

**(1990) 02 KAR CK 0011**  
**In the Karnataka High Court**  
**Case No : W.A. No. 1156 of 1989**

Union of India

APPELLANT

Vs

Binny Limited

RESPONDENT

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**Date of Decision :** 27-02-1990

**Acts Referred:**

Central Excise Act, 1944 — Section 11 B, 11 B (4), 4  
Constitution of India, 1950 — Article 226  
Contract Act, 1872 — Section 72

**Citation :** (1990) 31 ECR 341 : (1990) 50 ELT 23 : (1990) ILR (Kar) 1297

**Hon'ble Judges :** S.R. Rajasekhara Murthy, J; M. Rama Jois, J

**Bench :** Division Bench

**Advocate :** Shri Shylendra Kumar, for the Appellant; Shri Kurian, for M/s King and Patridge, for the Respondent

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## Judgement

1. In this writ appeal, presented by Union of India, by its Secretary, Ministry of Finance and the Assistant Collector of Central Excise, III Division, Bangalore, the following two questions of law arise for consideration :

1. Whether the assistant Collector of Central Excise has the authority or duty to consider a claim for refund of any excess amount paid by way of excise duty by mistake of law which falls outside the purview of Section 11-B of the Central Excises and Salt Act, 1944 ?

2. Whether a person can claim refund of any excess amount paid as excise duty by mistake of law, from Union of India, even though such claim for refund does not fall within the scope of Section 11-B of the Central Excises and Salt Act, 1944 ?

2. The facts of the case, in brief, are these : During the period commencing from 1st September 1975 and ending on 30th September, 1983, the respondent - Binny Limited, paid excise duty on textile goods manufactured by it assessing the value of the manufactured goods also taking into account the freight and transit insurance charges paid by the assessee on those goods. The Supreme Court, in

the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, and 1983(14) ELT 1896, decided on 9-5-1983, held that the freight and transit insurance charges do not form part of the assessable value of the goods manufactured u/s 4 of the Central Excise and Salt Act, 1944 ("the Act" for short). The order of the Supreme Court was pronounced on 9-5-1983, but the reasons in support of the order were pronounced on 7-10-1983. Thereafter the assessee-respondent, realising that it had paid excise duty in excess of what it was required to pay in law, made two applications before the Assistant Collector of Central Excise, Bangalore. In one of the applications, the assessee claimed refund of the excess amount paid which fall within the period of six months from the date on which the duty was paid. In the second application, the assessee claimed refund for the rest of the period commencing from 1-9-1975 to 30-9-1983, which came to Rs. 14,37,600-72. In this representation, the respondent expressly stated that the above claim for refund was being made outside the purview of Section 11-B of the Act in the light of the ration of the judgment of the Supreme Court in the case of Bombay Tyre International Limited (supra).

3. As far as the first application is concerned, the Assistant Collector granted the refund. This refund was on the basis that the assessee had paid more amount of excise duty than payable in law and this had happened on account of the inclusion of the freight and transit insurance charges in the value of the goods for the purpose of computing excise duty. As regards the rest of the claim, which related to the period earlier to the date of six months on which the duty was paid, a notice was issued by the Assistant Collector to the respondent calling upon it to show cause as to why the refund application should not be rejected on the ground that it fell outside the purview of Section 11-B of the Act. The respondent appeared before the authority and submitted that as the higher rate of excise duty was paid by it on account of mistake of law and the correct position in law was declared by the Supreme Court on 7-10-1983, the assessee was entitled to claim the refund of the excess amount paid by it. The assessing authority, however, rejected the submission made by the respondent and held that in view of the judgment of the Supreme Court in Dhanyalakshmi Rice Mills and Others Vs. The Commissioner of Civil Supplies and Another, , he had no authority to make any refund outside the purview of Section 11-B of the Act. Aggrieved by the said order, the respondent presented the writ petition.

4. In the writ petition, the objection of the respondent was that there could be no refund by the Asst. Collector otherwise than by what is permitted u/s 11-B of the Act. This objection of the appellants was accepted by the learned Single Judge. He, however, proceeded to issue a direction to the appellants to dispose of the application presented by the respondent without reference to the period of limitation prescribed u/s 11-B of the Act. The relevant portion of the judgment of the learned Single reads :

"3. Of course the departmental authorities are bound by provisions of the Act

and the Rules in the matter of levy of assessment and refund as has been held by the Supreme Court in the case of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, . But it is made clear in that judgment that it is open to the parties to approach the Civil Court or avail of any remedy like a writ petition to obtain refund of tax paid under a mistake.

4. In the present case, it is the contention of the petitioner that it discovered the mistake of having paid the tax which it was not liable to pay, only when the Supreme Court Pronounced its judgment and thereafter when it went through the detailed judgment which was rendered on 7-10-1983. the petitioner preferred his claim on 9-4-1984. This writ petition was filed before this court on 21-11-1984 which is well within the period of three years prescribed under the Limitation Act which is the period prescribed for filing a suit for recovery of any money paid under a mistake. In the circumstances it is necessary to quash the order passed by the second respondent as per Annexure-F and direct the authorities to dispose of the application without reference to the period of limitation prescribed u/s 11B of the Central Excises and Salt Act, 1944, within a period of three months from today. Petition allowed and rule made absolute accordingly".

Aggrieved by the said order, the appellants have presented this appeal.

5. Sri Shylendrakumar, the learned standing counsel for the Central Government, submitted that the question of refund was covered by Section 11-B of the Act and therefore there can be no direction to the appellants to consider the application of the respondent for refund without reference to Section 11-B of the Act.

6. In our opinion, the contention urged by the appellants holds good in so far as the second appellant - the Assistant Collector, is concerned, for, his power to order refund is derived from and circumscribed by the provisions of Section 11-B of the Act. Relevant of the Section reads :

"11-B. CLAIM FOR REFUND OF DUTY :

(1) Any person claiming refund of any duty may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date.

XXX XXX XXX (4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained."

From the above provision, it is clear that an application for refund has to be made before the expiry of six months from the relevant date. The meaning of "relevant date" is given in Clause (B) of the sub-section (1) of Section 11-B of the Act. The relevant sub clause applicable to this case is sub-clause (f), according to which the relevant date is the date of payment of duty. Therefore, an application for refund before the Assistant Collector u/s 11-B of the Act could be made only within a period of six months from the date on which the duty was

paid. Sub-section (4) of Section 11-B of the Act makes it further clear that no claim for refund of duty of excise shall be entertained except as otherwise provided under the Act. Therefore, it is clear that no claim for refund of duty paid can lie before the Assistant Collector after the expiry of six months from the date on which the duty was paid and under the provision he has no authority to order refund on an application made after the expiry of six months on which the duty was paid. If that is the limited power conferred on the Assistant Collector, it follows that no direction can be issued to the Assistant Collector to consider an application for refund without reference to the period of limitation fixed u/s 11-B of the Act. This position of law is also clear from the decision of the Supreme Court in the *Burmah Construction Co. Vs. The State of Orissa and Others*, in which the Supreme Court was considering the question of refund u/s 14 of the Orissa General Sales Tax Act. The Supreme Court held that a claim for refund could be made before the Collector only in conformity with the provision of Section 14 thereof and therefore a person cannot, while claiming refund under that Section, ignore the restrictions regarding the time fixed in that Section and therefore there could be no direction to the Collector to make any refund, which he is not authorised to make u/s 14 of the Act. Similar was the view taken by the Supreme Court in the case of *Dhanyalakshmi Rice Mills and Others Vs. The Commissioner of Civil Supplies and Another*, on which the Assistant Collector relies. The same view is reiterated by the Supreme Court in the case of *Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar*,

7. For the aforesaid reasons, we answer the first question arising for consideration as follows :

"The Assistant Collector of Central Excise has no authority or duty to consider a claim for refund of any amount paid by way of excise duty by mistake of law, which falls outside the purview of Section 11-B of the Act."

In view of the above answer, the order of the learned Single Judge in so far it directed the second appellant to consider the application for refund without reference to Section 11-B of the Act, has got to be set aside.

8. As far as any application claiming refund to be made before the Union of India is concerned, in our opinion, such a demand stands entirely on a different footing. The right to claim refund of any tax or duty paid to or collected by the Government without authority of law flows from Article 265 of the Constitution of India read with Section 72 of the Indian Contract Act.

Article 265 of the Constitution of India reads :

"265 TAXES NOT TO BE IMPOSED SAVE BY AUTHORITY OF LAW :- No tax shall be levied or collected except by authority of law."

Section 72 of the Indian Contract Act, 1872 reads :

"72. LIABILITY OF PERSON TO WHOM MONEY IS PAID, OR THING DELIVERED, BY MISTAKE OR UNDER COERCION : A person to whom money has been paid, or

anything delivered, by mistake or under coercion, must repay or return it."

Article 265 expressly provides that realisation of tax or money by the State without authority of law is bad. Therefore, if a person realizes that any amount of tax or excise duty was collected or paid by him/by Government without authority of law and that he had made such payment under mistake of law, he can always make a demand before the Government for the refund of the amount on the basis of Section 72 of the Contract Act and if the Government fails to make such refund, it is open to the party either to file a civil suit or to approach this Court in a petition under Article 226 of the Constitution of India for recovering the amount so paid or collected....., whether on merits, the suit should be decreed or a writ petition should be allowed and a direction should be issued to the Government to refund the amount, depends upon the facts and circumstances of the case. Therefore, the respondent was entitled to make an application before the Government of India demanding or requesting for refund of the excise duty paid in excess of what it was required to pay in law, in the light of the judgment of the Supreme Court in the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, . In this behalf, it is apposite to refer to the observations of the Supreme Court in the case of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, The relevant portion of the judgment reads :

"... Realisation of tax or money without the authority of law is bad under Article 265 of the Constitution. Octroi cannot be levied or collected in respect of goods which are not used or consumed or sold within the municipal limits. So these amounts become collection without the authority of law. The respondent is a statutory authority in the present case. It has no right to retain the amount, so far and so much. These are refundable within the period of limitation. There is no question of limitation. There is no dispute as to the amount. There is no scope of any possible dispute on the plea of undue enrichment of the petitioners. We are therefore of the opinion that the Division Bench was in error in the view it took. Where there is no question of undue enrichment, in respect of money collected or retained, refund to which a citizen is entitled, must be made in a situation like this."

Therefore, the respondent was entitled to make an application before the Central Government seeking refund of excess of excise duty paid.

9. In the present case, the respondent instead of making an application for refund of excess amount paid earlier, before the Central Government, made the application before the Assistant Collector. It is also well settled that as far as the prayer for the issue of a writ of mandamus is concerned, it should always be preceded by a demand and refusal. As far as filing of suit is concerned, in view of Section 80 of the C.P.C. the party has to issue a statutory notice to the Government before filing the suit. The question of seeking a relief of refund in a suit or a writ petition would arise only when the application for refund is rejected by the Government or a notice u/s 80 C.P.C. is not complied with by the

Government. In the present case, obviously for this reason the learned Judge has only directed the authorities to consider the application of the respondent for refund. As we have held that such an application could be made by the respondent before the Government, the direction issued by the learned Single Judge as against the Central Government should be confirmed.

10. As pointed out by the learned counsel for the appellant, it is a fact that the application was not addressed to the Central Government. However, as the Central Government is made a party to the writ petition and a copy of the application produced as Annexure-A has been made available to the Union of India, there could hardly be any objection on the part of the Union of India to consider the said application.

11. For the aforesaid reasons, we answer the second question as follows :

"A person can claim refund of any excess amount paid as excise duty by mistake of law, from Union of India, even though such claim does not fall within Section 11-B of the Act."

12. Accordingly, we make the following order :

(i) The writ appeal is partly allowed.

(ii) The order of the learned Single Judge in so far as there was a direction to the second appellants to consider the application of the petitioner for refund without reference to the period of limitation prescribed u/s 14-B of the Act is concerned, it is set aside.

(iii) The direction issued in the writ petition to the first appellant-Union of India, to dispose of the application for refund made by the respondent without reference to the period of limitation prescribed u/s 11-B of the Act, is confirmed.

(iv) The Government of India is directed to consider and dispose of the said application within a period of four months from today having due regard to Article 265 of the Constitution of India read with Section 72 of the Indian Contract Act, 1872.