

(1991) 12 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 2150 of 1987

Navsari Oil Products Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 04-12-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11B

Citation : (1992) 60 ELT 550

Hon'ble Judges : J.M. Panchal, J;A.P. Ravani, J

Bench : Division Bench

Advocate : P.M. Dave, for S.H. Sanjanwala, for the Appellant; B.B. Naik, for the Respondent

Judgement

Ravani, J.—The petitioner company which is engaged in the business of manufacturing Glycerin and Fatty Acid claims refund of an amount of Rs. 15,32,134.08 ps. of excise duty paid during the period commencing from July 1, 1982 to January 27, 1985 inter alia on the ground that the duty was paid under mistake of law and therefore it is entitled to restitution and also on the ground that the tax could not have been levied and collected in contravention of the provisions of Article 265 of the Constitution of India.

2. The petitioner manufactures three different varieties of Glycerine, namely, (i) Glycerine Mono Stearate SE (10); (ii) Glycerine Mono Stearate SE; and (iii) Glycerine Mono Stearate NSE. The petitioner as well as the department considered the aforesaid articles to be falling under Tariff Item No. 68, i.e. not elsewhere specified, of the First Schedule to the Central Excises and Salt Act, 1944 ("the Act" for short). Therefore the petitioner paid excise duty on the basis that the product was covered by Tariff Item No. 68. According to the petitioner it was a mistake to consider the article falling in Tariff Item No. 68, inasmuch as the article could be called organic surface active agent and therefore covered by Tariff Item No. 15AA of the First Schedule to the Act. Hence sometime in June 1985 the petitioner applied for reclassification of the product. Samples were

drawn by Chemical Analyser on June 27, 1985 and on August 13, 1985. In November, 1985 Chemical Analyser submitted report to the appropriate authority of the excise department. As per the report the product was covered by Tariff Item No. 15AA of the First Schedule to the Act and therefore it was liable to excise duty as organic surface active agents. Tariff Item No. 15AA read as follows :

"Organic surface active agents (other than soap) surface active preparations and washing preparations whether or not containing soap. Twenty per cent ad valorem."

These products were liable to excise duty at the rate of 20 per cent ad valorem.

3. However, in the case of the products falling under Tariff Item No. 15AA exemption could be availed of by the manufacturers if they satisfied the conditions laid down in Notification No. 208 of 1969 dated August 27, 1969. The petitioner contended that it was entitled to exemption. Hence it preferred refund claim on December 23, 1985 which was received by the department on January 3, 1986. The claim covered the period commencing from January 28, 1985 to December 13, 1985 and it was for Rs. 4,75,331.50 ps. The claim was made on the ground that the duty was paid erroneously and therefore it was required to be refunded. After issuing the show cause notice and after adjudication the Assistant Collector passed order dated October 15, 1986 and allowed the claim of Rs. 2,08,434.00 for the period of six months prior to the date of filing of the application i.e. for the period commencing from July 3, 1985 to December 13, 1985. Rest of the claim for the period commencing from January 25, 1985 to July 2, 1985 has been rejected on the ground that the claim was preferred beyond the prescribed period of limitation as provided u/s 11B of the Act.

4. In this petition the petitioner has made claim for the amount of excise duty paid from July 1, 1982 onwards upto January 27, 1985. Thus even for the period for which claim was not preferred before the department this petition is filed. The claim of refund is for Rs. 15,32,124.08 ps. (Rupees fifteen lacs thirty two thousand one hundred twenty four and paise eight only). The petition is filed on April 20, 1987.

5. Learned counsel for the petitioner has submitted that in view of the decision of the Supreme Court in the case of *Miles India Limited v. Asstt. Collector of Customs*, reported in 1987 (30) E.L.T. 641(SC) and in the case of 1988 (18) ECR 46 , the authority exercising powers under the Act is bound by the provisions of the Act and therefore no useful purpose would be served by approaching the authorities for claiming refund for the amount which is beyond the prescribed period of limitation of six months. In the case of *Doaba Co-op. Sugar Mills (supra)*, the Supreme Court has inter alia observed that in making claims for refund before the departmental authorities the assessee is bound within four corners of the statute. The Supreme Court has further observed that the period of limitation prescribed in the Act and the Rules framed thereunder must be

adhered to inasmuch as the authorities functioning under the Act are bound by the provisions of the Act. In view of this position of law laid down by the Supreme Court, the order passed by the Assistant Collector refusing to grant refund for the period beyond the prescribed period of limitation cannot be said to be in any way unlawful. However, it is submitted that this court should exercise its power under Article 226 of the Constitution of India and should direct the respondents to refund the amount of excise duty illegally recovered from the assessee.

6. It is contended that the Assistant Collector has rejected the claim of the petitioner for the period commencing from January 28, 1985 to July 2, 1985 on the ground of limitation provided u/s 11B of the Act. As far as the powers of this court under Article 226 of the Constitution of India is concerned, the court can issue appropriate direction in relation to the amount of refund claimed which may be beyond the period of limitation prescribed u/s 11B of the Act. It is further submitted that various other High Courts in the country have entertained petitions under Article 226 of the Constitution of India for the claim which is beyond the period of limitation prescribed under the Act and in fact granted claims because as far as petitions under Article 226 of the Constitution of India are concerned there is no period of limitation and the High Court is not bound by the period of limitation prescribed under the statute. Reliance is placed on the following decisions of Bombay High Court.

Phenoweld Polymer Pvt. Ltd. Vs. Union of India, .

Parle Beverages Pvt. Ltd. Vs. Union of India, .

In the aforesaid decisions the Bombay High Court has held that in proceedings under Article 226 of the Constitution of India provisions of the Act or the Rules which prescribe limitation is not good defence. In one case it is also held that in cases of duty recovered under mistake of law the period of limitation prescribed under the provisions of Section 11B is not attracted when relief is to be granted in writ jurisdiction. It is submitted that on similar lines other High Courts have also decided the following cases :

1. Asstt. Collector of Central Excise v. Kashyap Engineering and Metallurgicals Ltd., reported in 1990 (45) E.L.T. 275 (Kar.)
2. Oswal Oil And Soap Industries and Another Vs. Customs, Excise and Gold Control Appellate Tribunal and Others,
3. Alembic Glass Industries Ltd. v. Union of India, reported in 1990 (46) E.L.T. 232 (Kar.)
4. Guru Charan Industrial Works Vs. Union of India (UOI) and Others,
5. Anandji Haridas and Company Pvt. Ltd. Vs. Union of India and others,
6. Dilichand Shreelal Vs. Collector of Central Excise and Others,

7. Hyderabad Bottling Co. Pvt. Ltd. v. Union of India, reported in 1987 (27) E.L.T. 406 (A.P.)

8. Tamil Nadu Betelnut Packers Vs. Union of India,

Relying on the aforesaid decisions it is submitted that in the State of Gujarat writ of Gujarat High Court will run. If Gujarat High Court takes the view that even in writ jurisdiction under Article 226 of the Constitution of India refund claim cannot be entertained for the period beyond the prescribed period of limitation, the manufacturers in the State of Gujarat would stand discriminated against the manufacturers in the State of Maharashtra, Uttar Pradesh, West Bengal, Andhra Pradesh, Tamilnadu, Punjab, Haryana and Karnataka wherein the High Court of the concerned States have held that the writ jurisdiction can be exercised even in respect of refund claim relating to the period beyond the prescribed period of limitation.

7. With utmost respect to the learned Judges of different High Courts, it is not possible to persuade ourselves to agree with the view canvassed by learned counsel for the petitioner. Article 226 of the Constitution of India provides for extraordinary remedy for enforcement of the fundamental rights and for any other purpose. The phrase "any other purpose" would in the context mean the enforcement of any legal right and for the performance of any legal duty. As far as the fundamental right is concerned, it cannot be contended that to claim refund of the amount of tax paid is a fundamental right. Therefore the question arise - does the petitioner who pays duty of excise under mistake of law prove any legal right to receive back the same ? Unless the petitioner proves legal right to claim refund and corresponding legal duty on the State to refund the same, petition under Article 226 of the Constitution of India cannot be entertained.

8. Many of the refund claims including the one in the present petition is based on the misconception that once the levy and collection of excise duty is held to be illegal or unauthorised the consequence must be to refund the amount to the manufacturer from whom the amount of excise duty was collected. On the same line it is further argued that the State cannot be allowed to retain the amount of tax unauthorisedly collected and the State cannot be permitted to unjustly enrich itself. Before examining all these questions it is required to be examined as to whether the petitioner proves its entitlement to claim refund. The claim is based on the provisions of Section 72 of the Indian Contract Act which deals with liability of a person to whom money is paid or things delivered under mistake or coercion. It provides that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. Provisions of Section 72 of the Indian Contract Act came up for consideration before a Division Bench of this Court in the case of Union of India and Others Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd. and Others, . In para 18 of the report the court observed that in order to claim restitution, the person claiming restitution has to prove loss or injury to him. If he proves loss or injury, he would be entitled to restitution to the extent of loss or injury suffered by him. However,

it is absolutely essential to plead and prove loss or injury to successfully claim restitution u/s 72 of the Contract Act. In the case of Dhrangadhra Municipality v. Dhrangadhra Chemical Works Ltd., reported in 29 (1) GLR 388 : 1988 (35) E.L.T. 88 (Guj.) Division Bench of this Court discussed the law regarding restitution. After referring to Abson's Law of Contract (25th Edition) Chitty on Contracts (25th Edition) and also earlier Division Bench judgment of this Court in the case of Union of India v. New India Industries Ltd., reported in 24 (2) GLR 1106 : 1983 (14) E.L.T. 1763 (Guj.), Union of India Vs. New India Industries Ltd., Baroda, and also the decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, , in para 15 of the decision of the Court observed as follows :

Consequently, it must be held that for completing cause of action u/s 72 of the Act, the following three basic requirements of the Section have to be pleaded and then proved by the plaintiff against the defendant, (i) that the amount was paid under a mistake by the plaintiff to the defendant and that at the time of payment, both the plaintiff as well as the defendant were labouring under mutual mistake, meaning thereby the plaintiff thought that the amount was legally due by the plaintiff to the defendant. Defendant was also under the same impression but ultimately it is found that it was not so; (ii) and/or the amount was paid by the plaintiff under coercion, compulsion or pressure to the defendant; (iii) that if restitution is not granted to the plaintiff, the plaintiff would suffer legal injury or prejudice. Implicit in the three ingredients will be the necessity for pleading in case of claims for refund of tax collected by the defendant from the plaintiff that the plaintiff has not passed on the burden of such tax to anybody else and that the entire burden of tax rested on the shoulders of the plaintiff and that had picked the pocket of the plaintiff wherein the tax burden had finally reposed.

The aforesaid decision has been followed by another Division Bench consisting one of us (myself) and P. M. Chauhan, J. in the case of Union of India & Others v. M/s. Wood Papers Ltd., reported in 30(2) GLR 1323 : 1991 (53) E.L.T. 189 (Guj.).

9. Recently, in the case of Mahabir Kishore and others Vs. State of Madhya Pradesh, , the Supreme Court observed that the principle of unjust enrichment requires (i) that the defendant has been enriched by the receipt of a benefit; (ii) that this enrichment is "at the expense" of the plaintiff; and (iii) that the retention of the enrichment be unjust. Thus, in order to succeed, the petitioner or the plaintiff, as the case may be, must prove that the defendant (that is to say, in the case of collection of tax "the State") has been enriched "at the expense" of the plaintiff or the petitioner - meaning thereby, the petitioner must establish that he has suffered injury or loss and consequently the defendant has been enriched. In this case it is not even contended by the petitioner that the petitioner has suffered injury or that the respondent has been enriched "at the expense" of the petitioner. If the opponent/defendant State gets enriched at the expense of subsequent purchasers of the goods in question, the petitioner does not get any right to claim restitution. Moreover the petitioner should also

establish that retention of the amount of tax so collected by the State through the petitioner would be unjust. There is no proof of these two ingredients. Therefore the provisions of Article 226 of the Constitution of India are not attracted at all because the petitioner has not even pleaded nor proved any legal right to claim refund. In absence of any such entitlement there does not arise any legal duty to refund the amount.

10. In this connection reference may be made to a decision of the Supreme Court in the case of *State of Madhya Pradesh Vs. Vyankatlal and Another*, . Therein the question arose as to whether the State Government was required to pay the difference between fixed price and ex-factory price of sugar. The High Court held that the amount was recovered by the State Government without authority of law and therefore the State was required to restore the same to the person from whom it was collected. However, the Supreme Court held that the burden of paying the amount in question was transferred by the respondents (plaintiffs) to the purchasers and therefore they were not entitled to get refund. Only on the persons on whom lay the ultimate burden to pay the amount would be entitled to get refund of the same. The Supreme Court further observed that if it is not possible to identify the persons on whom burden had been placed, the amount so collected can be utilised by the Government for the purpose for which the amount was collected, namely, development of sugar cane. In view of this position of law laid down by series of decisions of this Court and the decisions of the Supreme Court, it cannot be said that the petitioner is entitled to claim relief. Therefore the question of exercising discretion under Article 226 of the Constitution of India does not arise at all.

11. The contention that if the amount is permitted to be retained by the Government it would amount to unjust enrichment by the Government and unjust impoverishment of the petitioner has also no merits. In such case, if the question of exercise of discretion is to be considered, the discretion is not to be exercised in favour of the petitioner who has passed on the burden of tax upon subsequent purchasers [see *State of Madhya Pradesh v. Vyankatlal* (supra)]. Here reference may be made to another decision of the Supreme Court in the case of *Union of India Vs. Wood Papers Ltd.*, . The question arose as regards additional charges of tariff payable by the City Board. In para 10 of the judgment the Supreme Court observed that the City Board was not able to state that the City Board has not recouped itself by collecting charges from the consumers. In that situation the Supreme Court presumed that, the Board has not suffered any loss by the levy of 7 1/2% by way of additional charges. In this background the Supreme Court held as follows :

"We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Art. 226 of the Constitution."

We do not see how in view of this law laid down by the Supreme Court it would be possible for this High Court to exercise its discretionary power under Article 226 of the Constitution of India, in favour of the petitioner and direct the respondent State to refund the amount of tax as prayed for.

12. The contention that in cases where the tax is unauthorisedly collected by the State, the State gets unjustly enriched is based on superficial view of the provisions of the Constitution and the functions of the modern State. Today the State cannot be conceived as simply a coercive machinery exercising the thunderbolt of authority. In the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, the Supreme Court has approvingly quoted the following passage from Mac Iver, "The Modern State", 183.

"If we clearly grasp the character of the State as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service."

Viewed from this angle, modern State is nothing but a service Corporation exercising certain powers conferred upon it subject to the inherent limitations imposed upon it. As far as "State" under the Indian Constitution is concerned, the character of the same can be gathered from the provisions of the Preamble to the Constitution and other provisions of the Constitution. Sovereignty rests with the people. It is "we the people" who are sovereign. Those who sit in the position of power and exercise power are answerable to people and cannot sit in the position of power beyond specified period unless fresh mandate is obtained. The object of the State is to secure to all its citizens inter alia justice - social, economic and political, and also equality of status and of opportunity.

13. Powers conferred upon the State are subject to the limitation contained in Part III of the Constitution relating to fundamental rights. The directive principles contained in Part IV of the Constitution are to be treated as fundamental in the government of the country and "it shall be the duty of the State to apply these principles in making laws". The State is under obligation to secure a social order for the promotion of welfare of the people (Art. 38). The State is required to direct its policy towards securing.

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d)

(e) (Art. 39)

14. In the background of the Constitutional provisions the powers conferred upon High Court under Article 226 of the Constitution of India are required to be examined. Judiciary is also one of the organs of the State. Therefore it is under an obligation to exercise its discretionary powers in conformity with the provisions of the Constitution and the principles and the objectives laid down therein. The powers conferred upon the Court under Article 226 of the Constitution of India are to be exercised in order to achieve the objects enshrined in the Preamble to the Constitution. In the case of *D.S. Nakara and Others Vs. Union of India (UOI)*, , in para 33 of the judgment the Supreme Court has inter alia observed that the Preamble directs the centres of power Legislative, Executive and Judiciary to strive to set up Sovereign Socialist Secular Democratic Republic. Having regard to the directive principles contained in Part IV of the Constitution these powers are to be exercised in order to secure and establish social order in which Justice Social, Economic and Political, informs all the institutions of the national life. It is the duty of the State to strive to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. The State is under obligation to see that the ownership and control of the material resources of the community are distributed so as best to subserve the common good. It is also under obligation to see that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment. In the background of these constitutional provisions, particularly the Preamble and Articles 38 and 39 contained in the Directive Principles of State Policy, the question as regards discretion to be exercised while exercising powers under Article 226 of the Constitution of India needs to be examined.

15. It does not require indepth research or intensive intellectual gymnastics to infer that allowing the manufacturer to retain the amount of tax (unauthorisedly collected) would not minimise the inequality in income. It would on the contrary accentuate inequality in income. Similarly either retention of amount of such tax or refund of such amount of tax to the manufacturer would result into operation of the economic system which would concentrate wealth and means of production in few hands. This is bound to be to the common detriment because these persons are not subject to any constitutional obligations and are not accountable to any one as the Government is under constitutional obligation and is also accountable to the people. Similarly, material resources of the community also would not be distributed in such a way so as to subserve common good. Thus, if the discretion is exercised by the High Court and the amount of tax collected by the State is ordered to be refunded, it would frustrate the objects and ideals of the Constitution. On the contrary, as observed by the Division Bench of this Court in the case of *Union of India v. New India Industries Ltd.*, reported in 24 (2) GLR 1108 : 1983 (14) E.L.T. 1763 (Guj.), it would amount to pick-pocketing the pockets of the people under the cover of law.

16. The question may be examined from yet another angle. It is true that under Article 265 of the Constitution of India State cannot levy or collect any tax except by the authority of law. But when the amount of tax unauthorisedly levied and collected by the State is ordered to be refunded to the intermediary who has not suffered the burden of tax, what is the consequence thereof ? The consequence is that it amounts to taxing the people by the manufacturer, trader or the businessman. Such persons have no authority or power to tax people. If the Court while exercising powers under Article 226 of the Constitution of India directs refund of the amount of tax collected to the persons who has "paid" the tax (but who has not suffered the burden of the tax), it would amount to permitting taxation by private individuals. This could never be done by the court while exercising powers under Article 226 of the Constitution of India. It would amount to perversion of the Constitution rather enhancing the objects and ideals of the Constitution.

17. The economic reality of life is described by the Division Bench of this High Court in the case of Union of India v. New India Industries (supra), in para 31 of the judgment as follows :

"In fact it is not "He" - the manufacturer who pays the tax. It is his "hand" which pays the tax. His hand moves; by a chain of reaction, the hand ultimately gets inserted into the pockets of ultimate buyers - the consumers of the commodity in question. The consumers allow their pockets to be cleared - many a times with tears in their eyes and rarely with smile on their faces - but always under the belief that the "Hand" has an authority of law and it will pass on the amount of tax so collected to the Government and the "Hand" will not turn to "His" own (the manufacturer's) pocket. It is not even legally permissible for "him" (the manufacturer) to turn his "Hand" towards his own pocket and retain the amount In fact it would be against the basic cannons of ethics and morality that such a "hand" should turn to "his" (manufacturer's) own pocket. If this is permitted it will be difficult to distinguish between "pick-pocketing simpliciter" and "pick-pocketing under the cover of law".

The High Court while exercising powers under Article 226 of the Constitution cannot be oblivious of this reality of the world of business and commerce and the High Court is also required to bear in mind other constitutional provisions and cannot be indifferent to the consequences which follow on account of its order.

17A. The reality of the world of business and commerce is that indirect taxes such as excise duty, customs duty, sales tax and octroi duty are the taxes on commodity. In economic jargon these taxes are also called commodity taxes. The burden of the tax is to be borne by the commodity and not by the individual who happens to pay the tax. It is the commodity which bears the incidence of tax and carries with it the burden of the tax which is being passed on to the subsequent purchasers either in the shape of cost or as a component of sale-price or separately specified as tax such as excise duty, customs duty, sales tax or octroi. The law has also recognised this position. This can be seen from the provisions of

Section 64A of the Sale of Goods Act, 1930 which enables the parties to a contract of sale to make variation in the sale price depending upon increase or decrease in the tax before the goods are sold. Therefore, such cases are not to be examined from the point of view of who happens to pay the amount of tax. It is the commodity that bears the burden of the tax, whether the tax is directly paid by the manufacturer/importer or businessman or it forms part of the cost-structure of some other commodity when the initial commodity which bears the burden is used as raw material. In all such cases it is the commodity which bears the burden and carries with it the burden of the tax which is ultimately suffered by innumerable consumers in the society. The liability to pay the amount of tax in respect of the commodity taxes is determined on the basis of administrative convenience. It has nothing to do with the individual or the person. It is by mere fortuitous circumstances that a particular individual or a person happens to pay the amount of such commodity taxes. Simply because that individual or person pays the tax, he would not be entitled to claim refund of the same in case the levy and collection of the commodity tax is held to be illegal, because the burden of tax is carried by the commodity itself. Even in case of direct tax like Income Tax such an eventuality may occur. In a given case a company may deduct the amount of Income Tax at source from the amount of dividend or interest. In another case an employer may deduct the amount of Income Tax at source from the amount of salary or wages. Later on if the levy and collection of such Income Tax is held to be illegal, the company or the employer cannot claim refund of the amount of Income Tax because the company or the employer happened to make payment of the same to the Government. In case the individual from whose income of dividend or interest or of salary or wages the amount of tax was deducted is not traceable and is not available, the amount would naturally remain with the Government. Same analogy would apply in the case of commodity tax also because the burden of tax is never suffered by the manufacturer, the importer or the businessman, as the case may be, who by more fortuitous circumstances happen to pay the amount of tax without suffering the burden of the same. Therefore in such cases there is nothing unjust if the amount is retained by the Government.

18. The question is also required to be examined from the point of view of the provisions of Article 296 of the Constitution of India, which refers to the doctrine of escheat and bona vacantia. According to this doctrine, all property - movable and immovable - vests in the Government in the absence of a heir or successor. In cases of unauthorised levy and collection of taxes in respect of commodity taxes or indirect taxes, the injury or the burden is suffered by unidentifiable innumerable consumers. It is these persons to whom the amount really belongs, but by the very nature of things they cannot be identified. In such cases the doctrine of escheat or bona vacantia contained in Article 296 of the Constitution would apply.

19. In the case of Narendra Bahadur Tandon Vs. Shankar Lal (since deceased) by Lrs, , in para 7 of the judgment the Supreme Court has inter alia observed :

"In India the law is well settled that the property of an intestate dying without leaving lawful heirs and the property of a dissolved Corporation passes to the Government by escheat or as bona vacantia. Of course such property will be subject to trusts and charges, if any, previously affecting it."

Here reference may be made to the provisions of Section 555(2) of the Companies Act, 1956 which expressly enjoins a duty on the liquidator to deposit. On the dissolution of the Company, into an account in the Reserve Bank of India known as the Companies Liquidation Account any money representing unpaid dividend or undisputed assets lying in his hands at the time of dissolution. The character of the amount of tax "unauthorisedly" collected from the people who suffered the burden would be similar to that of unclaimed dividend and such other assets. In such cases the provisions of Article 296 of the Constitution would come into play and the property would vest in the State. Therefore in view of this constitutional provision also it would not be open for the High Court to exercise discretion in favour of the petitioner and grant claim of refund to the person who has not suffered the burden of tax.

20. There is no question of unjust impoverishment. In a democratic form of Government as envisaged under the Constitution, the people empower their chosen representatives to enact laws. By enacting appropriate laws, chosen representatives of the people can levy and collect tax in accordance with law. Thus the people themselves decide through their representatives to tax themselves. In case there is levy and collection of tax otherwise than in accordance with law, the question which arises is not that of choosing between the manufacturer and the State. It is not a question of merely resolving a technicality. One is required to examine the hard economic and social realities of life which has been referred to hereinabove. Moreover the Constitution never intended to confer powers under Article 226 upon the High Courts to exercise the same against the basic tenets of the Constitution. To permit manufacturers to retain such amount would amount to empowering private individuals and corporations to tax the people. This, in our opinion, would be abuse of the process of the court.

21. On the other hand if the State is permitted to retain this amount it would not result into unjust enrichment of the State. All that would happen would be that the amount remains with the society and that amount will be required to be utilised by the State subject to the limitations and obligations imposed upon it under the Constitution and the relevant laws. Again the Government which expends these funds will be accountable to the Parliament or the State Legislature as the case may be. On the other hand there will be no such obligation on the private individuals who may be granted refund. In a democratic State, will of the people is expressed through the chosen representatives of the people. When tax is imposed by the Parliament and other appropriate legislatures, it is the expression of the will of the people. Thus people decide through their representatives to tax themselves. In this view of the matter, when

the Court states, "let the State retain the amount", in effect the Court states, "let the people retain the amount with them". If the Court does otherwise, the Court would be doing injustice to many, who never thought that the money paid by them would be retained by the intermediary and they would be exploited under the cover of law, and that too by the decree and orders of the Court. Such a view would both be unjust and improper and against the provisions of the Constitution also. As indicated hereinabove, such argument is advanced on too technical and superficial view of the provisions of law and without examining the Constitutional provisions in detail. For this reason also the contention that the discretion should be exercised in favour of the petitioner cannot be accepted.

22. Learned counsel for the petitioner submitted that different High Courts in the country have taken the view that there is no limitation on the powers of the High Court under Article 226 of the Constitution of India and the High Court in its discretion can grant relief of restitution in cases of unauthorised levy and collection of taxes. Therefore it is submitted that as far as the manufacturers, traders and businessmen in Gujarat are concerned they would be discriminated if this High Court does not exercise discretion in favour of the petitioner. We do not know how in view of the decision of the Supreme Court in the case of *State of M.P. v. Vyankatlal* (supra) and in the case of *U.P.S.E. Board v. City Board, Mussoorie* (supra) the High Court can exercise discretion in favour of the petitioner and grant relief of restitution as claimed. If the argument advanced by the learned counsel for the petitioner is accepted it would mean that this High Court should cease to exercise its own judicial power and surrender or submit its judicial power to other High Courts in the country. Doing so would amount to committing breach of the oath. Moreover, the High Court cannot look at the problem and decide the question by keeping in mind the narrow regional bias. In fact in a system wherein different judicial or quasi-judicial authorities are conferred with power to decide as per the relevant provisions of the Constitution or Statute, differences in the decisions are bound to arise. These differences are ultimately resolved by the superior judicial forum. Unless such differences are the result of conscious discrimination, the same cannot be interfered with. In the case of *Eskayef Limited Vs. Collector of Central Excise*, the question arose on account of different interpretations given to relevant exemption notification by the excise authorities. The Supreme Court referred to its earlier decision in the case of *Narain Das and Others Vs. The Improvement Trust, Amritsar and Another*, and observed that in such cases the right to equality before the law and equal protection of the laws guaranteed under Article 14 of the Constitution cannot be invoked. The Supreme Court observed that the discrimination complained of arose on account of the order passed by different excise authorities acting quasi-judicially. It was inadvertent discrimination which could be corrected by the appropriate authority. But on such grounds it cannot be complained that there was any hostile discrimination. In view of this law laid down by the Supreme Court there is no substance in the contention that the manufacturers, traders and businessmen in Gujarat would be treated with hostile

discrimination. It may also be noted that the learned counsel for the petitioner has not been able to point out that the view taken by this High Court is in any way erroneous or is not in conformity with the constitutional provisions indicated hereinabove.

23. Learned counsel for the petitioner submitted that the decision rendered by the Division Bench of this High Court in the case of *Wigman Elec. Engg. Industries v. Union of India*, reported in 1991 (2) GLR 1081 holding that Section 11B of the Central Excises and Salt Act, 1944 which prescribes the limitation of six months for claiming refund is constitutionally valid requires reconsideration. It was submitted that the Division Bench has not taken into consideration the difference between the provisions of Section 11A of the Act which provides for recovery from the manufacturers in case of short payment, non-payment and erroneous refunds and the provisions of Section 11B of the Act which provides for refund to the assessee. What should be the period of limitation for initiating a particular action is a question to be decided by the legislature. Classification of two different categories of claim of refund by the assessee and claim of recovery of duty by revenue itself is reasonable classification. It cannot be said that the legislature has classified these two categories irrationally or unintelligently. Be it noted that in case of fraud or concealment the period of five years is provided under the proviso to Section 11A of the Act. In other normal cases the period of limitation provided even u/s 11A of the Act is the same as provided in Section 11B of the Act. Thus it is obvious that the legislature has proceeded on the footing that as far as the Government is concerned there would not be a case of concealment or fraud to be perpetrated by the Government on the people for taxing them. Such assumption is reasonable. In our opinion there is no substance in the contention so raised and the decision of the Division Bench of this High Court in the case of *Wigman Elec. Engg. Industries (supra)* does not require to be reconsidered.

24. Recently in the case of *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , the Supreme Court has examined the question of limitation in a case where the person affected by illegal exaction filed application for refund under the provisions of the statute or filed suit to recover the tax paid under mistake of law. In para 71 of the reported decision it is observed by the Supreme Court that in such a case the Court can grant relief only to the extent permissible under the relevant rules of limitation. The Supreme Court has inter alia observed that if the relief is granted in writ petition under Article 226 of the Constitution of India even for the period beyond the period of limitation prescribed under the relevant provisions of the statute, it would result into discrimination between persons based on their choice of forum for relief. Such classification is considered by the Supreme Court to be "too fragile to be considered a relevant criterion for the resulting discrimination". For this reason also the view taken by the Division Bench of this High Court in the case of *Wigman Elec. Engg. Industries (supra)* is not required to be reconsidered. On the contrary indirectly it gets reaffirmed by the Supreme Court's observation made in the case of *Orissa Cement Ltd.*

(supra).

25. In the instant case the petitioner claims that though it was entitled to the benefit of exemption Notification No. 208 of 1969 it has not been granted the same on account of mistake of law. The contention proceeds on the footing that the facts are established, and the relevant conditions required to be satisfied as per notification are also complied with. The notification inter alia provided that for claiming exemption from whole of the duty leviable on surface active agents falling under Tariff Item No. 15AA of the First Schedule to the Act, the assessee must fulfil the condition that :

The difference between the surface tension value as determined by Stalagmo meter of the liquid obtained by treating one gram of the organic surface active agents or the surface active preparation as the case may be with 100 millimetres of distilled water is not more than 20 dynes per centimetre at the same temperature.

Whether the aforesaid condition is fulfilled or not cannot be verified by referring to the record of the petitioner. Even before removal of the goods the manufacturer must apply for exemption and claim exemption from payment of duty by satisfying the conditions of the notification. Once the goods are removed it would be impossible for the department to verify as to whether the product in respect of which refund claim is made satisfied the condition laid down in the notification. From the accounts and other records of the petitioner Company there cannot be physical verification of the article and it cannot be verified as to what was the surface tension value as determined by Stalagmo meter obtained by particular method and as to whether it satisfied the condition of the notification or not.

26. In this connection reference may be made to a decision of the Supreme Court in the case of Wigman Electrical Eng. Ind. P. Ltd. Vs. Union of India, . The case arose in respect of the claim of rebate/concession as regards payment of octroi. To claim rebate/concession an importer was required to file declaration in the form of undertaking that the goods imported shall not be used for any other purpose for sale or otherwise to be disposed of to any other party for any other purpose and that it was to be used as raw material to be used in the manufacture of aluminium products. Since such declaration was not filed while lodging the claim, the claim was rejected by the Municipal Corporation. Later on claim was made on the basis of the records and financial accounts of the Company. This claim was also rejected by the Corporation. The matter was carried upto the Supreme Court. While rejecting the SLP the Supreme Court observed that insistence on declaration was with a view to verify the correctness of the same. The Supreme Court observed that the octroi authority had no opportunity to verify the correctness or otherwise of the declaration. Therefore the Supreme Court rejected the claim of the company on the ground that it had failed to fulfil the important obligation under the law, though it was procedural. The Supreme Court observed that having failed to file necessary declaration the

Company cannot turn around and ask the authorities to make verification of some records. The verification at the time when the raw material was still there is entirely different from verification at a belated stage after the article has ceased to be there.

27. In the instant case also, removal of the goods without satisfying the authorities as regards fulfilment of the condition would disentitle the petitioner to claim benefits of exemption notification. There is no substance in the contention that for the period of six months for which refund claim was granted there was no verification. The Assistant Collector had granted refund for a period of six months only after the analysis of the samples were drawn from the manufacturer during June-August, 1985. It is not even the case of the petitioner that samples of articles manufactured and removed from the factory premises were drawn for the period prior to June, 1985. Therefore, even on facts it cannot be said that the petitioner as proved that it satisfied the conditions of exemption notification and that it was entitled to claim benefits of exemption under Notification No. 208 of 1969.

28. No other contention is raised. There is no substance in the petition. On all the grounds stated hereinabove either taken individually or cumulatively the petition is liable to be rejected and it is hereby rejected. Rule discharged.