

(1975) 07 BOM CK 0004

In the Bombay High Court

Case No : Special Civil Application No. 1295 of 1973

Ogale Glass Works Ltd.

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 15-07-1975

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 113, 226, 276, 286, 96
Contract Act, 1872 — Section 2, 3, 72

Citation : (1977) 79 BOMLR 37

Hon'ble Judges : mukhi, J;Deshpande, J

Bench : Division Bench

Judgement

Mukhi, J.—This writ petition raises an important question of law as to whether the cost of packing of excisable goods can be included for the purpose of determining the value thereof u/s 4 of the Central Excises and Salt Act, 1944, (hereinafter referred to as "the Act").

2. Now, we should have thought that this question has already been determined and concluded by a Division Bench judgment of this Court in Union v. Mansingka Industries (1974) 77 Bom. L.R. 663.

3. It requires to be noticed that in that judgment reference is made to a judgment of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, , in which the scope and content of Section 4 of the Act was considered.

4. The learned Counsel for the respondents has, however, contended that these decisions did not conclude the questions which arise in the petition before us. He added that there were certain contentions which did not arise in previous cases.

5. It will, therefore, be necessary to examine the ratio of these judgments in relation to the facts of this case.

6. Before we discuss the contentions raised before us in this petition, it is necessary to set out the relevant facts, which fortunately are not many and

largely undisputed.

7. The petitioners, Messrs. Ogale Glass Works Ltd., manufacture at Ogalewadi as well as at Pimpri, among other things, glass and glassware. In particular, they manufacture tumblers, jars and pressed-ware, bottles of different kinds as well as glass bricks and tiles.

8. These products are charged to excise duty ad valorem under the Act and the relevant Item in the First Schedule is Item 23A, which reads as follows:

23A. GLASS AND GLASSWARE-

(1) Sheet glass and Plate glass.... Ten per cent. ad valorem. (2) Laboratory glassware.... Five per cent. ad valorem. (3) Glass shells, glass globes and chimneys for lamps and Janterns.... Ten per cent. ad valorem. (4) Other glassware including tableware.... Fifteen per cent. ad valorem.

9. The petitioners say that as from 1962 they have been paying excise duty on glass and glassware under the said Item 23A, as demanded by the Excise authorities on price lists furnished by the petitioners and approved by the Excise authorities.

10. The excisable goods under Item 23A, viz. glass and glassware, are sold by the petitioners to different buyers and they are packed and despatched to such buyers according to their requirements. In so far as packing is concerned, the glass and glassware is either packed in cartons or corrugated paper or corrugated box or in bamboo baskets. Some times the buyers are satisfied with packing which may consist of hay or straw padding. There is no dispute that the packing materials are not manufactured by the petitioners themselves at their factories but are procured by them from the open market. The excisable goods manufactured at the factories are then packed with such packing materials according to the requirements of the buyers.

11. It requires to be noticed that the cost of packing is borne by the buyers and the record shows that the packing costs are recovered from the petitioners' buyers and are calculated either in terms of rupees and paises or on the basis of a percentage of the price of the product concerned. For instance, in respect of jars and tumblers, the packing charges are indicated in terms of rupees and paises, whereas in the case of chimneys and globes the packing charges are charged extra at a percentage of the basic rate, which may be 18 per cent. in the case of bamboo baskets or 22 per cent. for corrugated board cartons. When packing is desired in wooden crates, the packing charges are higher and calculated at the rate of 28 per cent. of the value of the excisable goods to be so packed and despatched.

12. It would appear that the Excise authorities have been demanding and the petitioners have been paying right from 1962 onwards the excise duty not only on the value of the excisable goods, viz. glass and glassware, but also on packing charges. Thus, the Excise authorities have been charging to the

petitioners and collecting from them not only excise duty on the value of the glassware but moneys have been claimed and recovered purporting to be excise duty on the value of packing materials and charges.

13. It is significant that there appears to have been no dispute between the parties that the extra amounts so claimed by the Excise authorities and paid by the petitioners were moneys said to be due to the Excise authorities and payable by the petitioners.

14. It is appropriate at this stage to notice that the procedure adopted in this behalf under the relevant Excise Rules is that the petitioners file price lists of the manufactured goods assessable to Excise duty ad valorem for the purpose of determining the value in accordance with Section 4 of the Act. These price lists are then approved by the Excise authorities from time to time and the excisable goods are then permitted to be removed from the factory where they are manufactured.

15. In order to facilitate such removal, a procedure is followed by which a current account is maintained and relevant entries made therein from time to time as the goods are removed from the factory and cash deposits are made into the current account by the petitioners. This facility is made available by the Excise authorities in order to ensure that excisable goods are removed from the factory without any delay.

16. It was in these circumstances that the Excise authorities collected from the petitioners moneys said to represent excise duties on excisable goods produced by the petitioners at their factories at Ogalewadi and Pimpri.

17. It is the petitioners' case that as no excise duties could be levied and collected on packing charges and materials, such moneys were being collected by the Excise authorities and paid by the petitioners under a common mistake of law.

18. It is stated that the petitioners came to know about a decision of the Mysore High Court in a case concerning glass and glassware under the same entry, viz. 23A of the First Schedule of the Act. The decision appears to have been given in a petition filed by Alembic Glass Industries Ltd. of Bangalore. The Mysore High Court considered the same question as at issue here, viz. whether the value of packing materials could be included in the value of the glass and glassware under Item 23A for the purposes of determination of value u/s 4 and the collection of excise duty thereon. The Mysore High Court held that the value of packing charges and packing materials in which glass and glassware is packed is not chargeable to excise duty. It is necessary to notice that this judgment of the Mysore High Court was delivered on September 10, 1971.

19. On December 18, 1972 the petitioners made a representation in writing to the Assistant Collector of Central Excise, Poona, on behalf of both the factories of the petitioners, that is to say, one at Ogalewadi and the other at Pimpri, and pointed out to the Excise authorities that no excise duty could be validly levied

on packing charges. The petitioners also forwarded along with that representation a true copy of the judgment of the Mysore High Court and pointed out that as a result of that judgment no excise duty on packing charges in relation to glass and glassware was now being demanded or collected by the Excise authorities from Messrs. Alembic Glass Industries Ltd. Along with the said representation the petitioners also forwarded to the Assistant Collector, as required by Rule 103(c) of the Excise Rules a fresh price list for his approval which showed separately the price of the glass and glassware for the purpose of assessment of excise duty.

20. By a letter dated January 6, 1973 addressed to the petitioners-Ogle Glass Works Ltd. at their Pimpri Unit, Poona, Shri D.D. Barve, Assistant Collector, referred to the petitioners' representation dated December 18, 1972 and to a discussion which the petitioners' representative had with him on December 31, 1972, and then stated as follows:

As regards the revised price lists, it is regretted that the assessable value exclusive of packing charges cannot be approved under the existing orders.

(Italics supplied).

21. There is no explanation as to what were the "existing orders" the Assistant Collector was referring to, but it is significant that a copy of this letter is shown to have been endorsed to Shri Jasjit Singh, Chairman, Central Board of Excise and Customs, New Delhi.

22. By another letter dated January 19, 1973 addressed to the petitioners-Ogle Glass Works Ltd. at Ogalewadi, District Satara, the Assistant Collector Shri D.D. Barve, referred to the correspondence on the subject, viz. inclusion of packing charges in the assessable value, and stated as follows:

I have carefully considered the representation and arguments advanced during the course of personal hearing and I have to inform you that it is regretted that the assessable value exclusive of packing charges cannot be approved under the existing orders.

(Italics supplied).

22. The Assistant Collector then went on to say:

You are, therefore, advised to file revised lists declaring prices inclusive of packing charges in respect of all the price lists which are so far filed by excluding packing charges.

Reference to the "existing orders" in this letter is again significant.

23. It requires to be noticed that although reference to the Mysore High Court decision was made, the learned Assistant Collector declined to follow the ratio of that authority and insisted on including costs of packing charges in the value of excisable goods, viz. glass and glassware.

24. It is not known whether re-revised price lists were filed by the petitioners, but soon after, this Special Civil Application was presented to this Court and after notice of admission to the respondents and hearing the respondents at that stage a rule nisi was issued.

25. I find it necessary now to mention that although the petition was admitted and the rule nisi issued (the petition was admitted on June 25, 1973), the respondents did not care to file their affidavit in reply until October 10, 1974, by which time the Division Bench judgment of this High Court in Union v. Mansingka Industries had been delivered on fer to this judgment at a later stage and point out how the point at issue whether packing charges can be included in the value of excisable goods manufactured at the factory has been pronounced upon and that that judgment for the moment declares the law on the subject as obtaining in the State of Maharashtra.

26. On these facts, it is the case of the petitioners that from 1962 to 1972 the Excise authorities have been collecting and the petitioners have been paying under a common mistake of law moneys in excess of Excise duties which could be legitimately and validly levied. The petitioners say that the moneys so collected by the Excise authorities on the cost of packing and packing materials is a collection and impost without the authority of law and, therefore, liable to be refunded to them by the respondents.

27. On these facts, the petitioners have raised the following contentions:

28. The levy and collection of what purports to be Excise duty on the packing cost of glass and glassware manufactured by the petitioners in their factories is without the authority of the law and beyond the jurisdiction of the Excise authorities. As the moneys were paid under a mistake of law, they are liable to be refunded to them by the respondents u/s 72 of the Contract Act.

29. In other words, the contention is that the petitioners are entitled to recover from the respondents such moneys paid through mistake of law and as set out in exh. "C" to the petition.

30. The next contention is that the duty of excise on glass and glassware is on the production and manufacture of excisable goods and the manufacture of such excisable goods is complete as soon as glass and glassware are themselves manufactured. The packing of such manufactured goods for their safety, protection or convenience during transport and delivery to the buyer is not a process incidental or ancillary, to the completion of the manufactured product, viz. glass and glassware.

31. The petitioners have also contended that they came to know about the mistake of law when they received information that the Mysore High Court had decided in the ease of Alembic Glass Industries Ltd. in relation to Item 23A that excise duty could not be validly collected on the cost of packing materials. They have come to Court after making an attempt with the Excise authorities to obtain

revision of price lists.

32. It is in these circumstances that the petitioners contend that the orders passed by the Assistant Collector in refusing to revise the price lists in accordance with the correct position of the law should be set aside and the respondents directed to refund the amounts illegally collected from the petitioners from 1962 to 1972. Mr. V.B. Patel, the learned Counsel for the petitioners, contended that the petitioners' claim for refund falls squarely within the purview of Section 72 of the Contract Act.

33. In their affidavit in reply (which, as I have stated, was filed more than sixteen months after the admission of the petition) a number of preliminary objections are taken, viz. that there has been delay in filing the petition; that there are disputed questions of facts which cannot be dealt with in a writ petition; that the refund of tax is not permissible in a writ petition; and that there was an adequate and alternate remedy available to the petitioners which had not been exhausted.

34. On merits, the defence taken is that packing of glass and glassware is an incidental and ancillary process for the completion of manufacture of the petitioners' glass products.

35. The second contention is that the petitioners' goods, viz. glass and glassware, are in fact sold by them in the wholesale market only in packed condition and that it is almost impossible to sell such goods in the wholesale market without the same being packed as they were fragile goods and would get broken. In other words, in so far as computation of the value in relation to Section 4 of the Act is concerned, the contention and argument of the respondents is that packing is a part of manufacture so that excisable goods are not completely manufactured until they are packed and that glass and glassware cannot be sold and in fact is not sold by the petitioners without packing.

36. On this footing Mr. Andhyarujina, the learned Counsel for the respondents, argued that the value of the glass and glassware should be assessed u/s 4(a) of the Act on the footing that what is sold is packaged glass and glassware.

37. At the hearing of this petition, however, Mr. Andhyarujina did not argue that packaging of glassware was a process incidental and ancillary to the manufacture of glassware within the relevant definition in the Act, or that the manufacture of the excisable product was not complete until it was packed, but he laid stress on the contention that because what came into the market was "packaged glassware" whether packed in hay, straw, corrugated paper, cartons or bamboo baskets, its value had to be determined accordingly. In his own language Mr. Andhyarujina contended that in determining the value of an article for levy of excise duty ad valorem you have to consider the wholesale cost price at which the article is being sold along with its packaging.

38. Mr. Andhyarujina also contended that there was in fact no mistake of law;

there was a prima facie triable issue which should go to the civil Court; refund could not be obtained by the petitioners by filing a writ petition; and that, in any event Rules 11 and 173G of the Excise Rules barred the refund claimed by the petitioners.

39. He lastly contended that there was delay in seeking the refund and that since the petitioners had already collected from their customers excise duty on packing charges, justice did not lie on their side in recovering the moneys from the respondents.

40. Apart from the preliminary objections, the points that arise for consideration in this writ petition may be summarised as follows:

1. Can it be properly contended that the packing of glassware is a process incidental or ancillary to the completion of the manufacture of glass and glassware?

2. Can the cost of packing and packing materials be included in arriving at the wholesale cash price u/s 4(a) of the Act (as it stood before the amendment of 1973), or, in other words, can the assessable value of the glassware include the cost of packing and packing materials u/s 4 of the Act?

3. Was there a mistake of law on the basis of which a claim could be made by the petitioners for refund u/s 72 of the Contract Act? And when can it be said that the mistake was discovered?

4. Are the petitioners entitled to refund of the amounts collected by the respondents without the authority of law?

5. In view of the circumstances of the case should the discretion of the Court be exercised in favour of the petitioners in so far as the claim for refund is concerned?

41. Before discussing the points which need to be discussed in this petition, it is appropriate to briefly refer to the relevant provisions of the Act.

42. Section 2(d) of the Act defines "excisable goods" to mean "goods specified in the First Schedule (of the Act) as being subject to a duty of excise and includes salt.

43. Section 2(f) defines "manufacture" as including "any process incidental or ancillary to the completion of a manufactured product".

44. Then there are separate definitions of "manufacture" with reference to certain other products, such as, tobacco, salt and patent or proprietary medicines, but we are not concerned with those definitions in this petition.

45. It has already been noticed that glass and glassware are covered by Item 23A of the First Schedule, which has already been quoted above, and it requires to be noticed that excisable goods for the purpose of this petition are glass and glassware, that is to say, sheet glass and plate glass; laboratory glassware; glass

shells, glass globes; and other glassware including tableware.

46. Section 3 is the charging section and it in terms provides that "duties of excise (are to be collected) on all excisable goods...which are produced or manufactured in India....

47. Section 4 provides for determination of value for the purposes of the duty. And as it stood before the Amendment Act 22 of 1973, provides that "the value of the excisable goods is deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal...."

48. Now, in so far as the first and the second points are concerned, there is no difficulty in holding that it can never be contended with any show of reason that manufacture of glass and glassware is not complete before it is or can be packed for the purpose of delivery and transport.

49. There is also no difficulty in holding that the cost of packing and packing materials cannot be legally included in arriving at the wholesale cash price of the excisable goods manufactured by the petitioners.

50. Both these points are covered by the judgment of a division Bench of this Court in *Union v. Mansingka Industries*. In that judgment, this Court was considering the contention of the Excise authorities that the article manufactured by the respondents therein, viz. vegetable oil, was such that it could not be presented for sale in the market without a container. It was also contended in that case that the vegetable oil, as excisable goods, became fully manufactured and assessable only after the same was packed in tins and that that process of packing in tins was ancillary to the manufacture of the vegetable oil, without which, the vegetable oil could not be sold in the market. Both these contentions were rejected by this Court.

51. After referring to the decision of the Supreme Court in *A.K. Roy v. Voltas Ltd.*, and extracting therefrom the relevant passage, as to determination of value u/s 4 of the Act, this Court held that the law as laid down by the Supreme Court clearly showed that only the value of the excisable product itself is to be taken into consideration at the point where the manufacture of the excisable product is complete.

52. It requires to be noticed that the Supreme Court in *Voltas* case had observed that Section 4 made it clear that excise duty was levied only on the amount representing the manufacturing cost plus the manufacturing profit and excluded post-manufacturing operations. It was also observed that the price had to be fixed for delivery at the factory gate "thereby eliminating freight, octroi and other charges involved in the transport of the articles....

53. In *Atic Industries v. Asst. Collector, Central Excise* AIR [1971] S.C, Bhagwati J., who spoke for the Court, after referring to the *Voltas* case said (p. 967):

...The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation.

54 Now, in *Union v. Mansingka Industries* this High Court observed (p. 667):

...it can never be stated with any show of reason that manufacture of hydrogenated vegetable oil is incomplete until it is packed in tin-containers. It cannot be forgotten that hydrogenated vegetable oil is also sold and transported in bulk containers, in tankers and it may be indeed sold by a manufacturer to a wholesale buyer who brings his own container for receiving the product.

This Court also referred to the fact that Item 13 of the First Schedule to the Act dealt with vegetable products and did not mention any packaging at all.

55. Now, in the petition before us the relevant Item of the First Schedule is Item 23A, which refers to glass and glassware and mentions no packaging at all. It is difficult to appreciate how it can possibly be contended that the manufacture of glass and glassware is not complete before the necessity for packing it can arise, if the glass and glassware is required to be transported and delivered. It has been noticed that the excisable goods produced by the petitioners are items such as glass tumblers, jars, bottles and glass bricks, The manufacture of these articles is complete as soon as the glass and glassware which may be produced by the blow-process or mould-process is cooled and, if necessary, polished. Packing such goods can never be considered to be an element of manufacture.

56. The expression "manufacture" as used in Section 2(f) is to include any process which is incidental or ancillary to the completion of a manufactured product. There can be no doubt that before any process can be regarded as incidental or ancillary to the completion of glass and glassware it must have some direct relation to the manufacture of that product. To put it in plain language, something must happen to the product itself.

57. In *Union of India (UOI) Vs. Delhi Cloth and General Mills*, the Supreme Court quoted with approval a passage from the Permanent Edition of Words and Phrases, Vol. 26, to show that manufacture implied a change, although every change was not manufacture. But something more was necessary and there had to be some transformation or the bringing into effect a new and different article.

58. It is substantially clear that in order to become a process incidental or ancillary to the completion of manufacture of glass and glassware, what is done thereby must have its impact on the excisable product itself.

59. Our attention was invited to a judgment of the Gujarat High Court in *Extrusion Processes Ltd. v. N.B. Jadhav* [1964] Tax. L.R. 1655 In that case the goods concerned were extruded pipes and tubes, and the question that arose was whether by printing and lacquering the plain extruded pipe of aluminium did the petitioners there apply any further process¹ of extrusion to them and did they thereby manufacture tubes. The Gujarat High Court held that printing and

lacquering could not be said to be incidental or ancillary to the completion of the manufacture of the product because such printing and lacquering had no relation to the completion of manufacture of tubes. Extruded tubes remained extruded tubes whether they were printed or lacquered or not. The Gujarat High Court secondly observed that the process of printing and lacquering was independent of the manufacture of aluminium tubes. It was applied for the purpose of enhancing the saleability and not for the completion of the manufacture and the Court concluded that if printed or lacquered tubes were subject to Central Excise duty after duty on plain extruded tubes had been paid, it would not be duty on the manufacture of aluminium tubes but it would be a duty on the sale of that commodity.

60. There can be no doubt that packing a glass tumbler or a glass globe can never change its nature as a glass tumbler or a glass globe.

61. Even otherwise, in the present petition the packing of goods was clearly done at the instance of the buyer who determined the nature of the packing and paid for it accordingly. This packing is clearly done as a matter of convenience and to facilitate the delivery and removal of a product from the factory gate. As was observed by this Court in *Union v. "Mansingka Industries* in relation to vegetable oil, the glass and glassware manufactured by the petitioners in this petition could just as well be taken delivery of in the buyer's own packing materials, like baskets or boxes or even vehicles. There is nothing to suggest why the glass and glassware fully manufactured by the petitioners cannot be taken away by a prospective buyer in his own truck or transport vehicle, which may be layered with materials, such as, hay or grass to protect it from breakage during transport.

62. In my view, the method or manner of marketing or delivery or transporting excisable goods which have been fully manufactured can never by itself determine the assessable value of such excisable goods u/s 4 of the Act. Once it can be said that the manufacture of the excisable goods is complete, before they are packed, then that would be the end of the matter.

63. It may perhaps be possible to argue that in the case of a particular kind of excisable goods and relevant attendant circumstances the packing, or the necessity of a special container in relation to that product, is such that the excisable goods do not become excisable goods as such without such packing or placing them in a special container. That would depend on the nature of the goods and construction of the relevant entry in the First Schedule.

64. But in the case of glass and glassware and on a reading of Item 23A of the First Schedule and other relevant provisions of the Act it is clear that the cost of packing of glassware for the purpose of its protection and transport in whatever manner can never be included in its value in the absence of any specific statutory provisions in that behalf.

65. There is, therefore, no substance in the contention of the respondents that packing of glass and glassware is a process incidental or ancillary to the

completion of its manufacture.

66. It must also be held that the cost of packing and packing materials cannot be included in the value of the excisable goods for the purpose of levy and collection of excise duty. In this view of the matter, the impugned decisions of the Assistant Collector dated January 6, 1973 and January 19, 1973 are liable to be quashed.

67. Mr. Andhyarujina has sought to refer to certain decisions of the Privy Council in an effort to show that the whole matter has to be looked into in a business sense and one must consider the manner in which the article is sold in the market, But in view of the law as laid down by the Supreme Court and the decision of this High Court in Union v. Mansingka Industries it is not necessary to discuss them.

68. I now come to the question whether the petitioners have established that the moneys paid by them in excess of what could be legitimately levied as excise duty on glass and glassware for the period from 1962-1972 were paid under a mistake of law in terms of Section 72 of the Contract Act and are, therefore, repayable to them by the respondents.

69. Now, there are two aspects of this question. The first is whether it can be said that the mistake of law has been established. The second aspect is as to when it can be said that the mistake of law was discovered so that this Court may determine whether the claim for refund is within time and ought to be otherwise allowed in this petition.

70. As to the first aspect, I find that although the petitioners have made the necessary averments from which the mistake of law can be said to be established, the averments by themselves appear to be somewhat sketchy.

71. The petitioners have said that they came to know about the decision of the Mysore High Court in the case of Messrs. Alembic Glass Industries Ltd. in which the Mysore High Court had held that the value of the packing materials or packing charges was not chargeable to excise duty. The petitioners, however, do not say when they came to know about this decision, which, the record shows, is dated September 10, 1971. It would have been proper if the petitioners had in terms made an averment to show that they came to know about this decision on such and such date and that they forthwith took action for ultimate redress of their grievance either by the Excise authorities themselves or by the Court. But the petitioners do state that they got examined the authority of the respondents to levy the excise duty on such packing charges and that they were advised that such a levy was without the authority of law. It appears that it was only in December 1972 that the petitioners proceeded in the matter by making a representation to the Excise authorities that revised price lists should be approved in accordance with law by excluding packing charges.

72. The petitioners have clearly stated in their petition that the authorities have collected "excise duty" on packing charges and that the petitioners have paid the

same under a common mistake since the inception, meaning thereby from 1962, because exh. "C", which is a statement showing the excess illegal recoveries on such packing charges is for the period from 1962 to 1972.

73. The reply of the respondents, as set out in the affidavit in reply dated October 10, 1974 filed by Shri D.D. Barve, Assistant Collector of Central Excise, is laconic. All that is stated therein is that:

I deny the allegations that the petitioners paid such excise duty under a common mistake. I deny the correctness of the particulars in Annexure "C" to the petition.

This is followed by an allegation that the petitioners' contention "are clearly an after-thought apparently based upon the success of another glass factory in a writ petition in the Mysore High Court which was decided on the facts of that particular case and has no application to all cases of sale of glass products by factories."

74. It could well be said that the pleadings are somewhat unsatisfactory and that they leave something to be desired. But can it be said that even on these pleadings a mistake of law on the part of the petitioners is not established. The mistake clearly lies in paying moneys thinking that the moneys so paid were due, when in fact they were not due. There is no dispute that, according to the price lists approved by the respondents which included the cost of packaging, the petitioners have from 1962 to 1972 paid whatever moneys were demanded from them by the Excise authorities. Now, there is no doubt whatsoever that part of the moneys so paid represent legitimate excise duty on the value of the excisable goods, viz. glass and glassware. But the amounts so paid also include moneys purporting to be "Excise duty" on the costs of packing and packing materials, the levy and collection of which is now stated and held to be without the authority of the law.

75. As to when the petitioners became aware of the mistake, it is significant that there is no suggestion in the affidavit in reply of the respondents that the petitioners were aware, on a date earlier than the judgment of the Mysore High Court (which is dated September 10, 1971), that they were paying moneys to the Excise authorities in respect of the packing charges and packing materials, which they were not obliged to do under the law. Indeed, without the finding of a superior Court on this point of law, how could any person discover a mistake of law of this nature.

76. There is also no suggestion that due diligence has not been exercised by the petitioners in discovering the mistake of law earlier and which is now being set out as the ground for recovery or refunds of the relevant amounts u/s 72 of the Contract Act.

77. The very fact that the petitioners have from 1962 paid whatever was demanded from them by the Excise authorities without any demur shows that the moneys were paid under a mistake of law. The petitioners are laymen and

their mistake lay in thinking that they were bound to pay what was demanded. As Sir Leslie Scarman said in the 26th series of Hamlyn Lectures delivered by him in December 1974 "The law is very much the esoteric business of lawyers. It is neither easily accessible nor easy to understand when found."

78. There is also no suggestion in the affidavit in reply that the petitioners knew that they were paying moneys which were not due but did not bother about that aspect because they were recovering those moneys from their customers. It has been suggested that there should have been specific averments that the petitioners did not know from the very start that they were making payments which were not due. I do not see the need for such a statement.

79 It is then suggested that in order to come within the period of limitation, the petitioners must show that the mistake of law was such that it could not be discovered with reasonable diligence till judgment of the Mysore High Court was pronounced. I shall deal with this aspect of limitation a little later, but I would like to state at this juncture that the facts of the case themselves disclose that right from 1962 till 1972 the petitioners have been paying the moneys in excess of what could be claimed from them as legitimate and valid excise duty on the excisable goods manufactured by the petitioners.

80. A question may be asked as to what is a mistake and in particular what is a mistake of law. It is stated in *Corpus Juris Secundum*, vol. 58, at page 830, that:

In a legal sense, it is the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done;...

And again that (p. 830):

The operation of a mistake is ordinarily, although not always, affirmative, the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will. It consists of unconsciousness, ignorance, or a forgetfulness or it may be a belief of the existence of some fact, past or present, which did not or does not now exist, and on which the party acted.

According to *Corpus Juris Secundum* "The essential prerequisite of mistake is ignorance...."

81. The Supreme Court in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , dealt with the question of mistake of law and came to the conclusion that in so far as Section 72 of the Contract Act was concerned, there was no warrant for ascribing any limited meaning to the word "mistake". This is what the Supreme Court observed (p. 141):

We are of opinion that this interpretation put by their Lordships of the Privy Council on Section 72 is correct. There is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict

between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same.

82. Now, it is interesting to notice that the interpretation by the Privy Council, which the Supreme Court approved in *Kanhaiya Lal's* case is to be found in AIR 1949 297 (Privy Council)

83. Their Lordships of the Privy Council in that case were dealing with a contract and they found that on a proper construction thereof the royalty thereunder was in the circumstances payable at the rate of 3 annas, whereas it had been by mistake paid at the rate of 5 annas. Their Lordships came to the conclusion that where according to the terms of the mining lease after a certain date the lessee was only bound to pay royalties at lower rate but continued to pay them at a higher rate and so overpaid the lessor (and it was clear that there was no intention to make a present to the lessor of the money which was not due and the money was paid under the mistaken belief that it was legally due) then the case fell within Section 72 of the Contract Act.

84. It is interesting to notice how their Lordships dealt with the question as to why the lessee and his agents made the overpayments. This is what they said (p. 302):

In this case there was not sufficient evidence to show why the lessee and his agents made the overpayments. They may have acted on inadequate information, they may have taken a wrong view of their legal rights or they may have continued paying at the old rates without giving any thought to the matter. But it is clear that there was no intention, to make a present to the lessor of money which was not due. The money was paid under the belief that it was legally due. This belief was mistaken. In their Lordships' view that is sufficient to bring the case within Section 72....

85. Now, in my opinion, this appears to be precisely the case in the petition before us. The petitioners were manufacturing glass and glassware and were duty bound to pay excise duty which could be validly claimed under Item 23A of the First Schedule of the Act. They were asked by the Excise authorities to pay moneys which included a portion which was unauthorised. The petitioners thought that they were bound to pay those moneys and they accordingly did so without demur. This state of affairs continued till the judgment of the Mysore High Court was decided in September 1971, when the petitioners realised that they had been paying moneys to the Excise authorities which were not due under the mistaken belief that they were due. I suppose it is normal to expect business people to pay legal dues without demur if they think or are under the belief,

albeit mistaken, that the moneys are so due.

86. In these circumstances it is difficult to accept the argument of Mr. Andhyarujina that the petitioners have not established a mistake of law. Indeed, the mistake was common to both the parties because the Excise authorities could only demand what they bona fide believed was due as excise duty.

87. As a matter of fact, the contention of Mr. Andhyarujina is really different because what he says is that there is no payment under a mistake of law as such, but there is a wrong or erroneous levy of tax so that the moneys paid even if strictly not authorised by law were paid not under a mistake of law but on the basis of an assessment, which may be said to be erroneous. I am afraid, I find this argument unacceptable. The payments made by the petitioners, which are now found to be without the authority of law appear to have been clearly made because the petitioners as well as the respondents themselves thought that they were due.

88. When the State seeks to collect moneys in the guise of excise duty, although such levy and collection is without the authority of law, then what is thought to be collected is not what can be described as "excise duty under the Act" but an impost or moneys which are not authorised by law and which are in any event outside the Act.

89. To the extent that the Excise authorities sought to add the cost or value of packing and packing materials or any expense in relation to post-manufacture operations (surely, packing is a post-manufacture operation!) and collect excise duty on such value, then the so called excise duty thereon, if collected represents collection of moneys de hors the Act and without the authority of law. It cannot be said with any logic that such moneys are collected because they were authorised by an assessment order which assessment order at the worst may be said to be erroneous.

90. It is necessary to clear the air of a misconception which seems to persist that the amounts in excess of what could be legitimately recovered as excise duty were or could also be labelled as "excise duty". In my opinion, such amounts are not excise duties at all. They are imposts without the backing or authority of law and, therefore, completely illegal.

91. An attempt has been made to suggest that these moneys were collected as the result of inadvertance, error or misconstruction, but within the Act, so as to make the assessments merely erroneous but within jurisdiction.

92. Now, it is perhaps possible to contend if the facts so warrant that excise duty can be collected in excess but within the Act. For instance, glass bulbs may be charged as if they were globes or there may be error as to quality or even an arithmetical error. But to charge excise duties on goods which are not excisable goods can never be said to be an error within jurisdiction.

93. It is not necessary to refer to or discuss the several authorities on the

question of what can be said to be within jurisdiction and what was without jurisdiction, except to recall the words of Mathew J. in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, that "the word "jurisdiction" is a verbal cast of many colours", and those of Lord Pearce in *Anisminic v. Foreign Comp. Comm.* [1969] 2 A.C. 147 quoted in the Supreme Court case (p. 2385):

Lack of jurisdiction may arise in various ways...the tribunal may at the end make an order that it has no jurisdiction to make.... Any of these "things would cause its purported decision to be a nullity.

94. In my view, both the assessment and the collection of moneys to that extent were without jurisdiction.

95. Reference may now be made to a decision of the Supreme Court in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, . In that case moneys were sought to be recovered on the basis of an assessment under the C.P. Municipalities Act, although such recovery of tax was in excess of constitutional limits prescribed by Article 276. The appellants filed a suit and the contention of the respondents therein was that the suit was barred by Section 48 of that Act. It was held by the majority of the Court that a suit for refund of a tax in excess of constitutional limits cannot be held to be in respect of the matter purported to be done under the Act.

96. The Supreme Court said (p. 259):

...It is true that the Committee had jurisdiction to recover an amount up to the constitutional limit. But it cannot fairly be contended on its behalf that merely because of this, that the recovery by it of an amount in excess of the constitutional limit was only irregular or at the worst illegal. Where power exists to assess and recover a tax up to a particular limit and the assessment or recovery of anything above that amount is prohibited the assessment or recovery of an amount in excess is wholly without jurisdiction and nothing else. To such a case the Statute under which action was purported to be taken can afford no protection. Indeed, to the extent that it affords protection, it would be bad.

97. These observations of the Supreme Court furnish authority for the proposition that if a levy or collection is unsupported by law, as in the petition before us in so far as no excise duty can be levied on packing charges, then nothing in the Central Excises and Salt Act of 1944 can afford any protection to such illegal levy. If there was any assessment made under the Act, then such an assessment would be wholly without jurisdiction.

98. It requires to be noticed that the judgment of the Supreme Court in *B. K. Bhandar's* case was referred to by the Supreme Court in *Indore Municipality v. Niyamatulla* AIR [1971] S.C. 97 , and the same reasoning, viz. that where power exists to assess or recover a tax to a particular limit, the collection or recovery in excess to that extent is wholly without jurisdiction was applied to the facts of that case.

99. In the State of Kerala v. Aluminium, Industries Ltd. (1965) 16 S.T.C. 689 , which was also a case for refund of "sales tax" paid under a mistake of law, the Supreme Court followed its previous decisions in State of Madhya Pradesh Vs. Bhailal Bhai and Others, , and held that the mistake of law common to both the parties was that, as the respondents did not raise the question relating to Article 286 of the Constitution, the Sales Tax Officer had no occasion to consider it. It was, therefore, held that the tax had been levied by mistake of law and that in such a case it was ordinarily the duty of the State to refund the tax.

100. Now, I may mention that the Supreme Court, while so holding, observed that such a refund would be "subject to any provision in the law relating" to sales tax". It has been suggested to us that this showed that no refund would be made if there was a provision in the Sales Tax law barring such a refund.

101. In my opinion, the observations of the Supreme Court in B.K. Bhandar's case, which have been referred to above, clearly show that when moneys have been collected in excess of what is legally recoverable, the statute under which action was purported to be taken can never afford any protection and that indeed to the extent that such a statute seeks to afford protection, it would be bad.

102. It is significant that in the case just cited, i.e. State of Kerala v. Aluminium Industries Ltd., there were no proceedings as such for setting aside the assessment and the protest was as to the mistake of law stating that a request for refund had been made and had been denied.

103. Mr. Andhyarujina then cited a decision of the Supreme Court in Kamala Mills Ltd. Vs. State of Bombay, . In that case, which arose under the Bombay Sales Tax Act, the question before the Court was whether the wide words of Section 20 of the Act (Bombay Sales Tax Act of 1946) created a bar against the institution of a suit claiming refund of the amount of tax recovered from the plaintiff for certain sale transactions in question.

104. The question that arose was whether a particular transaction was taxable. The contention of the appellants was that the transactions were outside sales and that they did not and could not fall under the charging section because of Article 286 of the Constitution and that the parties had committed a mistake of fact as well as law in dealing with the question.

105. Now, in that case the Supreme Court was really concerned only with the aspect of the bar to a suit created by Section 20 of the Bombay Sales Tax Act because the wide words used there were "no assessment order made shall be called in question." The Court observed (p. 1950):

...For the purpose of construing Section 20, we are not prepared to hold that an assessment based on an erroneous finding about the character of the transaction, is an assessment made without jurisdiction and as such, is outside the purview of Section 20 of the Act. We would like to repeat that it is only this narrow question we are considering in the present appeal.

(Italics supplied)

Again (p. 1950):

Reverting then to Section 20, it seems to us plain that (the words used in this Section are so wide that even erroneous orders of assessment made would be entitled to claim its protection against the institution of a civil suit.

106. It is significant, however, that the Supreme Court after making the above observations went on to say that if the appellant therein had moved the appropriate authority its claim may have been considered and that

Having failed to take recourse to the said remedy, it may have been open to the appellant to move the High Court under Article 226. Whether or not in such a case, the jurisdiction of the High Court could have been effectively invoked, is a matter on which we propose to express no opinion. (p. 1954)

107. This authority can, therefore, be of no assistance to the respondents here.

108. I shall now deal with the second aspect as to when it can be said that the petitioners discovered the mistake of law. It is true, that the petitioners have not mentioned any specific date on which they came to know about the mistake but the fact remains that the judgment of the Mysore High Court was delivered on September 10, 1971 and on that basis it may be safely assumed that the mistake of law became known a reasonable time thereafter. It may be recalled that it was only in December 1972 that the petitioners made a representation to the Excise authorities. But there is no difficulty in proceeding on the basis that the petitioners could be said to have discovered the mistake some time at the end of 1971.

109. The present petition has been filed on April 9, 1973 that is to say, shortly after the order of the Assistant Collector of Central Excise, Poona, refusing to revise the price lists by excluding packing charges. It may be, therefore, said that the petition has been filed within a year and a quarter from the date when the mistake came to be known to the petitioners.

110. Now, the period within which a petition under Article 226 may be entertained by a Court has been discussed by the Supreme Court in a number of matters. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , the Supreme Court referred to its earlier judgment in *Bhailal Bhai's* case, and held that the period of limitation prescribed for recovery of money paid under a mistake of law was three years from the date when the mistake was known and that period may ordinarily be taken to be the reasonable standard by which delay in seeking remedies under Article 226 of the Constitution can be measured.

111. In *State of Kerala v. Aluminium Industries Ltd.*, the Supreme Court followed the view taken in *Bhailal Bhai's* case on the question of period of limitation within which, a writ petition is required to be filed.

112. Now, as to when it can be said that a mistake of law becomes known to the

party the view of the Supreme Court has been that in so far as a particular law has been declared to be invalid then it is seldom that a person can even with a reasonable diligence discover a mistake of law before a judgment adjudging the invalidity of the law is pronounced.

113. It has been strenuously suggested by counsel for the respondents that it is only where the law is declared to be invalid that it can be said that the person discovered the mistake when the judgment of the Court was pronounced. But when it is a question of interpretation of law, then it cannot be said that a person must wait until a Court pronounces its interpretation of the relevant law.

114. But why should there be any difference between the two positions? A mistake of law arises when parties think that a particular payment is due under the law when in fact it is not so due. Such a mistake can equally arise when the law is held invalid or understood on its proper interpretation by a superior Court. Surely, then it is necessary that even the interpretation of a particular law must be made by a High Court or the Supreme Court before it can be reasonably said that the mistake of law has become apparent.

115. It is significant that in the *State of Kerala v. Aluminium Industries Ltd.*, the mistake of law was founded, not on a declaration as to the invalidity of the law but as to an assessment of sales tax which did not take into consideration the mandate of Article 286(1)(a) of the Constitution as interpreted by the Courts.

116. It is difficult to appreciate how the petitioners could have with any exercise of reasonable diligence come to know that the collection of moneys; purporting to be excise duty on packing charges was without the authority of law until a High Court or the Supreme Court has pronounced on that aspect of the law.

117. The facts of the petition before us show that it was only after the Mysore High Court had delivered its judgment in 1971 in a case covering the very Entry 23A, i.e. glass and glassware, with which the petitioners are concerned, that they could approach the authorities with a grievance that moneys already paid had been so paid under a mistake of law.

118. In *D. Cawasji & Co. v. State of Mysore*, Mathew J., who delivered the judgment of the Court, appreciated the difficult situation which arises because a suit or a writ petition may be filed within three years for refund of moneys paid under a mistake of law. But he also stated that as the law stood

...the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so.

119. In my view, the petitioners can be said to have discovered the mistake of law under which they are said to have paid moneys only after the judgment of

the Mysore High Court was pronounced and in these circumstances there is no reason why their claim for refund cannot be entertained in this writ petition. There is no substance in the contention of the respondents that there is inordinate delay.

120. Mr. Andhyarujina, the learned Counsel for the respondents, has contended that because of the existence of Rules 11 and 1736 of the Excise Rules, which limit refund of tax, the petitioners cannot claim refund of the moneys paid by them. Now, I have already dealt with this point and I have held that the moneys collected from the petitioners by the Excise authorities and paid by them were moneys which could not be described as excise duty as they were de hors the Act. The so called bar of Rule 11 read with Rule 173G cannot stand in the way of the petitioners.

121. Mr. Andhyarujina has also contended that the remedy under Article 226 of the Constitution is misconceived and that the petitioners should be relegated to a suit, particularly because there are questions of facts and triable, issues.

122. It requires to be noticed that in their affidavit in reply the respondents have stated that the petition involves disputed questions of fact. But it is nowhere stated, nor have we been told at the Bar, as to what are those disputed questions of fact and I must confess that I have been unable to find any such disputed questions of fact much less questions which cannot be determined in a writ petition. It has been faintly suggested by Mr. Andhyarujina that there is a triable issue. What is that triable issue has also not been spelled out. Mr. Andhyarujina seemed to suggest that as to whether there was a mistake of law and as to when such a mistake of law was discovered were disputed questions of fact and as such constituted triable issues. I have already dealt with this aspect of the matter and I find no substance in Mr. Andhyarujina's argument that there is a triable issue in the manner suggested by him.

123. It is to be remembered that it is not disputed that all through from 1962, moneys, which are now found on authority to be without any basis in law, were paid without demur. All that the respondents in their affidavit in reply could say was that they denied the allegation that the petitioners had paid excise duty under a common mistake of law. It is true that they have denied the correctness of the particulars in exh. "C" to the petition which set out the amounts paid by the petitioners in excess of what was due. But the denial is a bald one and even though the respondents are possessed of records, there is no suggestion that they have been referred to so that it could be pointed out as to how the respondents say that the particulars in annexure "C" are not correct. It cannot be contended with any show of reason that nothing was paid in excess. A mere bald denial cannot in my view change the situation or create what Mr. Andhyarujina describes as disputed questions of fact or triable issues, which cannot be dealt with in a writ petition.

124. It may be mentioned that it was suggested that the petitioners are not

entitled to any refund for the period prior to December 18, 1972, because no such demand was made to the Excise authorities. Now, if regard is had to the refusal of the Excise authorities even to permit revision of price lists after December 1972 then a demand for refund covering a period of ten years would at the best be an empty formality. In my view, nothing should turn on this aspect of the matter and it must be presumed on the facts of the case that a demand for refund would not have been complied with.

125. I now come to the last point and that is the contention of Mr. Andhyarujina that justice does not lie on the side of the petitioners and, therefore, this Court should not in its writ jurisdiction assist the petitioners.

126. Now, this argument is based on the fact that as the bills and invoices annexed to the petition show the petitioners have already charged and collected from their customers the amounts now held to have been illegally collected from the petitioners by the respondents. In other words, the argument is that the petitioners have really lost nothing and that what they are seeking (apart from the refund from December 18, 1972 which must be made) is to recover from the respondents moneys which the petitioners have not paid out of their own pocket. Mr. Andhyarujina says that even though, strictly speaking, the law may be on the petitioners' side, and no question of estoppel arises in this case, this Court must consider whether an appropriate order should issue requiring the respondents to refund to the petitioners moneys as set out in exh. "C" (collectively) to the petition.

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

128. Mr. Patel, the learned Counsel for the petitioners, strenuously urged that the Court should not import considerations of equity because his claim was based on a provision of law, viz. Section 72 of the Contract Act, which, in terms, provides for the petitioners' right to a refund. In fact, Section 72 uses the following words:

A person to whom money has been, paid, or anything delivered, by mistake or under coercion, must repay or return it.

Mr. Patel's argument is that this is what the law says and once the Court finds that the payments from 1962 to 1972 have been made under a mistake of law, then it must order the respondents to repay or return that money. To that extent perhaps Mr. Patel is right. He also seeks to rely on the observations of Mathew J. in *D. Cawasji & Co. v. State of Mysore* that there is no provision of law under which the Court could deny refund of tax even if the person who paid it had collected it from his own customers.

129. However, the question that really falls for consideration is somewhat

different and that is whether this Writ Court should at all exercise its jurisdiction and assist the petitioners by granting the relief by way of refund. It is well settled that under Article 226 of the Constitution of India, the Court is not bound to grant relief to the petitioners even if some statutory right has been established. In Bhailal Bhai's case there are clear observations of the Supreme Court that the Court is not bound to exercise its discretion directing repayment even if a legal right is established. This is what the Court said (p. 1011):

...Thus, where, as in these cases, a person comes to the Court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get It back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances.

130. In order to enable a petitioner to obtain relief from the Court in a writ petition, it is not sufficient that he should make out some statutory right or show that an order passed against him is illegal. He must, in addition, show that justice lies on his side and that by making an order which is sought from the Court, the Court will be doing justice.

131. In *State of Bombay v. Morarji* (1958) 61 Bom. L.R. 318, Chief Justice Chagla, who spoke for the Court, made the following observations (p. 332):

But it is not sufficient that a party should come to this Court and make out a case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, not only must he come with clean hands, not only must lie not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side.

132. In *Paygonda Surgonda Patil and Others Vs. Jingonda Surgonda Patil and Others*, , a division Bench of this Court observed that interference of the Court "under Article 226 of the Constitution was discretionary and it was the settled practice of this Court not to interfere under these provisions unless it is necessary to do so in the interests of justice.

133. In the petition before us, I am unable to persuade myself that justice lies on the side of the petitioners and that this Court will be doing justice in ordering the respondents to refund the amount of Rs. 12 lakhs to the petitioners when, to begin with, that money never came from the petitioners' pocket. It is true that the respondents may not have the legal right to retain that money, but in the circumstances of the case justice does not require that these moneys should be transferred from the respondents (who have no right to it) to the petitioners who also have no right to it.

134. In this view of the matter, the petitioners will not be entitled to the relief claimed by them for a refund of the moneys recovered from them during the period from 1962 to December 18, 1972.

135. It may be mentioned that Mr. Andhyarujina vehemently argued that a writ mandamus would not issue in a writ petition solely filed for the purpose of obtaining a refund. He cited a number of authorities but it is not necessary to refer to them since this particular relief of refund is being denied to the petitioners.

136. It is appropriate, however, to state that I would find it difficult to agree that this is a writ petition filed solely for the purpose of obtaining a refund of moneys paid under a mistake. On the facts of this petition that relief will clearly be a consequential relief after the Court has decided that the moneys were in fact paid under a mistake of law; collected without authority of law; and, therefore, liable to be refunded.

137. In the result, the petition is partly allowed and the rule made absolute in terms of prayers (a) and (b). In so far as the relief for refund of the amounts paid for the period from 1962 upto December 18, 1972 is concerned, the rule is discharged. There will be a direction that the respondents will refund to the petitioners the amounts levied and collected in relation to the cost of packing charges after the period from the December 18, 1972. The petitioners will be entitled to costs of this petition.

Per Deshpande, J.

138. I agree with all the main conclusions of my learned brother, namely that-(1) wholesale cash price of the excisable glass and glassware under item No. 23A of the First Schedule to the Central Excise Act of 1944 (hereinafter referred to as "the Act") cannot include the cost of the packages in which it is sold, and (2) that consequentially the order of the Assistant Collector incorporated in his letters dated January 6, 1973, and January 19, 1973, so including Such prices of packages is liable to be quashed and (3) that the excess duty collected from the petitioner from December 18, 1972, on the strength of such interpretation is liable to be refunded, and (4) that in spite of all this, the petitioners' claim for refund of such excess duties paid by them during the period from 1962 to December 18, 1972, is liable to be rejected. My learned brother has, however, found that (a) such impugned assessments were not under the Act, and (b) that the petitioner paid such excess duties under mistake of law and (c) that limitation under Rule 11 is not relevant and (d) that there are no laches and no unreasonable delay in claiming such refund in this writ petition. With respect, I do not find myself in agreement with any of these findings.

139. It is necessary to bear in mind the distinction between, the money paid under "a mistake of law"; and the money paid under a valid order of any Court, or any other competent statutory authority, including assessments, discovered to have been based, on any such mistake of law. Section 72 of the Contract Act

affords a remedy for refund in the former case, while it has no application whatsoever in the latter case; it being merely a question of getting such mistakes or errors corrected by recourse to the remedies provided in the statute within the period of limitation prescribed therefor. Such orders also are subject to writ jurisdiction under Article 226 of the Constitution, if invoked directly against the same within a reasonable time, if not within forty five days thereof. There is also a distinction between the orders, that are void and nullities for reasons known to law and the orders not so void. Section 72 of the Contract Act can be availed of in the former case in a civil suit based on the composite cause of action of (1) the order being void and (2) payment having been made under the mistake of law of its being valid. But the order falling under the latter category, even if discovered to be patently erroneous, would continue to be final and binding on the parties, if not corrected in spite of the remedies, and the question of claiming refund of money paid thereunder, on discovery of mistake of law in such an order, at any later stage, can never arise. "Mistake of law", can have no relevance whatsoever in such cases excepting for extension of limitation for availing of the remedies, provided the concerned statute itself admits of such extension. Rights and liabilities of the persons so bound by such final valid but erroneous orders get settled down, in terms thereof permanently and mere subsequent discovery of any errors of law therein cannot unsettle the same, even if recovery of money thereunder by the State turns out to be without any authority of law. The fact that State happens to be the beneficiary of such erroneous orders does not make any difference to this well settled legal position. Substantive rights thus get modified and settled once for all under such procedural laws which are as much based on public policy, and practical considerations of justice, as the substantive law itself. Such finality and immunity from further interference is part of the rule of the law. The contention, that, on subsequent discovery of lack of legal authority, such orders cease to be effective and final, in disregard of procedural limitations, because of being violative of fundamental rights has been firmly rejected by the Constitution Bench of the Supreme Court in *Ujjam Bai v. State of Uttar Pradesh* AIR [1962] S.C. 1621 . This view is affirmed by it in the case of *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, Such contention in this case is also liable to be rejected.

140. Mr. Patel, the learned advocate appearing for the petitioner, contends that refund of tax recovered without the authority of law can be claimed at any time within, at any rate, three years of discovery of the attendant "mistake of law" under which any citizen suffers such payment or recovery. He relied on the cases reported in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, and *State of Kerala v. Aluminium Industries Ltd.* (1965) 16 S.T.C. 689, in support of his contention. The length of the period after which refund claims were entertained and a few observations therein, if read in isolation, do give impression of such support. However, in the first two cases, the taxing provision was found to be ultra vires

rendering the assessment itself void and a nullity, and at once attracting Section 72 of the Contract Act read with Article 96 of the Limitation Act. Writ jurisdiction was allowed to be availed of instead of the remedy of suit, no triable issues being found therein. As indicated earlier, claims arising out of void assessments based on void provisions come under the above discussed first category and afford no legal comparison to the claim based on mere mistakes of law discovered later. One can ill afford to ignore the distinction between the two. Every mistake of law cannot be attributed to the invalidity of law itself. These cases can have no application to above discussed second category of cases, where as here, mistake of law results from mere misinterpretation of the entry 23A in the Schedule read with Section 4 of the Act.

141. The writ jurisdiction in the third case appears to have been invoked directly, and not so collaterally, against the impugned assessments itself within a reasonable time. The true import of this case is liable to be missed, if the short judgment in this third case delivered on April 21, 1965 is not read along with another important judgment of the same larger Constitution Bench in *Kamala Mills Ltd. Vs. State of Bombay*, delivered two days later on April 23, 1965, raising several cognate, if not identical points. Reference to the "remedy of suit" and "three years limitation" in this case appears to be casual; as an assessment in violation of Article 286(7)(a) based merely on misinterpretation cannot be considered to be outside the Act and the case, therefore, comes under the above discussed second category.

142. Can the claim for refund in this case be considered in the same manner as was done in the above *State of Kerala's* case? Petitioner in this case claims refund of duties paid during the period from 1962 to December, 1972, Duty was paid every time when the manufactured goods were taken out of the factory. The lis as to the liability to the duty and the quantum gets determined when price list submitted by the manufacturer is approved by the Assistant Collector. It was open to the petitioner to challenge the same and pay duty under protest and avail of the statutory remedies on every occasion of such payment. These assessments have now become final in terms of Section 35 of the Act and too stale to admit any judicial review under Article 226 of the Constitution. Secondly, the petitioner has not challenged such assessments directly nor has he enclosed the concerned papers of every such assessment for that purpose. The petitioner cannot be permitted to collaterally attack their validity merely as a consequential relief to his challenge to the said letters of the Assistant Collector dealing with post-December, 1972, assessments. Thirdly, the petitioner never claimed any refund of pre-December, 1972, duties by approaching any authority whatsoever till the claim is set up, for the first time, in this petition. It is admitted that no claim for such refund was made in its representation dated December 18, 1972. From mere refusal to revise the price list, I am not prepared to hold that such earlier demand for refunds would have been an empty formality. Approval of price list requires almost "on the spot" decision in the light of existing orders. Refund of ten years old duties, obviously requires more mature consideration at

higher levels, in view of the far higher stakes and questions of policies. Nor such an inference can be drawn by Government stand at the hearing once the claim is set up in the Court. Fourthly, such refund claims on account of mistakes or misconstruction are governed by Rule 11 of the Rules under the Act which, with Rule 171G, prescribes a period of limitation of one year. This application to the Court on April 9, 1973 is far beyond even this one year period from the date of discovery of the supposed mistake of law when Mysore High Court delivered its judgment on September 10, 1971. Excepting the bald plea of "mistake of law", no case for ignoring such a long delay is made out. It would not be sound exercise of discretion to entertain this ten year old stale claim of refund of pre-December, 1972, duties, in disregard to all the vital procedural rules, some at any rate of which appear to be fatal. Doctrine of laches in Courts of equity is not an arbitrary or merely a technical rule. It is based on the public policy of eliminating uncertainty and indefinite suspense as to the rights and liabilities.

143. Mr. Patel contends that assessments based on misinterpretation of the provisions also were void and outside the Act and, not Rule 11, but ratio of Bhailal's case should govern the approach. I have referred to Rule 11 merely to indicate a measure of reasonableness of the time. If all other such sufferers are required to claim refund within one year of the payment, there is no reason why the petitioner should not have approached at least this Court within one year of the discovery of the supposed mistake.

154. This apart, there are two difficulties¹ in the way. Firstly, it is not possible to hold that assessment turns out to be void and a nullity merely because competent officer commits errors of law or fact. The distinction between the errors of jurisdiction and errors in exercise of jurisdiction is well known and well settled. Errors in charging duty at higher rate on raw betel nuts mistaking the same for boiled ones AIR 1940 105 (Privy Council) charging Sambhar salt to terminal tax at higher rate under one item in the schedule mistaking the same to be common salt liable to higher duty under different item Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana,), subjecting certain type of Biris to Sales-tax mistaking as being not the kind of Biris exempted under the Act (Ujjam Bai v. State of Uttar Pradesh), have been considered to be errors in exercise of jurisdiction and assessments suffering from such errors of law are never considered to be outside the Act. In the case of Kamala Mills Ltd., sales tax officer had included the sales outside the State also in the turn over and assessed them to sales tax. The contention was that such assessment in violation of the constitutional prohibition of Article 286(7)(a) could not be said to be under the Act to oust the jurisdiction of civil Court, in terms of Section 2b of the Bombay Sales Tax Act. A larger Constitution Bench of the Supreme Court overruled this contention saying that an assessment under the Act does not necessarily mean the assessment properly or correctly made. According to the learned Judges the phraseology "assessment made" includes the one "purported to have been made under the Act", the finding as to the taxability of the

transaction not being in any manner a collateral to the main Us in such proceedings. There being no challenge to the assessment under Article 226 of the Constitution, the Supreme Court could have no occasion to express any opinion thereon. However, express exclusion of such opinion only indicates how such assessments under the Act can be open to question under Article 226, subject to other limitations, even though jurisdiction of civil Court with regard thereto stands ousted. Every error cannot amount to error of jurisdiction. It is difficult to distinguish this case of misinterpretation from these weighty authorities. The contention of Mr. Patel is thus unacceptable.

155. Mr. Patel strongly relied on cases of (1) B.K. Bhandar v. Dhamangaon Municipality AIR S.C. 249 : S.C. 69 Bom. L.R. 69 , (2) State of Kerala Vs. Ramaswami Iyer and Sons, and (3) Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, . In all these cases, provisions of law or notifications giving rise to assessment were found to be ultra vires. Such assessments, as indicated earlier, obviously cannot be said to be under the Act, once the provision is held to be rum est. Oases reported in Srinivasa v. State of A. P. AIR [1971] S.C. 97 and Union of India (UOI) Vs. Tarachand Gupta and Bros, stand on still different footing. Considerations weighing with the authorities therein were found to be de hors of the Act so as to attract the ratio of the Privy Council judgment in the Mask & Co."s case. However, distinction between the orders found to be outside the Act on account of there being a breach of any condition precedent or any fundamental procedural rule, adverted to in this Privy Council case and the orders passed under the void or non est law cannot be lightly ignored. In the former cases orders are essentially voidable. The condition precedents and the fundamental procedural rules being intended for the benefit of the parties alone, the description of their being outside the Act though invariably given to them, has a limited content and has more ah element of rhetoric in it. It is a moot point whether incidence of void orders follows in such cases for all purposes. In either case, cases of misinterpretation do not fall in either of these categories. Ratio of the case of Union of India (UOI) Vs. Tarachand Gupta and Bros, has no relevance. The dismissal of an employee of the Municipal Corporation by an incompetent officer was found not to have been under the Act. Cases cited by Mr. Patel thus are all irrelevant.

156. Secondly, I am also not satisfied that any case of the existence of mistake of law or, its subsequent discovery, is made out by the petitioner in this case. All that the petitioner has stated in paragraph 13 of the petition is that "The authorities collected excise on packing charges and the petitioner paid the same under a common mistake since the inception."" This bald statement may mean anything or nothing. Mistake of law, after all, is but a belief of any person that he was liable to pay the tax though, in fact, legally he was not. The circumstances generating any such belief are known to such person alone. It is difficult to judge the truth, relevancy, cogency or sufficiency thereof unless the same are spelt out clearly and opportunity to contest the same is given to the opponent. None can claim refund of the amount paid voluntarily as none can avoid contract entered

with free consent. However, existence of mistake, fraud, duress or misrepresentation vitiates contracts, as each one of these factors goes to affect freedom of consent. Existence of each such factor enables the victim to avoid the contract. Pleading of detailed account of such mistake is as much essential as of fraud and other factors affecting volition. It is difficult to hold firmly that payment could have been made only due to the mistake of law, though the argument is attractively plausible. Petitioner in this case was, after all not, paying the duties; from his own pocket, but was passing on the same to the State after collecting from his purchasers when deal was invariably struck before the goods were taken out of the factory. This is different from paying excess royalty out of one's pocket adverted to in AIR 1949 297 (Privy Council) It was necessary to set out some facts eliminating the possibility of such payment being the result of sheer indifference, disinterestedness or negligence. These factors cannot be equated with mistake of law.

157. The story of discovery of the mistake is equally vague and uncertain, No date of such discovery is mentioned, nor the facts which attracted his attention. There are no means of knowing how and when the judgment of Mysore High Court, judgments of the City Civil Court and appeal against them in the High Court of Gujarat and withdrawal thereof by Union of India, came to petitioners' notice. Mysore High Court judgment was delivered on September 10, 1971. Though dates of other judgments are not pleaded, Mr. Trivedi appearing for the petitioner informed at the Bar that City Civil Court judgments in two cases were delivered on August 12, 1969, and April 19, 1971, and appeal against them by the Union of India was withdrawn on November 14, 1973. This petition to this Court is filed on April 9, 1973, long after one year of the Mysore High Court judgment dated September 10, 1971 and long after three years after the first City Civil Court judgment in Gujarat on August 12, 1969. There is no Article in the Limitation Act of 1963 corresponding to Article 96 of the Act of 1908 under which limitation for such suit commenced from the date of discovery of mistake. Relevant Article 113 of the present Act is differently worded. But unlike under 1908 Act, reasonable diligence in the discovery of mistake is now a relevant factor u/s 17 of the new Act, The petition is drafted in total disregard of these requirements. It is difficult to find fault with the respondents for vague denials when the petitioner himself has not pleaded the necessary facts.

158. In cases of *Kanhaiya Lal*, *Bhailal Bhai* and *D. Cawasji & Co.* assessments were found to have become void on the relevant provision of law being held ,as ultra vires by the Court. In all such cases occasions of mistake of law, as their continuation and discovery are demonstrable without anything more. Ratio of these cases is inapplicable, when mistake of law is claimed to have been caused by mere misinterpretation. Its existence cannot be assumed merely for asking, in the same way as the existence of fraud, duress or misrepresentation, without more. It is difficult to see how any party to any transaction or order can be deprived of its benefits on such bald, empty and facile assertions. The fact that State happens to be such benefiting party cannot make difference to the

requirements of the law.

159. This apart, respondents deny (1) that the petitioners were under any mistake of law while paying duties, and (2) that it was discovered only after Court judgments, or (3) that the quantum of duties so paid is the same as claimed. Denials are, no doubt, vague and it is not knowing why quantum of duties alleged to have been paid could not have been verified by the respondent from its record. Even so, it cannot be held that the pleadings do not raise triable issues, decision on which is not possible with the available material.

160. Even if my views, on these points were to be different, I would have still agreed with my learned brother in refusing to exercise discretionary jurisdiction under Article 226 to refund pre-1972 duties claimed in this case. As held in *State of Bombay v. Morarji* (1958) 61 Bom. L.R. 318 and *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, it is not enough for relief under this Article to have merely a legal right, but it must also be shown that justice is on the side of the petitioner. Money paid and claimed by way of refund does not belong to the petitioner. He merely collected it from his purchasers and passed on to the State. In the ultimate analysis, unidentifiable consumer, and not the petitioner or his wholesale purchaser, has suffered. It is difficult to see any justice in this claim of the petitioner, when he has not suffered anything. On the other hand, inexpediency and injustice pinpointed by Mathew J. in *D. Cawasji's* case in directing the State to refund, after such lapse of time and spending on the causes earmarked, is certainly a relevant factor, militating against such refund, though this by itself is not conclusive. Mr. Patel is, no doubt, right in contending that the Supreme Court never considered any such circumstances by itself as being fatal to the claim for refund in the leading cases of *Kanhaiya Lal, Bhailal Bhai* and *D. Cawasji & Co*, True position is that no such point was specially raised and did not fall for consideration therein. *Kanhaiya Lal's* case related to the refund of the sales tax recovered by the State on forward transactions. It is doubtful if claimant sellers had in fact any occasion to collect such taxes from their purchasers, as actual delivery does not take place on forward transactions. In application of the equitable considerations, adverted to in this judgment is in quite a different context, one being about the plea of estoppel and other being about including the plea of mistake of law in Section 72 of the Contract Act. In *Bhailal Bhai's* case, the Supreme Court was not called upon to exercise discretion of its own. Discretion to refund the money was already exercised by the High Court on facts not clear in this judgment and orders were confirmed by it in the cases where claims had not become stale. In the case of *D. Cawasji*, the Supreme Court ultimately upheld the order of the High Court refusing to exercise its discretion on the ground of laches. Mr. Patel, no doubt, is justified in relying on few of the observations made in paragraphs 4 to 10. However, these still cannot be of any help to the petitioner. Having upheld the order of the ground of laches, Supreme Court was not required to consider the effect of these observations thereon.

161. Reliance on R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, is equally misplaced. State was found to have no legal authority to enforce the recovery and the Court had intervened to enforce the rule of law. The petitioner incidentally received the aid to retain illgotten money as happens in the present case in the case of the State. Reference to the two Gujarat High Court judgments relied on by Mr. Patel does not appear to me to be necessary in view of the above. In the cases of State of Kerala v. Aluminium Industries and D. Cawasji Supreme Court has expressly noted the absence of any provision dealing with refunds. Rule 11 in this case makes all the difference.

162. With these observations, I concur with the operative part of the order passed by my learned brother.

P.C.:

163. In the result, the petition is partly allowed and the rule made absolute in terms: of prayers (a) and (b). In so far as the relief for refund of the amounts paid for the period from 1962 upto December 18, 1972, is concerned, the rule is discharged. There will be a direction that the respondents will refund to the petitioners the amounts levied and collected in relation to the cost of packing charges after the period from December 18, 1972. The petitioners will be entitled to costs of this petition.