
(1986) 10 BOM CK 0012

In the Bombay High Court

Case No : Writ Petition No. 161 of 1985 and No. 55/86

Rapidur (India) Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-10-1986

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(2A)
Civil Procedure Code, 1908 (CPC) — Section 11
Goa Sales Tax Act, 1964 — Section 10(1)

Citation : (1987) 11 ECR 236 : (1985) 59 STC 165(1)

Hon'ble Judges : Mehta, J;G.F. Couto, J

Bench : Division Bench

Judgement

Dr. Couto, J.—Petitioners, a company registered under the Companies Act, 1956, challenge in these Writ Petitions the Assessment Orders passed by the second respondent, Sales Tax Officer, Panaji on 26th June, 1986 and 30th December, 1985 in respect of the assessment years ending on 31st December, 1981, 31st December, 1982, 31st December, 1983 and 31st December, 1984 as well as the Notice of Demand dated 30th December, 1985, and further seek the refund of the Central Sales Tax allegedly levied and collected from them without the authority of law in the said assessment years. The issues raised are basically the same and hence, this common judgment.

2. We may state the relevant and undisputed facts.

Section 10(1) of the Goa, Daman & Diu Sales Tax Act, 1964, for short the Goa Sales Tax Act, provides that no tax shall be payable under the said Act on the sale of the goods specified in the second schedule subject to the conditions and exceptions set out therein. In exercise of the powers u/s 10(2), the first respondent added Entry 68 to the Second Schedule by a Notification dated 2nd November, 1972 and goods manufactured, processed or assembled in the Union Territory of Goa, Daman and Diu at the point of sale by Small Scale Industries were totally exempted from the local sales tax for a period of five years from the

date of its registration with the Directorate of Industries, Government of Goa, Daman & Diu. Then, by another Notification dated 5th July, 1983, Entry 68 was again amended and goods manufactured, processed or assembled in the Union Territory of Goa, Daman & Diu by a Small Scale Industry set up on or after the date of coming into force of the said Notification which has not gone into production and has not effected any sales of such goods manufactured, processed or assembled by it on any day prior to the day of coming into force of the Notification, at the point of sale made by such Small Scale Industry were exempted for a period of 15 years" from the first sale of such goods effected by it, or on or after the date of its registration under the Goa Sales Tax Act. In its turn, Section 8(2A) of the Central Sales Tax Act, 1956 provides that no Central Sales Tax is payable under the said Act by a dealer or on his turnover if the turnover or any part thereof relates to the sale of any goods, the sale or as the case may be, the purchase which is under the sales tax law of the appropriate state exempt from tax generally.

3. The petitioners are a small scale Industry registered with the Directorate of Industries, Government of Goa, Daman & Diu, holding a certificate a registration dated 3rd March, 1978. They claimed exemption from payment of the Central Sales Tax under the provisions of section 8(2) but the Sales Tax Authorities rejected such claim, and therefore, the petitioners filed a writ Petition, being Writ Petition No. 21/84, in this Court challenging the Order of assessment dated 28th December, 1983 pertaining to the assessment year ending on 31st December, 1979. They sought the quashing of the said Order and also prayed for the refund of the amount levied and collected by way of Central Sales Tax for the assessment year 1979 as well as for the period commencing in 1978 and ending in 1983. At the time of the admission of the said Writ Petition, the prayer for refund was not, however, pressed and rule was issued, on 20th February, 1984 only as regards the reliefs claimed other than the said refund. The said Writ Petition came to be heard and disposed of on 13th December, 1984. The rule was made absolute, and accordingly, the Assessment Order dated 28th December, 1983 was quashed and it was ordered that petitioners be granted exemption from the Central Sales Tax Act on their Inter State sales u/s 8(2A).

4. The assessment proceedings for the assessment years ending on 31st December, 1981, 31st December, 1982, 31st December, 1983 and 31st December, 1984 had not been completed at the time the said Writ Petition No. 21/84 was decided, and therefore, the petitioners filed revised returns by their letter dated 21st December, 1984 and claimed refund of the Central Sales Tax levied and collected, contending that they were not liable to the Central Sales Tax in respect of the Inter State sales of their goods as had been held by the Division Bench in the said Writ Petition. Personal hearing was given to the petitioners and ultimately, by three separate Orders dated 26th June, 1985 pertaining to the assessment years ending respectively on 31st December, 1981, 31st December, 1982 and 31st December, 1983, the second respondent held that petitioners are exempted from payment of Central Sales Tax in respect of Inter

State Sales of their goods, but he rejected the prayer for refund on the grounds that the petitioners were not entitled to the claimed refund, on one hand, as they had given up such claim at the time of the admission of the writ petition No. 21/84 and on the other, because such refund would give cause to unjust enrichment. He however, did not pass an assessment order as regards the assessment year ending on 31st December, 1984.

5. Petitioners then filed in August, 1985 a Writ Petition, being the present Writ Petition No. 161/85 challenging the said three assessment Orders dated 26th June, 1985 and further prayed for a writ of mandamus directing the respondents to, inter alia, forthwith pass the assessment order pertaining to the year ending on 31st December, 1984 and to refund to them the Central Sales Tax levied and collected for the assessment years ending on 31st December, 1981, 31st December, 1982, 31st December, 1983 and 31st December 1984. Much after this Writ Petition was admitted i.e. on 30th December, 1985, the second respondent passed the assessment order pertaining to the year ending on 31st December, 1984 holding that though the petitioners are exempted from the Central Sales Tax in respect of the Inter State sales of their goods, they are not entitled to the refund of the tax which had been collected by them from the customers. Hence, he rejected the claim for refund and issued a demand notice requiring the petitioners to pay by way of Central Sales Tax an amount of Rs. 14,300/-. Petitioners therefore filed the Writ Petition No. 55/86 challenging the said Order of Assessment and notice of demand and prayed for a writ of mandamus directed the respondents to refund to them the Central Sales Tax levied and collected for the assessment year ending on 31st December, 1984.

6. Mr. Hidayatullah, the learned counsel appearing for the petitioners, has assailed the said three Orders of Assessment dated 26th June, 1985 on the grounds that (i) the respondent No. 2 has wrongly held that the petitioners had given up their claim for refund by not pressing such relief in the Writ Petition No. 21/84 at the time of the admission; and (ii) the defence based on the theory of unjust enrichment to refuse restitution of the illegally collected tax is not available in a case where tax is levied and collected without the authority of law. The assessment Order dated 30th December, 1985 and the Demand Notice of the same date were however challenged on the second ground only.

7. As regards the first grounds, the learned counsel submitted that the prayer for refund has not been pressed by the petitioners at the time of the admission of the Writ Petition No. 21/84, firstly because the assessment proceedings for the years in question had not been commenced nor had culminated in assessment orders. Secondly, in view of the decision of the Supreme Court in *Suganmal Vs. State of Madhya Pradesh and Others*, which was followed by a Single Judge of this Court in *Atul Products Ltd. Vs. Union of India and others*, , the petitioners realised that the prayer for refund was not available to them and could not be granted by the Court. Thirdly, the petitioners had not pressed the prayer in prayer (b)(iv) in the said Writ Petition as it was always open to an assessee to

invoke the machinery laid down for refund u/s 19 of the Goa Sales Tax Act, without therefore seeking a high prerogative writ. In the circumstances, he contended the second respondent could not have refused the refund of the Tax on the ground that prayer for refund has not been pressed by the petitioners in Writ Petition No. 21/84.

8. It was however contended by Mr. Nadkarni, the learned Government Advocate, that the refund sought by the petitioners is not available to them since they had given up the said claim at the time of the admission of the Writ Petition No. 21/84. He urged that the Order dated 20th February, 1984, though passed at the admission stage, is final in nature inasmuch as consequent upon the petitioners not pressing the said prayer (b)(iv), rule has been issued with exclusion of the said prayer. Thus, the principles of res judicate operate and it is not open to the petitioners to reagitate the issue and seek the same relief in a fresh proceeding. The principles of res judicate are indeed also applicable to a Writ Petition as held by the Supreme Court in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, . The learned counsel further contended that there was no need for the petitioners to file revised returns, but they so acted with a view to circumvent the effects of the order passed by the Division Bench on 20th February, 1984. This order nowhere discloses that the prayer (b) (iv) in the Writ Petition No. 21/84 has been given up or was not pressed only at that point of time and solely in the said Writ Petition. Further, it does not indicate that the right to claim the refund by other means had not been given up. Thus, as the rule was issued with exclusion of the prayer (b)(iv), the logical inference is that the said prayer was rejected and hence, the principles of res judicate as laid down in Section 11 of the C.P.C. were fully attracted, bearing specially in mind its Explanations 4 and 5.

9. We thus think it expedient and necessary to make a reference to the prayer (b) (iv) in the Writ Petition No. 21/84 for the proper understanding of the above rival contentions and therefore, we may point out that the said prayer was for a writ of mandamus or an appropriate writ, direction or order to direct the respondents, their officers, servants, agents, subordinates and their successors in office to refund to the petitioners a sum of Rs. 6,43,928.34 illegally levied and collected as and by way of Sales Tax for the year of assessment of 1979 and for the period 1978-1983 together with interest thereon at the rate of 18% per annum from the date of collection till the date of payment. It is thus clear from the above prayer that what the petitioners sought by the said prayer (b)(iv) in the Writ Petition No. 21/84 was a direction to the respondents to refund the amount collected as and by way of Central Sales Tax. Mr. Hidayatullah is, therefore, right in his submission that what the petitioners did not press was the prayer for a direction to refund the said amount and hence, by not pressing the said prayer, they had not given up their right to seek the refund by other means available to them under law. In *Suganmal's case (supra)*, the Supreme Court held that a writ of mandamus cannot be issued solely for refund of tax, this ruling having been followed by a Single Judge of this Court in *Atul Products Limited's case*. We are,

therefore, inclined to accept the submission of Mr. Hidayatullah that, at the time of the admission of the Writ Petition No. 21/84, the petitioners having realised in view of the said rulings that the prayer (b)(iv) could not be granted by the Court, did not press it. There is, in these circumstances, great force in the contention that petitioners, did not give up their claim for the refund of Central Sales Tax paid and merely abstained from getting such refund of means of an order or direction of this Court to the respondents to that effect. It is not thus possible to accept the view that by not pressing the said prayer (b)(iv), petitioners gave up forever their claim for that refund. It is no doubt true that, as a result, the rule was issued only in respect of other prayers, but the only consequence thereof was that the said prayer was no more alive and hence, the relief sought through it could not be granted in the Writ Petition No. 21/84, without however precluding the petitioners from obtaining the refund by other means available to them under law. Mr. Nadkarni was therefore wrong when he submitted that the petitioners were barred from filing a fresh writ petition to get the relief not pressed in the earlier Writ Petition No. 21/84 by the principles of res judicata. We are conscious that such principles are also applicable to writ petitions, as observed by the Supreme Court in Prabhat Mandal's case (above). But they are not at all attracted to the facts and the circumstances of the case before us, for on one hand, issues involved in the Writ Petition No. 21/84 and in the present Writ Petitions are not substantially the same, and on the other, in any event, the prayer (b)(iv) in Writ Petition No. 21/84 was not finally decided. As rightly pointed out by Mr. Hidayatullah, the matter directly and substantially in issue in Writ Petition No. 21/84 was the quashing of the assessment order pertaining the year 1979, the prayer for refund being merely incidental, whereas the main issue in the Writ Petitions at hand is the refund of the Central Sales Tax collected without the authority of law. Therefore, one of the basic conditions for res judicata is missing. That apart, since the prayer (b)(iv) in Writ Petition No. 21/84 was not pressed and therefore, rule was not issued as regards the said prayer, the Division Bench did not deal with and did not finally decide it. Another basic condition is not, thus, present. Mr. Nadkarni, no doubt, emphasised that since any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed a matter directly and substantially in issue in that suit, and that since any relief claimed in the plaint, which is not expressly granted by the decree, shall be deemed to have been refused, as provided by Explanations IV and V, respectively, it follows that the issue of refund was directly and substantially in issue in Writ Petition No. 21/84 and is deemed to have been refused. There is no force in these submissions, firstly, because it is incorrect to say in view of the rulings in Suganmal and in Atul Products Limited (both supra) that the matter of refund ought to have been raised in Writ Petition No. 21/84, and secondly, the relief of refund was not before the Division Bench as it was not pressed and rule was not issued in respect of it.

10. We are, therefore, of clever view that refund of the Central Sales Tax levied and collected for the assessment years 1981, 1982 and 1983 could not have

been refused to the petitioners on the ground that they had given up such claim by not pressing prayer (b)(vi) in the Writ Petition No. 21/84.

11. We now turn to the next contention of Mr. Hidayatullah according to which the defence based on the theory of unjust enrichment to refuse the restitution of illegally collected taxes is not available in a case where a tax is levied and collected without the authority of law. Elaborating, the learned counsel urged that the State cannot keep monies illegally collected by way of tax as this would be violative of the mandate in Article 265 of the Constitution and that, as such, it follows that refund of monies so collected to the person from whom they were collected is a necessary corollary. He submitted that this is the law laid down by the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, which has been consistently followed by this Court, inter alia, in *Maharashtra Vegetable Products Pvt. Ltd. and another v. Union of India and others* 1981 E.L.T. 468, *Wipro Products Ltd. and Another v. Union of India and Another* 1981 E.L.T. 531, *Leukoplast (India) Ltd. v. Union of India and Others* 1983 ELT 2106, *Golden Tobacco Company Ltd. v. Union of India and another*, 1983 E.L.T. 2238 and *I.T.C. Limited Vs. M.K. Chipkar and others*, and recently reiterated by the Supreme Court in *Commissioner of Sales Tax, U.P. v. Auriaya Chamber of Commerce, Allahabad* 1986 (25) E.L.T. 867. The second respondent, he submitted, was fully aware that the petitioners were exempted from the payment of the Central Sales Tax on their Inter State sales where he passed the impugned assessment orders, for the Division Bench of this Court (Rege and Kamat, JJ.) had expressly so held and relied in the judgment delivered in the Writ Petition No. 21/84 on 13th December, 1984. Therefore, according to the learned counsel, being obvious that the respondents had collected without the authority of law Central Sales Tax on the Inter State sale made by the petitioners during the relevant period covered by the impugned assessment orders, the theory of unjust enrichment does not constitute a valid defence to refuse restitution of the illegally collected tax.

12. Mr. Nadkarni however contended that the law laid down in *Cawasji's* case is no more good law in view of the decision of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and Another*, . He submitted that, in any event, the question of unjust enrichment was not in issue and was not falling for the determination of the Court. Hence, the observations made by the Supreme Court in *Cawasji's* case were not at all necessary for the decision and, according to the learned counsel, can, at the most, amount to obiter. In *Vyankatlal's* case, however, the question of unjust enrichment, being in issue, was directly dealt with, and therefore, the judgment of the Supreme Court in the latter case is a binding judgment on the subject which thus prevails over and makes the judgment in *Cawasji's* case not binding. Reliance was placed in this connection on the decision of the Supreme Court in *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, .

13. Elaborating the submissions, the learned counsel invited our attention in

particular to the paragraph 14 of the judgment in Vyankatlal's case, wherein it was observed that the principles laid down in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, , *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, and in *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, , though based on the specific provisions of the Acts applicable to those cases, can safely be applied also to other cases inasmuch as the amount was not paid by the respondents in the case from their coffers; and that there was no question of refunding the amount to the respondents who had not eventually paid the amount towards the fund, for doing so would virtually amount to allow the respondents unjust enrichment. Mr. Nadkarni then contended that, as their Lordships of the Supreme Court observed, the principles laid down in *Orient Paper Mills*, *Shiv Shanker Dal Mills*, *Kanhaiya Lal Makund Lal Saraf* and *Amar Nath Om Parkash* can be applied to other cases inasmuch as the moneys collected had not come from the coffers of the person claiming the refund thereof and therefore, refund is to be refused since it would amount to unjust enrichment, it is apparent and obvious that law has been laid down to the effect that taxes collected without authority of law are not to be returned to the persons from whom they were collected because the moneys had not come from their coffers and the refund, in such circumstances, would amount to unjust enrichment. He, therefore, submitted that the second respondent has rightly refused the refund of the amount of Central Sales Tax collected from the petitioners, as the said amount had not come from petitioners' coffers but from the consumers. The judgment in Vyankatlal's case lays the law on the question of non-restitution of tax illegally collected on basis of the theory of unjust enrichment and as such, Cawasji's case is no more good law. He further contended that, thus, the view taken by Jahagirdar, J. in an unreported judgment delivered on 21st July, 1986 in Writ Petition No. 1362/1980, *Parle Products Limited and another v. Union of India and another*, does not seem to be correct.

14. In our view there is no force in the submission of Mr. Nadkarni that the law laid down by the Supreme Court in Cawasji's case is not binding on us. Whether it was not necessary for the Supreme Court to deal with that question is entirely irrelevant. The Supreme Court has indeed dealt with it and has laid down the law on the subject. Thus, since even the obiter of the Supreme Court is binding on all Courts subordinate to it, we think it pertinent and necessary to advert to that ruling of the Supreme Court. Their Lordships, after having dealt with other aspects of the case, observed in paragraphs 8 and 9 that a suit will lie to recover moneys paid under a mistake of law and a writ petition for refund of tax within the period of limitation prescribed i.e. within 3 years of the knowledge of the mistake, would also lie; that for filing a writ petition for recovery of the money payable under a mistake of law, the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party; that if any writ petition is filed beyond three years

after that date, it will almost always be proper for the Court to consider that it is unreasonable to entertain that petition though even in cases where it is filed within three years, the Court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application; that the result of this view would be to enable a person to recover the amount paid as tax even after several years of the date of payment, which if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person within three years from the date of declaration of the invalidity of the law; and that that might both be inexpedient and unjust so far as the State is concerned. Then, in paragraph 10, Their Lordships proceeded as under :-

"A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case, if 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".

And lastly, in paragraph 12, it was observed that the task of writing legislation to protect the interest of the nation is committed to Parliament and the legislatures of the States and that reference has been made to this aspect only to alert their attention to the present state of law. In other words, the Supreme Court has made it clear that if tax is paid under a mistake of law or is collected without the authority of law, the same has in all cases to be refunded to the party who paid it, irrespective of the time when the tax was paid. The only limitation that Their Lordships had laid down is that the writ petition or suit for the purpose of refund should be filed within three years from the discovery or knowledge of the mistake of law. The law as above laid down by the Supreme Court in Cawasji's case has been consistently followed by this Court. It is not necessary for us to make a detailed reference to all such decisions of this High Court, for it suffices to advert to the judgment in Chipkar's case reported in 1985 (23) E.L.T. 334, passed on the difference of opinion between Lentin and Sawant, JJ. After reviewing in detail and minutely the relevant decisions of the Supreme Court and of this Court on the subject, Shah, J. observed in paragraph 39 that the question as to whether unjust enrichment is a valid defence to the restitution in respect of the excess duty collected by the department without the authority of law has been squarely answered by the Supreme Court in Cawasji's case, specially when the Supreme Court observed that there is no 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. This view was later on followed also by Jahagirdar, J. in Parle Products Limited (supra).

15. It may appear that a different view was taken in Vyankatlal's case as the Supreme Court has observed that the principles laid down in Orient Paper Mills, Shiv Shanker Dal Mills, Kanhaiya Lal Makund Lal Saraf and in Amar Nath Om Parkash, were also applicable to the particular case before Their Lordships, inasmuch as the respondents in that case had not paid the amount from their coffers. That was a case where respondents were the owners of Jeora Sugar Mills situated in the earlier State of Madhya Bharat. After the merger, the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 came into force. By a Notification dated 5th September, 1949, the Madhya Bharat Government, in exercise of the powers vested under the said Act, included "sugar" in the list of articles as an essential commodity and by another notification also dated 5th September, 1949, delegated its powers to issue orders under the said Act in favour of the Director, Civil Supplies, Madhya Bharat. In the exercise of the powers conferred on him under the Madhya Bharat Sugar Control Order, 1949 the Director of Civil Supplies issued a notification dated 14th January, 1950 fixing ex-factory price for different sugar factories. Under the said notification, all sugar factories in Madhya Bharat were to supply and despatch sugar of Grade E-27 at the rate of Rs. 32.40 per maund F.O.R. destination. The supply price was a little higher than the ex-factory price and the difference between the supply price and the ex-factory price was to be credited to Madhya Bharat Government Sugar Fund. The Jeora Sugar Mills did not deposit the said amount, but ultimately, after several demands, deposited, under protest, an amount of Rs. 50,000/- in the account of the Madhya Bharat Government Sugar Fund. Thereafter, a suit was filed by the said Jeora Sugar Mills for a relief of refund of the said amount. It was on these facts that the Supreme Court made the observations in paragraph 14 of Vyankatlal's case to the effect that there was no question of refunding the amount to the respondents who had not paid the amount towards the Fund as doing so would virtually amount to allow them unjust enrichment. This, according to Mr. Nadkarni, lays down the law on the subject, and as such, when the amount collected does not come from the coffers or from the pockets of the person who has made the payment, the theory of unjust enrichment comes into operation and no refund can be granted.

16. Mr. Hidayatullah, however, sought to distinguish the said decision of the Supreme Court. He urged that, unlike in Cawasji's case, the Supreme Court was dealing in Vyankatlal's case with a question of price fixation and not with a matter of taxation. Therefore, Cawasji's case is a direct judgment on the point, whereas the judgment in Vyankatlal's case touches the subject only in an indirect manner. A direct judgment is preferable to and prevails over an indirect judgment. Hence, the law laid down in Cawasji's case is to be followed. That apart, in Vyankatlal's case, Article 265 of the Constitution, though urged by the petitioners in that case, did not constitute the basis for the Supreme Court's decision. Then, in the various judgments referred to by Their Lordships of the Supreme Court in Vyankatlal's case, the Court has not been dealing with taxation but with matters related to fixation of prices, market fees and licence

fees, i.e., with subjects that would not be covered by Article 265 of the Constitution, with exception however of the cases of Orient Paper Mills Ltd. and Kanhaiya Lal Mukund Lal Saraf. But in those two latter cases there was an express provision of law stating that the Sales Tax illegally collected should be returned to the customers. Besides, in Vyankatlal's case, the Supreme Court was dealing with a judgment passed in a suit, and not with a writ petition. The principles applicable in a suit and a writ petition are different, the learned counsel contended, and the principles applicable in a writ petition as regards the question of unjust enrichment are laid down in Cawasji's case. Finally, the observations made in Vyankatlal's case are on the facts of that case and therefore, do not lay the law on the subject.

17. We already stated that that in Cawasji's case, the Supreme Court has in clear and unambiguous terms laid down that if a Tax is paid under a mistake of law or is collected without the authority of law, this amount of the Tax paid has to be refunded 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. Cawasji's case was one in respect of Taxation, more particularly, relating to refund of Tax, unlike Vyankatlal's case. In the latter case, in fact, the question was as regards the fixation of price and the observations made were strictly on the facts of that particular case, where the difference of price collected was meant for the Government Sugar Fund. It was in this context that the Supreme Court observed that, in the particular facts of that case where the said difference of price has been paid by the consumers and not by the Jaora Sugar Mills and where the said difference was to be credited to the Sugar Fund, the principles laid down in the cases referred to by Their Lordships were applicable. No general proposition of law was laid down and thus, in our view, the direct judgment in Cawasji's case was not disapproved. We may also point out that if other was the intention of the Supreme Court while deciding the Vyankatlal's case, a specific reference would have been made by Their Lordships to the Cawasji's case. Thus, in our opinion, Vyankatlal's case does not help the case of the respondents, as it does not replace the law laid down in Cawasji's case. We are supported in this by Jahagirdar, J. in Parle Products Limited case. In this view of the matter, the second respondent could not have refused the refund claimed by the petitioners on the ground that that would give cause to unjust enrichment.

18. We may finally deal with the last contention of Mr. Nadkarni. He urged that, in any event, the petitioners could not be granted refund for the whole period claimed by them, for at the most, they will be entitled to the refund of the Central Sales Tax paid for the three years immediately preceding the filing of the writ petition. The cause of action for claiming refund was indeed already available to the petitioners when the writ petition No. 21/84 was filed i.e., much before the judgment in that case was passed. There is no averment in both the petitions as to when the petitioners discovered the mistake of law, but it is apparent from the averment made in paragraph 10(c) in the Writ Petition No. 21/84 that the

petitioners were fully aware that they were entitled to exemption, at least, from the time the decision of the Himachal Pradesh High Court in Himachal Conductors Private Ltd. and another v. The Deputy Excise and Taxation Commissioner, Himachal Pradesh, Simla and another 42 S.T.C. 440 was published. The petitioners, in fact, alleged therein that the said judgment of the Himachal Pradesh High Court was binding on the second respondent as the same judgment was passed in a pari materia provision. The Writ Petition No. 161/85 was filed on 3rd August, 1985 and therefore, following the decision of the Supreme Court in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, , the claim for refund cannot go beyond 4th August, 1982. Mr. Hidayatullah, however, joined issue with Mr. Nadkarni and submitted that none of the petitions could conceivably be couched on the ground of mistake of law since what has been challenged was the assessment order itself. The Writ Petition No. 21/84 was not filed for getting the refund of the Sales Tax paid under a mistake of law but to challenge the validity of a wrong assessment order. In any event, the learned counsel contended, the law laid down in Vallabh Glass Works" case has not been followed by this Court in Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others, and in Parle Products Limited (supra). He further contended that the law as laid down in Cawasji's case had been interpreted in two earlier decisions of this Court and it has been held that, on the principles laid down in the said case by the Supreme Court, refund can be granted for more than three years from the date of filing of the writ petition, although the petition has to be filed within three years from the date on which the mistake of law is discovered. Mr. Hidayatullah then urged that even if there is a mistake in the interpretation of the said judgment of the Supreme Court, the decisions of this Court will be binding on this Court as has been held in Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others, .

19. In Vallabh Glass Works's case, Their Lordships of the Supreme Court held that the appellant in that case had filed a writ petition to the High Court on 28.9.1976 for directing repayment of the excess duty paid by them, but no relief could be granted in that petition in view of the provisions of Article 226 of the Constitution as it stood then and the petition had to be withdrawn; that even granting that on the date of making each payment of excise duty in excess of the proper duty payable under law, the appellants should be deemed to have discovered the mistake, only such excess payments made which would fall within the period of three years should have been ordered to be refunded. This was held by the Supreme Court on the facts of that particular case where it had not been possible to find with precision the date on which the appellants had discovered the mistake of law. The Supreme Court, therefore, observed that the appellants could have, with due diligence, discovered their mistake each time they made a payment of their debts. But, in the circumstances, since the writ petition was filed on 28.9.76, Their Lordships held that they were entitled to only a period of three years. This decision has been distinguished in Parle Products Limited's case. In fact, after having referred to the facts and the reasonings in

Vallabh Glass Works, Jahagirdar, J. observed that it is clear that the Supreme Court has proceeded on the basis that every time a payment was made by an assessee, the assessee could have asked for refund of the excess amount so paid, because every time the payment was made, it was made on the basis that the mistake of law was discovered at the time of payment. This view, according to the learned Judge, is not in any manner, opposed to Cawasji's case since that was exclusively dictated by the peculiar facts in Vallabh's case. Hence, he held that refund of tax paid under mistake of law should be ordered without the limitation imposed in Vallabh Glass Works' case. Similarly, in Shalimar Textiles (above), Pendse, J. construing the law laid down in Cawasji's case, held that the refund is to be ordered without any limitation, provided the writ petition is filed within three years of the discovery of the mistake of law. We too are of the same view. We may however observe that these are two decisions of this Court (Shalimar Textiles and Parle Products) interpreting Cawasji's case on the said point, and hence, we, are, in any case, bound by them as held in Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others, . It will also be useful to mention that we are fortified in the view we have taken by the decision of the Supreme Court in Auriaya Chamber of Commerce, Allahabad's case (supra) as Their Lordships observed that if a mistake either of law or of fact is established, the assessee is entitled to recover the money and the party receiving them is bound to return it, irrespective of any other consideration.

20. Mr. Hidayatullah has prayed in this case for interest at 21% from the date of the collection till the date of refund. Mr. Hidayatullah has emphasized the fact that although the judgment in Writ Petition No. 21/1984 was delivered by Rege & Kamat, JJ. on 13.12.1984 wherein it was made abundantly clear that the petitioners were not liable to pay the Inter State Tax, the Department persisted in refusing to refund the tax paid under a mistake of law. Mr. Hidayatullah therefore submitted that in view of this attitude on the part of the Department, we should accede to the prayer for interest as mentioned above.

21. We are unable to accept this submission of Mr. Hidayatullah although it is true that the petitioners have been kept away from their money since 13.12.1984. It may be mentioned that so far as Writ Petition No. 161/85 is concerned there was an interim order dated 20th February, 1984 which could have been interpreted as meaning that the petitioners had surrendered their claim to refund. That we have not accepted this interpretation is not relevant for the question of interest, but the Department could have taken the view that the petitioners had surrendered their claim for refund. In this view of the matter, we are unable to accede to the prayer for interest not only in Writ Petition No. 161/85 but also in Writ Petition No. 55/86. There will also be no order as to the costs of the writ petitions.

22. In the result these petitions succeed and consequently the rule is made absolute in terms of prayers (a) and (b) (i) and (ii) in Writ Petition No. 55/86, the refund being limited to the admitted sum of Rs. 3,13,173.50 only; and in terms

of prayer (b) (iv) and partly in terms of prayer (a) in Writ Petition No. 161/85 inasmuch as the refund prayed for was rejected. The Assessment Orders with such modifications are upheld.

23. Mr. Nadkarni made an oral application for leave to appeal to the Supreme Court in both Writ Petitions. Since we have relied on judgments of the Supreme Court, we do not think that this is a case where leave to appeal should be granted. In the circumstances, the application for leave is rejected.

24. Mr. Nadkarni has also prayed for stay of our Order for refund for a period of four weeks from today in both the matters. We see no reason for granting the stay and therefore reject the application for stay. The petitioners will be at liberty to withdraw the sum of Rs. 3,13,179.50 out of the amount of Rs. 3,27,473.41 deposited by the respondents in Writ Petition No. 55/86. The balance amount to be refunded to the respondents.