the relevant time. From the mere fact that the two processes have been combined and Malco has undertaken the combined process it cannot be said that it is not liable to pay duty in respect of the aluminium in crude form produced by them. Merely because the end product manufactured by them, that is properzi rods do not fall under item 27(a) the manufacture of crude aluminium cannot escape liability to excise duty. The *Manaklal Harilal Spg. and Mfg. Co, Ltd., Ahmedabad v. Union of India-1978 E.L.T. (J 618)= 1979 Tax L.R. NOC 96*, a Division Bench of the Gujarat High Court held that a manufacturer of cloth who pays excise duty on the cloth it manufactures is also liable to pay duty on the yarn which it produced at the intervening stage during the course of

manufacturing cloth, even if such yarn is not removed out of the factory premises or sold but is used for the consumption within the factory premises for manufacturing the end product, namely, cloth. Therefore we are of the view that though the end product manufactured by the petitioners does not fall under item 27(a) of the Excise Tariff as it then stood, molten aluminium produced by them should be taken to be aluminium in crude form which is covered by item 27(a).

30. In this case authorities have made the assessment under item 27(d) between 1-1-1967 to 11-8-1967 and under item 27(a) between 12-8-1967 to 28-2-1969. The petitioners have not chosen to question the separate classification made by the authorities by seeking a writ of certiorari. But they have merely chosen to ask for refund of the duty on the basis the properzi rods are not dutiable. Now that we have held that though properzi rods per se fell outside item 27 of the Excise Tariff, molten aluminium produced by the petitioners at the intermediate stage is subject to excise duty under item 27(a) as aluminium in crude form taking molten aluminium as represented by the end product. The petitioners can therefore claim refund only if there is any excess collection during the period between 1-1-1967 to 11-8-1967 when item 27(d) was invoked by the authorities.

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

32. In *In re : the Central Provinces and Berar Act XIV of 1938*, 1978 ELT (J 269)= 1939 F.G.R. 18, the Federal Court had described excise duty thus-

"But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption".

It was also observed in that case-

"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 continues to be excise duty, that is a duty on home produced or home manufactured goods, no matter at what stage it is collected...If the proper import of an excise duty is that it is a tax on consumption, there is no reason why the State should not have the

power to levy and collect it at any stage before consumption, namely, from the time the commodity is produced or manufactured upto the time it reaches the consumer."

33. In *Boddu Paidanna's* case, 1942 F.C.R. 90, the Federal Court while dealing with the scope of excise duty observed-

"There is in theory nothing to prevent the Central Legislature from imposing a 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. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty even though it may be collected later...."

Thus in its nature, excise duty is an indirect tax to be borne ultimately by the consumer. Here the excise duty levied and collected from the petitioners have ultimately been borne by the consumers and if it is found that the excise duty is not exigible, then the excise duty is to be refunded only to the consumer who had been made to pay the excise duty illegally and who is entitled to get return of the same. As pointed out in *Boddu Paidanna's* case, 1942 F.C.R. 90, referred to above, it is only on the payment of excise duty by the petitioners, they can pass on the excise duty to the consumers. But for the payment of excise duty to the State, it would not have been possible for them to pass on the same to the consumers. It is the payment of excise duty by the petitioners which has enabled them to pass it on to the consumers and, therefore, if it is found that the excise duty is not exigible, the benefit of the refund should go only to the consumer.

34. In respect of sales tax paid by the dealers and which has been passed on to the consumers courts have held that the money paid as tax primarily belonged to the consumers who paid it and not to the dealers (vide (1962) 16 STC 973, 1962 1 S.C.R. 735 and (1962) 30 STC 120. Therefore, the petitioners having passed on the excise duty, paid by them to the State, to the consumers, they cannot have any beneficial interest on the excise duty if and to be refunded by the State and the beneficial interest is vested only if all the consumers who had ultimately borne that burden. As pointed out by the Supreme Court in *R.C. Jain v. Union of India*, 1962 3 S.C.R. 436 -

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer."

If the ultimate incidence of the excise duty is on the consumer then the ultimate

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

35. It is well established that the right of the petitioners to get a refund of the excise duty is subject to questions of estoppel, limitation and the like. If peculiar circumstances existed and they showed that the amount the State has to refund really belongs not to the petitioners but to the consumers, then the court will be justified in refusing to direct refund. In this case, any direction to refund the excise duty to the petitioners will result in their retention of the duty collected by them from the consumers and the court will be siding an unjust enrichment by the petitioners by such a direction. Admittedly the petitioners have passed on the excise duty to the consumers and this was done on the basis that they have paid excise duty to the State. But for the payment of excise duty to the State the petitioners will not be entitled to or enabled to pass on the duty to the consumers. Therefore, if there is no possibility of excise duty being refunded to the actual consumers, the petitioners will have the benefit of both the collection of excise duty from the consumers and the benefit of refund from the State. Thus the court will indirectly and unjustly be enriching the petitioners by directing a refund of the excise duty paid by them. We are, therefore, satisfied that having regard to all the circumstances the petitioners are not entitled to get a refund of the excise duty if they are not in a position to trace the actual consumers and pay back the excise duty collected from them. The discretionary jurisdiction of this court under Article 226 of the Constitution should be exercised for public good and not to facilitate the petitioners to make an unlawful gain at the instance of the public (consumers) on the one hand and the State on the other, and the exercise of the extraordinary jurisdiction by this court must advance the cause of justice and not subserve the object of the petitioners to enrich themselves unjustly by getting a refund of the excise duty from the State and retaining the same without refunding it to the consumers. In *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , the Supreme Court while dealing with the validity of Section 14-A of the Orissa Sales tax (Amendment) Act of 1958, which provided that no refund of tax which the dealer was not liable to

pay could be claimed by a person from whom the dealer has actually realised it and not by the dealer, expressed the view that the dealer having collected the tax from the consumers and paid over the same to the State, he had no beneficial interest in that amount, that the amount shall be claimable only by the persons who paid the amount to the dealer and that, therefore, Section 9-B(3) of the Act providing that if the amount realised by the dealer exceeded the amount payable by him as tax such amount shall be deposited in the treasury is a reasonable restriction imposed on the right of the dealer to obtain refund in the interest of general public and does not infringe the provisions of Article 19(1)(6) of the Constitution. The following is the observations of the Supreme Court: -

"The amounts collected by the assesseees therefore primarily belonged not to the assesseees but to the purchasers. On an erroneous assumption that tax was payable, tax was collected by the assesseees and was paid over to the State. u/s 9-B, Clause (3) of the Act, as it stood at the material times, the amount realised by any person as tax on sale of any goods shall, notwithstanding anything contained in any other provision of the Act, be deposited by him in a Government treasury within such period as may be prescribed if the amount so realised exceeded the amount payable as tax in respect of that sale or if no tax is payable in respect thereof. As the tax collected by the assesseees was not exigible in respect of the sales from the purchaser, a statutory obligation arose to deposit it with the State and by paying that tax under the assessment, the assessee must be deemed to have complied with this requirement. But the amount of tax remained under S. 9-B of the Act, with the Government of Orissa as a deposit. If with a view to prevent the assessee who had no beneficial interest in these amounts from making a profit out of the tax collected, the Legislature enacted that the amount so deposited shall be claimable only by the persons who has paid the amounts to the dealer and not by the dealer, it must be held that the restrictions on the right of the assesseees to obtain refund was lawfully circumscribed in the interest of the general public."

36. Dealing with a claim for refund of tax which was held to be illegally collected, a Division Bench of the Andhra Pradesh High Court in Gurram Sreeramulu, Garlapati Anjaneyulu and Co. and Others Vs. The State of Andhra Pradesh and Others, expressed :

"More than anything else, one fact which must strongly weigh against the claim of the refund of sales tax by the petitioners is that the petitioners have already collected the tax and any direction in these writ petitions to refund such tax as they have paid would result in allowing them to retain the tax illegally collected from the consumers and thus make an unauthorised gain for themselves, while the State is in charge of the public funds and which has collected the tax as per the final orders of assessment, would be now obliged to return the same for the personal benefit of the dealer at the expense of the public from whom he has collected the tax. The extraordinary jurisdiction of this court must not be allowed to be invoked and the discretionary relief granted for the benefit of a private

individual in this manner at the expense of the public and the State. The discretionary jurisdiction of this court under Article 226 of the Constitution must not be allowed to be exploited to defeat the ends of justice."

37. In an unreported case, Matter No. 117 of 1973, *Dunlop India Ltd. v. Collector of Central Excise, West Bengal*, the Calcutta High court dealing with a claim for refund of excise duty on the ground that it has been collected illegally, pointed out that as the petitioners seeking refund have realised the entire amount from their wholesale and retail purchasers, they have not suffered any loss or detriment. End therefore, they are not entitled to get any refund, that an order directing a refund will amount to double reimbursement of moneys by the petitioners, that the double reimbursement to a claimant is equally bad as double taxation, and that the person who had actually paid the excise duty are the members of the public who consumed the goods and, therefore, the petitioners in that case were not entitled to get a refund.

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

39. There is another reason as to why the excess collection, if any, should be directed to be retained by the State as a deposit for the benefit of the actual consumers. An action for "money had and received" lies for money paid by mistake or upon a consideration which happened to fail or money got through imposition or extortion or oppression, and the relief in such action is based on the theory of unjust enrichment according to which it would be unjust to allow the defendant to retain a benefit received at the plaintiff's expense. Therefore, a direction to refund the duty illegally collected to the petitioners is based on the theory of unjust enrichment. But on the facts of the present case, a direction to refund the duty to the petitioners so as to prevent the State from enriching itself by imposing a levy not authorised by law, the court will be unjustly enriching the petitioners as they have already recouped themselves to the extent of the excise duty paid by them to the State and there is no possibility of their refunding it in their turn to the actual consumers who have borne the excise duty. In an

attempt to prevent the State from enriching itself, the court will be enabling the petitioners to unjustly enrich themselves. In the circumstances, the court will be justified in allowing the status quo to continue without directing any refund to the petitioners. If the refund is not ordered, the State will get unjustly enriched. If refund is ordered the petitioners will get unjustly enriched. In this case, as already stated, the petitioners should be taken to claim the refund only on behalf of the consumers because they have not suffered any detriment and it is only the ultimate consumers who have borne the burden who can claim refund. Therefore instead of directing the refund of the excise duty paid by the petitioners to them with a view to their ultimate disbursement to the ultimate consumers, the amount can be retained by the State for payment out to the ultimate customers as and when the claims are made and established by them. Now that we have recognised the right of the ultimate consumers to claim refund of the excise duty pro rata from the Government directly, there is no possibility of the actual consumers proceeding against the petitioners for recovery of the excise duty borne by them.

40. In the result, all the writ petitions are dismissed. There will, however, be no order as to costs.

41. The learned counsel for the petitioners seek the leave of the court for filing an appeal against the decision just rendered, before the Supreme Court. Having regard to the fact that the cases involve substantial question of law, of much public importance, and as there is no direct decision of the Supreme Court on some of the issues involved in this case, we grant the leave sought for.