

(1981) 01 MAD CK 0017

In the Madras High Court

Case No : Writ Petition No. 1109 of 1978

Madras Rubber Factory Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise, Madras and Another

RESPONDENT

Date of Decision : 12-01-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10(1), 11, 12, 173J
Central Excises and Salt Act, 1944 — Section 3, 35, 35A, 36(2), 37
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27

Citation : (1981) 8 ELT 565

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Advocate : G. Ramaswami, for V. Raju and K. Lucose, for the Appellant; K. Balasubramaniam, Addl. Central Government Standing Counsel, for the Respondent

Judgement

1. The Madras Rubber Factory Ltd., the petitioner herein, has filed this writ petition for the issue of a writ of prohibition restraining the Assistant

Collector of Central Excise, Madras, the first respondent herein, from taking any further proceedings in pursuance of the show cause notice No.

V/16A/18/1/78/T. 2, dated 28-2-1978. The facts leading to the filing of the writ petition may be stated as follows : The petitioner manufactures

passenger car tyres, truck tyres, tubes, tread rubber and other allied products. The petitioner has been marketing tread rubber in metal containers.

With effect from 1-6-1968, tread rubber became assessable to excise duty on ad valorem basis under the provisions of the Central Excises and

Salt Act, 1944 (hereinafter called the Act) and the petitioner has been paying the said duty on the tread rubber. In the beginning the price list

submitted by the petitioner for tread rubber for purposes of assessment of excise duty included the value of the metal container also. The price of the metal container as certified by the cost accountant came to 52 paise in the value of tread rubber for 1 K.G. In 1970 the petitioner took the stand before the Central Excise authorities that the value of the metal container in which the tread rubber was packed would have to be excluded from the assessable value of tread rubber for the purpose of excise duty under S. 4 of the Act. The Appellate Collector of the Central Excise upheld the contention of the petitioner by his order dated 8-6-1973. It became therefore clear that for the purpose of assessing the value of tread rubber to determine the excise duty payable by the petitioner it was not necessary to include the value of the metal container in which the tread rubber used to be packed.

2. On 13-9-1975 the petitioner claimed a refund of Rs. 8,63,289.97 being the duty paid on the value of the metal containers in which the tread rubber had been sold for the period from 1-6-1968 to 2-4-1970. The first respondent herein after giving a personal hearing to the petitioner passed an order on 21-1-1978, refunding an amount of Rs. 8,28,021.43, as against Rs. 8,63,289.97, claimed by the petitioner. Pursuant to the order passed by the first respondent the petitioner collected the amount of refund. Thereafter, the petitioner received the show cause notice dated 28-2-1978. The said notice stated that the Appellate Collector of Central Excise, had no jurisdiction under S. 35 of the Act to order refund for the period from 1-6-1968 to 2-4-1970. The show cause notice further stated that in the price list approved prior to the price list No. 5 of 1976 the petitioner had not stated that the price list included packing charges and that in any event, the refund in respect of the alleged excess duty paid should have been claimed within the time limit prescribed under rule 12 of the Central Excise Rules, 1944 (hereinafter called the Rules) read with rule 173-J of the Rules, and inasmuch as the petitioner's claim for refund was barred by limitation the petitioner was not entitled to the refund.

Consequently, the petitioner was called upon to show cause why the refund amount of Rs. 8,28,021.43, should not be demanded under rule 10(1) of the rules. Hence, this writ petition for the issue of a writ of prohibition restraining the first respondent from proceeding further with the show

cause notice.

3. The contention of Mr. G. Ramaswami, the learned counsel for the petitioner, are as follows - (1) The Assistant Collector of Central Excise

having ordered refund on the ground that the duty was not leviable on metal containers has no jurisdiction to issue a show cause notice for

revocation of that order on the ground that the earlier order was erroneous. The order of refund passed by the first respondent is in the nature of a

quasi-judicial order. The Act does not confer on the first respondent any right to review its own order. In the circumstances, the original order of

refund cannot be reopened. (2) The excise duty is payable only on production and manufacture of tread rubber. No duty is payable on the metal

container in which the tread rubber is packed. The petitioner committed a mistake of law in paying the duty on the metal containers also. The said

amount cannot have the characteristics of an excise duty as defined under the Act. Further, the said amount was not returned to the petitioner on

account of any error committed by the first respondent. Therefore, rules 10 and 11 of the rules are not applicable to this case. Since the amount

was paid by the petitioner by mistake of law, the petitioner will have the time prescribed under the ordinary law of limitation for claiming refund of

the said amount and the period of limitation of one year prescribed under rule 11 read with rule 173-J of the Rules will not be applicable to such

claims. (3) Assuming that rule 11 applied to the case, rule 11 is ultra vires of the Act inasmuch as the Act does not confer power on the rule

making authority to prescribe any such period of limitation.

4. Mr. K. N. Balasubramaniam met the argument of Mr. Ramaswami in the following terms - (1) The writ petition itself is not maintainable. The

first respondent had issued only a show cause notice and it will be open to the petitioner to advance all his contentions before the first respondent.

(2) Rule 10 itself contains an implied power of review. In the circumstances, it will be open to the first respondent to call back the amount refunded

when once he is satisfied that the earlier order of refund was erroneously made.

(3) Rule 11 does not prescribe a period of limitation. It lays down

a condition precedent and consequently the argument that rule 11 is ultra vires of the Act does not hold good. (4) The order dated 8-6-1973, was

passed with reference to the price list No. 5 of 1970 in which price list alone the

petitioner did not include the value of the metal containers in the assessable value. The petitioner has not paid any excise duty on the metal container for the period from 1-6-1969 to 2-4-1970. The petitioner itself had given the assessable value of the tread rubber. That value was accepted by the excise authorities and the petitioner was called upon to pay excise duty thereon which the petitioner did. Having voluntarily paid the duty it is not open to the petitioner to plead that it had paid excise duty in excess on tread rubber and is therefore entitled to refund. The first respondent in ordering refund on 21-1-1978 committed an error and consequently he was entitled to set right the error and recall the amount. Mr. Balasubramaniam does not accept the contention of Mr. Ramaswami that the sum of Rs. 8,21,021.43 refunded to the petitioner does not represent excise duty paid but some unauthorised amount. (5) In any event, the assessment for the period 1-6-1968 to 2-4-1970 had become final and the petitioner had passed on the excise duty to the customers. In the circumstances, to allow the petitioner to claim a refund of Rs. 8,28,021.43 will amount to an unjust enrichment of the petitioner.

5. The question for consideration is whether the first respondent has jurisdiction to issue the show cause notice claiming payment of the amount refunded to the petitioner by the order dated 21-1-1978. It is not disputed that prior to 1970, the petitioner had been including the value of the metal containers in which tread rubber was being packed in the value of tread rubber for the purpose of determination of excise duty. On 31-3-1970 the petitioner furnished a revised price list No. 5 of 1970. For the first time, in this price list the petitioner did not include the value of the metal containers in the assessable value of tread rubber. The omission of the charges incurred on packing tread rubber in metal containers was taken objection to by the first respondent and on 7-4-1973, he passed an order holding that the said charges were liable to be included in the value on which excise duty was assessable on tread rubber. The petitioner preferred an appeal to the Appellate Collector of Central Excise, Madras. The Appellate Collector allowed the appeal by his order dated 8-6-1973. The Appellate Collector observed as follows :

Tread rubber is strong and hard. No question can arise of its suffering breakage of deterioration in quality when it is not packed. The original

authority has been informed by the appellant that there had, in fact, been sales of tread rubber with no packing whatsoever, whether of metal or of cardboard... In the instance case of tread rubber, packing is seen to be entirely extraneous to the entire process of manufacture of the commodity, and, as observed more than once above, the commodity could be and has been delivered to customers without being packed. It is evident that tread rubber is delivered to cartons or metal containers merely from commercial or marketing considerations. The charges incurred on such packing cannot form part of the assessable value of the tread rubber. The appeal is accordingly allowed.

6. Thereafter, on 13-9-1975 the petitioner preferred a claim for the refund of Rs. 8,63,289.97 being the duty paid by it on metal containers used

for packing tread rubber during the period 1-6-1968 to 2-4-1970. On this the first respondent issued a show cause notice No. C.V. 16A/18/5/76

dated 22-2-1977. The said show cause notice stated that the claim for refund for the period 1-6-1968 to 2-4-1970 which was received by the

Group Superintendent on 19-9-1975, after a lapse of five years was barred by limitation inasmuch as the claim for refund was made beyond the

period of one year as contemplated under Rule 11 read with rule 173-J of the Rules. The show cause notice further stated that the price list No.

1/68, dated 2-4-1968; 24/68 dated 10-12-68 and 25/68, dated 14-12-1968 did not separately show that the prices included the cost of packing.

Consequently, the petitioner was called upon to show cause why the application for refund should not be rejected. The petitioner was also called

upon to state whether it desired a personal hearing. To this the petitioner submitted an explanation on 21-12-1977. The petitioner was also given a

personal hearing. Having been satisfied with the contentions put forward on the side of the petitioner, the first respondent passed an order on 21-

1-1978, refunding an amount of Rs. 8,28,021.43. The amount was also received by the petitioners. It is not disputed that the order passed by the

first respondent is in the nature of quasi-judicial order. The question for consideration is whether having passed the order of refund it will be open

to the first respondent to issue the show cause notice calling upon the petitioner to state why the amount refunded should not be paid back. This

action of the first respondent amounts to a review of its own earlier order. It is now settled law that there is no inherent power of review in an

authority while acting judicially or quasi-judicially. The power of review must be conferred expressly or by necessary implication by the provisions of the statute.

7. In *Draw v. Willis*, 1891 1 QB 450, Lord Esher M.R. pointed out that "No court has a power of setting aside an order which has been properly made, unless it is given by statute.

In *Hession v. Jones*, 1914 2 KB 421, Bankes J. pointed out that the court, under the statute, has no power to review an order deliberately made

after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it and observed - Then as to the inherent

jurisdiction of the court. Before the Judicature Acts the Courts of Common Law had no jurisdiction whatever to set aside an order which has been

made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction

if the order as drawn up did not express the intention of the court; the court of Chancery however went somewhat further than that, and would in a

proper case recall any decree or order before it was passed and entered; but after it had been drawn up and perfected no court of Judge had any

power to interfere with it. This is clear from the judgment of Thesigar L.J. in the case of *In re : St. Nazair Co.*, 1879 12 Ch.D. 88.

Seshagiri Iyer J. has laid down the following dictum in *Anantaraju Shetti v. Appu Hegade*, AIR 1919 Mad. 244 -

It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by the statute. *Prima*

facie, a party who has obtained a decision is entitled to keep it unassailed, unless the legislature had indicated the mode by which it can be set

aside. A review is practically the hearing of the appeal by the same officer who decided the case. There is at least a good reason for saying that

such power should not be exercised unless the statute gives it, as for saying that the another tribunal should not bear an appeal from the trial court

unless such a power is given to it by statute".

Lord Atkinson observed thus in *Baijnath Ram Goenka v. Nand Kumar Singh*, 40 I.A. 54 . -

Their Lordships are clearly of opinion that the order of March 23, 1900, was final and conclusive, and that, so far as the Commissioner was

concerned, had no power to review that order in the way in which he has reviewed it.

In Harbhajan Singh Vs. Karam Singh and Others, , V. Ramaswami J. stated the dictum thus -

There is no provision in the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, granting express power of review to the

State Government with regard to an order made under S. 42 of the Act. In the absence of any such express power, the Director, Consolidation of

Holdings, cannot review his previous order of dismissing the application of the petitioner u/s 42 of the Act. Hence, the subsequent review order of

the director is ultra vires and without jurisdiction. The High Court is right in quashing that order by the grant of a writ under Art. 226 of the

Constitution.

In Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , Hedge J. has observed as follows :-

There is no provision in the Act from which the power of the State Government to review its own order u/s 63 can be gathered. It is obvious that

the Commissioner functioning as delegates of its functions under S. 63 cannot review its orders.

8. In the present case, the Act or the Rules made thereunder do not confer upon the first respondent and power to review its down order.

Consequently, the first respondent has no jurisdiction to issue a notice to the petitioner why the order, dated 21-1-1978 should not be act aside on

the ground that it was wrong in law.

9. Mr. Balasubramaniam, in this context argued that though an assessee under the Act could prefer appeals and further revisions to the higher

authorities under the provisions of the Act, no such remedy is made available to the authorities concerned to set right orders passed erroneously.

The learned counsel is not correct in his submission. Section 35-A confers suo motu power on the Central Board of Excise and Customs and the

Collector of Central Excise to call for and examine the record of any proceeding in which any decision or order has been passed under the Act or

the rules made thereunder for the purpose of satisfying themselves as to the correctness, legality or propriety of such decision or order. S. 36(2)

confers suo motu powers on the Central Government to revise any decision or

order passed under S. 35 or S. 35-A of the Act. Thus, the Act

contains sufficient safeguard to correct any order passed by an authority under the Act which is contrary to law. I have, therefore, no hesitation to

hold that it is not open to the first respondent to set aside the order of refund passed by him on 21-1-1978.

10. The next question for consideration is whether rule 10 of the rules is applicable to the fact of this case. Rule 10 of the Rules reads as follows :-

10. Recovery of duties or charges short-levied or erroneously refunded. - When duties or charges have been short-levied through inadvertence,

error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods in the

part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the person

chargeable with the duty or charge, so short levied or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount

paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the

duty or charge was paid or adjusted in the owner's account current, if any, or from the date of making the refund.

It is seen from the above that for the application of rule 10 of the rules, two things must be satisfied. (1) The amount refunded must be "duty" and

(2) The refund must have been made erroneously.

The word "duty" has been defined in rule 2 of the rules. It states that "duty" means the duty payable under S. 3 of the Act. S. 3 read thus -

3. Duties specified in the first schedule to be levied. - (1) There shall be levied and collected in such manner as may be prescribed duties of excise

on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in or imported by land into,

any part of India as, and at the rates, set forth in the first schedule...

According to S. 3 of the Act duties could be levied and collected only as excisable goods produced or manufactured in India. The Appellate

Collector has held by the order dated 8-6-1973, that while valuing tread rubber for the purpose of levy of excise duty, the value of tin containers

shall not be included. Therefore, any amount that had been paid by the petitioner on the value of the tin containers could not be treated as duty but

must be deemed to be an amount paid outside the provisions of the Act.

11. The next question for consideration is whether the refund has been made erroneously. In this case, the petitioner claimed refund on the ground

that the value of the metal containers could not have been included in the assessable value of tread rubber for the purpose of excise duty, that the

mistake was realised only by the order of the Appellate Collector passed on 8-6-1973, and therefore, it was entitled to the refund of the amount

paid on the value of the metal containers by way of mistake. The first respondent went into the claim of refund put forward by the petitioner and on

a consideration of the contentions advanced on behalf of the petitioner came to the conclusion that the petitioner was entitled to a refund of the

amount paid on the value of the tin containers as the same is not includible in the assessment of tread rubber for the purpose of excise duty. The

refund was made only pursuant to the said order. Consequently, it cannot be said that refund was made erroneously. A refund in order to

constitute "erroneous refund" must have been made by reason of inadvertence, error or misconstruction as will be seen from the discussion in the

following paragraph. Therefore, I have no hesitation to hold that rule 10 of the Rules is not applicable to this case.

12. The next question for consideration is whether the application for refund made by the petitioner is barred by limitation. The contention of Mr.

Balasubramaniam is that rule 11 read with rule 173-J of the rules is applicable to this case and therefore the period of limitation is one year. On the

other hand, Mr. G. Ramaswami contended that the amount paid on the value of the tin containers is an amount paid by mistake and therefore rule

11 read with rule 173-J of the rules is not applicable and the period of limitation for the refund of the amount paid by mistake is three years. The

scope of rule 11 of the rules came up for consideration before the Patna High Court in Bata Shoe Co. v. Collector of Central Excise, 1972 T.L.R.

1833. The question arose for decision in connection with an application for refund made by the petitioner Bata in Shoe in Co. The Court observed

as follows :-

So far as rule 11 is concerned, it is manifest that it cannot stand in the way of the petitioner. That rule is designed to deal with cases of payment of

adjustment made through inadvertence, error or misconstruction. When tax is

paid where it is not payable under the law, it is regarded as payment

made under a mistake as that word is understood in the Contract Act. See for instance the Sales Tax Officer, Banaras and Others Vs. Kanhaiya

Lal Mukundlal Saraf, , and State of Madhya Pradesh Vs. Bhailal Bhai and Others, . The action of "mistake" is materially different from that of

inadvertence, error or misconstruction. Error is not synonymous with mistake. In rule 11, it obviously means some electrical or arithmetical error.

The word "misconstruction" also is not to be understood in the technical sense of misconstruction or misinterpretation of a provision of law or

notification. Occurring as it does in rule 11 in the context of inadvertence or error, it obviously connotes an erroneous building up or compiling and

calculating in the arithmetical sense only. It is merely intended to resolve or finalise disputes as to accounting.

13. As already stated, the Appellate Collector has made it clear by his order dated 8-6-1973, that packing charges for packing tread rubber could

not be properly included in the assessable value of tread rubber for the purpose of determination of excise duty. Therefore, the amount that was

paid by the petitioner on the value of the metal containers was not lawfully due to the respondents as part of the excise duty payable on tread

rubber. The amount which the petitioner was not liable to pay, but which is paid by mistake falls outside the provisions of the Act or the rules.

Consequently, the claim for refund of such excess amount paid by mistake cannot fall within the mischief of rule 11 of the rules. Once we come to

this conclusion it necessarily follows that the period of limitation of one year prescribed under rule 11 read with rule 173-J of the rules will not be

attracted. The period of limitation will be three years under Art. 113 of the Limitation Act, 1963. Support for this conclusion may be drawn from

the following decisions.

14. In Sales tax Officer vs. Kanhayalal Mukundlal, AIR 1959 S.C. 35 it has been observed that where it is once established that payment of tax

has been made by a party who was labouring under a mistake of law, the party was entitled to recover the same and the party receiving the same

was bound to repay or return it and that the article of limitation that would be applicable would be Art. 96 of the Limitation Act, 1908.

15. A similar question arose for consideration before the Patna High Court in

Rohtas Industries Ltd. Vs. Union of India (UOI), . Rohtas Industries

Ltd. had paid excise duty on the entire quantity of soap of all kinds manufactured by it without knowing that by S.R.O. 500, dated the 1st March

1956, the Central Government in exercise of the powers conferred on them by rule 8 of the Central Excise Rules, 1944, had exempted the first

one hundred twenty five tons of soap of all kinds for home consumption by any manufacturer on or after the 1st day of April from any duty. The

company came to know of the exemption only on 8th January, 1958. It therefore applied for refund of excise duty paid by mistake. The

application was rejected by the original authority on the ground of limitation. The appellate and revisional authority confirmed the rejection of the

claim for refund. Rohtas Industries Ltd. thereafter filed a suit for recovery of the amount. The claim for revision was opposed by the Excise

authorities on the ground that the suit was barred by rule 11 of the Central Excise Rules. The court has observed as follows :-

It may be mentioned that there is no provision either in the Act or in the rules made under S. 37 and published in accordance with S. 38 of the Act

for any application for refund to be made other than rule 11 of the Central Excise Rules, 1944, referred to above. In other words, the statute or the

rules made thereunder provide no machinery whatsoever for recovery of duty paid under a mistake when the mistake itself was discovered more

than three months after the payment was actually made. The application for refund was in fact and in substance an application for an equitable relief

at the hands of the authority to whom the aforesaid sum of Rs. 15296 and been paid under a mistake. In the aforesaid context, neither the order of

the Assistant Collector rejecting the claim of the plaintiff as time barred, nor the order of the Collector, Central Excise declining to interfere with the

order passed by the Assistant Collector, Central Excise, or the order of the Joint Secretary, Ministry of Finance, Government of India, finally

rejecting the plaintiff's prayer for refund were orders passed under the Act.

16. In Asst. Collector of Customs, Madras v. Premraj and Ganpatraj and Co., 1978 E.L.T. 630, the assessee had paid customs duty at the rate

which originally prevailed without noticing the change in the Tariff rates. Thereafter he filed an application for refund after the period stipulated

under S. 27 of the Customs Act. A Bench of this court held that there was no

jurisdiction either to impose a tax or collect the amount, the refund of which was claimed and S. 27 would not be a bar for claiming the refund.

17. In *Union of India v. Mansingka Industries, Pvt. Ltd.*, 1979 E.L.T. 158, the company was manufacturing vegetable oil which was packed in tin

containers. The excise authorities had added the value of the tin containers as well as the railway freight in the assessable value of the vegetable oil.

The Company therefore filed a suit for recovery of the amount levied illegally on the value of tin containers and on account of the freight on the

products. It was contended by the Union of India before the High Court of Bombay that the suit was barred by limitation under S. 40 as it stood

then. The contention was negated by the High Court of Bombay. The court observed thus :-

Now, in the case before us we have held that imposition of central excise duty on the tin container and on freight was not warranted by any of the

provisions of the Act of 1944. Thus any levy of central excise duty on the value of tin containers and the cost of freight was wholly outside the law

and it could not be said to be a mere question of an error in the exercise of jurisdiction. The Central Excises and Salt Act of 1944 only provides

for the duty of excise on excisable goods so that when an attempt is made to levy duty of excise on goods which are not excisable then such a levy

falls outside the law and therefore would be illegal.

18. A Division Bench of the Bombay High Court had occasion to consider a similar question in *Associated Bearing Co., Ltd. v. Union of India*,

1980 ELT 415. The Company manufactured ball and roller bearings which are chargeable to excise duty ad valorem under the Act. The bearings

were sold to different buyers in a packing. Excise duty was charged on the value of the bearings determined after including the cost of the packing

materials viz. polythene bags, paper cartons, cylindrical rolls and wooden cases. For the period 1-9-1974 to 31-8-1975, the total cost of packing

materials in respect of which excise duty was collected came to Rs. 19,44,473. On 31-10-1975 the company invited the attention of the Assistant

Collector of Central Excise that the cost of packing materials should not be taken into account for the purpose of determining the value of the

bearings for the purpose of excise duty. The Company also claimed a refund on the ground that the cost of packing was included in the declared

price submitted with the price list by a mistake of law. Since the authorities did not refund the amount, the Company filed a writ petition claiming

refund of the amount. It was contended before the Bombay High Court that the company itself had submitted the price list without showing any

separate cost or charges on packing and paid the ad valorem duty on such price. It was further contended that the claim for refund was barred

under rule 11 read with rule 173-J of the Rules, which was in force at that time inasmuch as the Company did not claim refund within a period of

12 months from the date of payment. The company contended that the payment of excise amount by way of duty was made under mistake of law

and once the mistake was discovered it will be open to claim the refund within three years from the date of the discovery of the mistake.

Chandurkar J. referred to to the decision of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, and held that for the purpose of S. 4

of the Act post-manufacturing costs consisting of packing material would have to be excluded before excise duty was levied. On the question of

refund the learned Judge referred to Union of India v. Mangingka Industries Pvt. Ltd., 1979 E.L.T. 158, and observed as follows :-

The effect of the decision in Mansingka's case therefore appears to be that excess duty recovered on the basis of price which included in element

of post-manufacturing cost has been held to be not merely an error in exercise of jurisdiction but it has been held to be on illegal recovery. The

jurisdiction of the authorities under the Central Excise Act is to recover duty according to law. If any duty is recovered in such a manner that duty

comes to be levied on price which is not permissible in law as in the case of including post-manufacturing expenses in the price of the dutiable

article, the levy of duty clearly amounts either to acting in excess of jurisdiction or acting without jurisdiction. Such an act on the part of the

departmental authorities cannot be considered as resulting from any error or misconstruction as contemplated by rule 11 of the Act. In such a case

there is also no question of any inadvertant demand. The very basis of computation of duty becomes wrong and to that extent the recovery is

wholly unauthorised.

The learned Judge then observed as follows :-

Thus, it clearly appears to us that once the recovery by the department of the

excess duty was held to be illegal, the provisions of rule 11 would not be attracted and such a claim for refund must be considered in the light of the fact that the claim is made on the footing that the payment was made under a mistake of law and the claim is made within three years from the time when the mistake was discovered. The claim for refund thus could be entertained even in proceedings under Art. 226 of the Constitution. It may be pointed out that the decision of M/s. Ogale Glass Works was given only in July 1975 and the application made by the company to the Assistant Collector is almost within 3 1/2 months from that date. It therefore cannot be said that the company was not diligent enough in making a claim which seems to have been made almost immediately after the decision in Messrs. Ogale Glass Works became known.

19. In the instant case, the Appellate Collector upheld the claim of the petitioner that the charges incurred on packing could not form part of

assessable value of tread rubber by his order dated 7-4-1973. Consequently, the cause of action for the recovery of the amount paid in excess on

the value of the packing materials arose only on 7-4-1973. The claim for refund had been made on 13-9-1975 within three years from that date.

In the circumstances, I hold that the claim for refund is not barred by limitation.

20. The contention of Mr. G. Ramaswami that rule 11 of the rules is ultra vires of the Act need not be considered in view of my finding that rule 11

is not applicable to this case.

21. Now let me take up the contention of Mr. Balasubramaniam, that the writ petition itself is not maintainable in view of the fact that the first

respondent has only issued a show cause notice and it will be open to the petitioner to advance all his contentions before the first respondent.

There is no force in this contention. If a notice issued by a Tribunal or authority threatening to initiate proceedings prejudicial to a person is on

admitted facts in excess of jurisdiction, the Tribunal or authority can be prohibited from proceeding further in the matter by way of writ under Art.

226 of the Constitution to save unnecessary harassment of the person. In Calcutta Discount Company Limited Vs. Income Tax Officer,

Companies District, I and Another, , the Supreme Court observed as follows :-

It is well settled however that through the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power

to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment the High Courts it is well settled will issue appropriate orders or directions to prevent such consequences.

22. In *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, the Supreme Court by a majority held as

follows :-

Where a Collector of Customs proposes to take action under S. 167(8) of the Sea Customs Act, read with S. 3(2) of the Imports and Exports

(Control) Act, 1947, the proceedings under the said section being quasi-judicial in nature whether a statute provides for a notice or not, it is

incumbent upon the Collector to issue notice to the importer disclosing the circumstances under which proceedings are sought to be initiated

against him. Any proceedings taken without such notice would be against the principles of natural justice. And if on a reading of the said notice, it is

manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified

sections was contravened, the Collector would have no jurisdiction to initiate proceedings pursuant to that notice. In such a case the Collector can

be prohibited from proceeding with the same".

23. *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*,

arose under the Central Excises and Salt Act, 1944. A single Judge of the Bombay High Court quashed two notices of demand issued by the

Central Excise authorities. That was confirmed by a Bench of the Bombay High Court. The Assistant Collector of Central Excise preferred an

appeal to the Supreme Court. The Supreme Court found that the demands had been admittedly made long after the expiry of the period of three

months referred to in rule 10, it follows that the demands were not valid. In the circumstances, the Supreme Court upheld the decision of the

Bombay High Court striking down the notices." Therefore the contention that the writ petition is premature cannot be sustained.

24. There is no merit in the contention of Mr. Balasubramaniam that the petitioner had not separately shown the value of the packing materials and

that the petitioner had voluntarily included the value of the packing materials in the price list. When once it is found, as rightly ruled by the Appellate

Collector, that the value of the packing materials could not properly form part of the assessable value for the determination of excise duty payable

on tread rubber, the payment on duty on such packing materials could have been only by mistake of law. Therefore, the fact that the petitioner had

included the value of the packing materials also in the value of the tread rubber could not give any validity to the payment because no excise duty

was payable on the value of the packing materials. Similarly, the mere fact that the value of the packing materials had not been separately shown

could not prevent the authorities from determining the real value of the excisable goods by excluding the post-manufacturing expenses which took

in its ambit the value of the packing materials also. In *Poona Beverages Pvt. Ltd. v. V. A. K. Bandopadhyay* 1980 ELT 1993, the Bombay High

Court observed as follows :-

Now, so far as the facts of the present case are concerned, the claim of the petitioner was that the sales to the wholesalers and the retailers were

made at the same price of Rs. 9.50 for two kinds of drink and at Rs. 4.80 for the third kind of drink and that the price charged to the wholesalers

and the retailers were inclusive of the freight which was uniformly spread over at the rate of Rs. 1.50 per crate of 24 bottles. This freight would

clearly be in the nature of post-manufacturing expenses and the mere fact that it has not been separately shown either in the invoice or in the bills,

will not make any difference to the legal position that any amount expended or charged to the customer, whether a wholesaler or retailer, on

account of freight could not validly and legally be included so far as the wholesale cash price is concerned for the purpose of determining excise

duty payable by the petitioners.

Therefore, this contention of Mr. Balasubramaniam is also rejected.

25. The next contention of Mr. Balasubramaniam is that the petitioner might have passed on the excise duty to the customers and if the petitioner is

allowed to retain the amount refunded it will amount to an unjust enrichment of the petitioner. This argument should have been considered before

the refund was originally ordered by the first respondent. After having given the refund it will not be open to the respondents to claim it back on the

ground that the retention of the amount by the petitioner would amount to unjust enrichment. Further the respondents have not taken any such ground in the counter affidavit, nor does the show cause notice refer to this ground. No doubt, it may be presumed that the manufacturer would have passed on the excise duty to the customers, but on the facts of this case, the first respondent had already refunded the amount to the petitioner. In the circumstances, there is now no justification for ordering the petitioner to return the money to the respondents who are equally not entitled to the same.

26. In the result, I find that the first respondent had no jurisdiction to proceed further in the matter. In the circumstances writ of prohibition will issue restraining the first respondent from taking further proceedings in pursuance of his show cause notice dated 21-2-1978. The writ petition is allowed. There will be no order as to costs.