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**(1991) 08 AP CK 0022**

**In the Andhra Pradesh High Court**

**Case No : Writ Petition No. 3503 of 1985**

Vst Industries Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

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**Date of Decision :** 19-08-1991

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 36, 4, 4(2)

**Citation :** (1992) 57 ELT 553

**Hon'ble Judges :** S.S. Mohammed Quadri, J;A. Lakshmana Rao, J

**Bench :** Division Bench

**Advocate :** K. Srinivasa Murthy, for the Appellant; I. Koti Reddy, S.C. for the Central Govt., for the Respondent

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## **Judgement**

Syed Shah Mohammed Quadri, J.—The petitioners challenge the validity of the order dated 9-12-1975 in Appeal No. 2115/75 passed by the Appellate Collector of Central Excise, Madras (the 2nd respondent) by praying for a writ of Certiorari to call for the records relating to the said order and to quash the same and for a direction to the respondents to refund the excess amount collected by way of excise duty in respect of equalised freight for the period 1-10-1972 to 30-9-1973.

2. The 1st petitioner is a company registered under the Hyderabad Companies Act IV of 1320 Fasli (now governed by the Companies Act, 1956), and the 2nd petitioner is its shareholder. The 1st petitioner (hereinafter referred to as "the Company") is in the business of the manufacture, wholesale, sale and distribution of cigarettes. The petitioners filed affidavit in support of the writ petition as also a supplementary affidavit. The facts disclosed therein are as follows :- Between 1st October, 1972 and 30th September, 1973 the sales of cigarettes were affected by the company on principal to principal basis to main dealers. The petitioner declared the assessable value of the goods u/s 4 of the Central Excises and Salt Act, 1944 (for short "the Act") showing the prices charged by it to its main dealers. That was approved by the Central Excise authorities. On 1-12-1972 in A.K. Roy and Another Vs. Voltas Limited,

(hereinafter referred to as "Voltas case") the Supreme Court rendered judgment holding that on a true and proper construction of Section 4 of the Act, excise duty should be levied only on the amount representing the manufacturing cost and manufacturing profit excluding post-manufacturing cost and selling profit, on the basis of which the petitioners claimed that Excise duty should have been charged on them after deducing post-manufacturing expenses like advertising expenses, selling expenses and equalised freight. They filed a claim on 29-11-1947 for refund of a sum of Rs. 63,22,319.34 ps. being the differential amount of duty which became due to them pursuant to the judgment in the Voltas case supra. It is further stated that in Union of India v. Bombay Tyres International Ltd. 1983 (14) ELT 1896(hereinafter referred to as "Bombay Tyres case") the Supreme Court held that the average freight included in the wholesale cash price has to be deducted in order to arrive at the real wholesale cash price at the factory gate and no excise duty can be charged on it, and therefore, collection of duty on equalised fare was in contravention of the judgment of the Supreme Court in Voltas case and is liable to be refunded. It is added that the judgment of the Supreme Court in Bombay Tyres case (supra) was delivered on 9-5-1983 and the reasons were given on 7th October, 1983, which supports the claim of the petitioners that no excise duty can be collected on equalised freight. The claim of the petitioners was rejected by the Assistant Collector (the 1st respondent) by his order No. C. V/4-II/18/81/74, M.P. 2. dated 11-4-1975. The petitioners preferred an appeal against the said order before the 2nd respondent on 9-7-1975. By order dated 9-12-1975 and 2nd respondent rejected the appeal of the petitioners. It is this order that is assailed in this writ petition. However, the petitioners filed a revision also against the said order before the Union of India (the 3rd respondent) u/s 36 of the Act. After the amendment of the Act and creation of Customs, Excise and Gold (Control) Appellate Tribunal (for short "CEGAT") the revision was transferred to CEGAT. It is stated that by order 6-1-1983 in 1983 ECR 242D the CEGAT held that the statutory authority was bound by the time limit provided by the statute under which the authority was exercising jurisdiction and that the general Law of Limitation could not be invoked before it, which was approved by the Supreme Court in its order dated 6-4-1984 in Miles India Limited v. Appellate Collector of Customs 1985 E.C.R. 289 (S.C.). It was also observed by the Supreme Court that the parties could seek recourse to such alternative remedy that might be advised in case where payments were made under mistake of law. The claim of the petitioners is based on the ground that the excise duty was paid under mistake of law which was discovered by the petitioners after the judgment of the Supreme Court in Bombay Tyres case supra. The claim filed for refund by the petitioners on 29-11-1974 for the period 1-10-1972 to 30-9-1973 is within limitation prescribed u/s 17(2) read with Section 29(2) of the Limitation Act.

3. Having explained the mechanics of price fixation of cigarettes the petitioners state that as the pricing considerations to the ultimate smoker are very critical, whenever the manufacturer puts up the prices to recover increase in duty it has

to subject itself to losses due to drop in volume levels. It is further stated that the duty increases could never be fully passed on to the customer though the industry generally adopts the "cum-duty price" for invoicing in respect of sales effected in the distribution structure. In these circumstances the petitioners pray for the relief indicated above.

4. The respondents filed counter-affidavit and additional counter-affidavit. The averments therein disclose that the marketing pattern of the petitioners' business activities which are not disputed, include sale at the factory gate to the main dealers. This factor is sufficient for purposes of Section 4 of the Act. It is stated that by their letter dated 26-4-1973 the petitioners asked the Collector, Central Excise to assess their product, viz., cigarette, to Central Excise duty on the price so charged by them to their distributor which is fair and reasonable. This was accepted in Deputy Collector's letter No. C. V/4-II/80/16/73, dated 7-8-1973. It is admitted that the petitioners made a refund claim on 29-11-1974; but it is stated that the claim does not mention "equalised freight" or the proportion of such rate as the basis of claim and that the claim was not supported by any document. The Supreme Court's judgment in Bombay Tyres case (supra), it is stated, does not direct that the cost of transportation has to be deducted where price has been determined under sub-section (2) of Section 4 prior to 1975 and therefore, no deduction towards transport is permissible from the wholesale cash price. It is added that the recent judgment of the Supreme Court dated 7-10-1983 in Bombay Tyres case did not decide the appeal of the petitioner bearing No. 55-61/79. The 1st respondent rejected the claim for valid reasons. The Appellate Collector also rejected the claim of the petitioners. The revision filed by the petitioners was transferred to CEGAT. It is stated that the duty paid by the petitioners is not under mistake of law, therefore, the judgments quoted by them are not relevant. In Writ Petitions No. 2194 and 1115 of 1976, the Andhra Pradesh High Court held that if on the date of filing the writ petitions the claim of the petitioners were not barred by limitation, a writ of Mandamus for refund can be issued. But as the case of the petitioners is barred by limitation, they are not entitled to refund. It is stated that the averments in the affidavit of the petitioners do not show that they have not passed on the excise duty to the customer. It is further stated that if the claims of refund are allowed, the element of uncertainty would enter, which is the basis canon of taxation and many other companies will come forward with the plea of losses incurred by different doses of taxation. It is added that the orders passed by the 1st respondent as well as the 2nd respondent are valid in law and it is prayed that the writ petition may be dismissed.

5. Sri K. Srinivasa Murthy, the learned counsel for the petitioners, submits that the revision of the petitioners which was transferred to CEGAT, was dismissed with liberty to pursue other remedies and that as the excise duty was paid and received under mistake of law the petitioners are entitled to refund of the same. It is further submitted that the reasons in the judgment of the Supreme Court in Bombay Tyres case were given on 7-10-1983 and the writ petition was filed on

17-4-1985 which is within three years from the date of the discovery of the mistake of law, therefore, the petitioners are entitled to refund of the Excise duty.

6. Sri I. Koti Reddy, the learned standing counsel for the respondents, on the other hand, contends that respondents 1 and 2 decided the claim of the petitioners for refund of the excise duty on merits and not on the ground of limitation, therefore, having not pressed the appeal before CEGAT the petitioners cannot claim refund for the same amount in this writ petition. He further submits that the claim relates to the period 1972-73 and the writ petition filed after 12 years has to be dismissed both on the ground of limitation as well as laches. The petitioners have passed on the burden of the excise duty to the ultimate customers, therefore the claim of refund would result in unjust enrichment of the petitioners. For this reason also, submits the learned counsel, the claim has to be rejected.

7. On the above contentions the following questions arise for consideration :-

1) Where the petitioners are entitled to challenge the impugned order of the 2nd respondent after the statutory appeal against the said order was dismissed as not pressed.

2) Where the claim of the petitioners for refund of the excise duty for the period 1-10-1972 to 30-9-1973 is barred by limitation and whether the writ petition is also liable to be dismissed on the ground of laches.

3) Whether the claim of refund would result in unjust enrichment of the petitioners; if so, is it liable to be rejected ?

8. First we shall take up the first question. Admittedly the petitioners sent a letter on 26-4-1973 asking that the cigarettes should be assessed to Central Excise duty on the price they charged. This was acceded to by the Collector, Customs on 10-7-1973 on provisional basis. On 7-8-1973 the provisional assessment was made final. This related to payment of excise duty for the period 1-10-1972 to 30-9-1973. On the ground that the duty was paid under a mistake of law the petitioners claimed refund of differential duty of Rs. 63,22,319.34 Ps. by their claim dated 29-11-1974. This claim was based on the judgment of the Supreme Court in Voltas case (supra). The judgment in Voltas case was delivered by the Supreme Court on 1-12-1972. The contention that the mistake of law was discovered after the payment of excise duty, itself cannot be accepted because it appears in their letter No. ACE/VJ/447, dated 20/26-4-1973 in regard to the approval of the price of cigarettes they have referred to the judgment of the Supreme Court in Paras 2 and 7 of that letter. Even otherwise, the said judgment was earlier to their letter of April, 1973 on the basis of which price was approved, so they would be deemed to have knowledge of the judgment in Voltas case. When the petitioners were aware of the judgment on the date of the payment of duty and paid the duty, they cannot be allowed to contend that the duty was paid under mistake of law and claim of refund based on the same judgment cannot be accepted. Be that as it may, on 11-4-1975 the 1st respondent negated the

refund claim of the petitioners made on 29-11-1974 on merits. Para 7 of the order which is relevant for our purpose reads as follows :-

"7. The company is not entitled for refund on the grounds :-

(i) that there is no assessable value which the licensee got approved other than the Distributor's price;

(ii) that the licensee at no time, protested for approval of this distributor's price as assessable value. On the other hand they have requested for final approval of "Distributor's price" as the basis for assessment to Central Excise duty; and

(iii) that the Central Excise duty paid by the Company on the above price was collected from the consumer and the party did not suffer any loss. As such it is seen that the refund claim is not in order and liable for rejection.

#### ORDER

I, therefore, reject the refund claim of Rs. 63,22,319-34 preferred by M/s. Vazir Sultan Tobacco Co., Ltd., Hyderabad."

From a perusal of the order extracted above, it is clear that the claim of refund was rejected on merits, but not on the ground of limitation. This order was questioned before the 2nd respondent in appeal. On 9-12-1975 the 2nd respondent dismissed the appeal. Paras 2 and 3 of the said order read as follows :-

"2. I have examined the appeal carefully. I have also heard the appellants' counsel.

3. The appellants claim that they are to pay the excise duty on manufacturing cost plus manufacturing profit only consequent on Voltas judgment. Actually the appellants have been selling the goods at a fixed price to their distributors ex-factory. Hence it is evident that this price comprises of manufacturing cost plus manufacturing profit. This ex-factory price is the actual selling price when the goods are sold to the distributors. As such the appellants' plea that this price includes some element of post-manufacturing expenditure is not tenable. I therefore see no reasons to interfere with the orders of the Original Authority which is correct in law. The appeal is, accordingly, rejected.

Sd/- H. N. Raina, 18-12-1975 APPELLATE COLLECTOR."

Even the appellate authority did not reject the claim of the petitioner on the ground of limitation; it decided the case on merits holding that on the basis of the judgment of the Supreme Court in Voltas case they have to pay excise duty on manufacturing cost plus manufacturing profit and that the price fixed by the petitioners comprised of manufacturing cost plus manufacturing profit. So, as a fact, it was found that the price fixed did not include any post-manufacturing expenditure. Against the said order, the petitioner filed a revision before the 3rd respondent which was transferred to CEGAT where it was numbered as Appeal

No. ED/SB/T/Appeal No. 245/76-A. On 31-7-1985 the petitioner did not press the appeal and the same was dismissed as not pressed. The order of the CEGAT reads as follows :-

"ORDER No. 559/1985-A.

This appeal is directed against the order of the Appellate Collector of Central Excise, Madras, dated 9-12-1975. It was filed as Revision Application before the Central Government but on transfer it is being treated as an appeal.

The lower authorities have dismissed the claim of the appellants for the refund of the duty paid on the ground of limitation. Shri Ansari states that according to the instruction his case is covered by the decision of this 1983 ECR 242D - Miles India Limited, Baroda v. Appellate Collector of Customs - and, therefore, he does not want to press this appeal. In view of his statement, the appeal is dismissed as not pressed."

For the reason that respondents 1 and 2 dismissed the claim of the appellants therein (petitioners herein) for refund of the excise duty, the learned counsel for the petitioners stated before the CEGAT that the case was covered by the decision of the Tribunal in Miles India Ltd. v. Appellate Collector of Customs, Bombay supra and therefore he did not want to press the appeal and in view of that statement it was dismissed as not pressed. It can be seen from the orders of respondents 1 and 2 extracted above, that the Original Authority as well as the appellate authority rejected the claim of the petitioners on merits without reference to the ground of limitation. The impugned order of the 2nd respondent which was the subject matter of the appeal before the CEGAT merged into the said order of the CEGAT dated 31-7-1985 and for this reason the petitioners cannot question the order of the second respondent dated 9-12-1975 in this writ petition. The first point is answered accordingly.

9. Question No. 2 : The contention of Sri K. Srinivasa Murthy is that once the amount is paid under mistake of law the authorities are not entitled to retain the same and the refund of the same can be claimed at any time. He relies on the judgment of the Supreme Court in D. Cawasji and Co. v. State of Mysore [1978 (2) ELT (J 154).]. In that case the appellants filed writ petition before the High Court of Mysore for a declaration that the Mysore Elementary Education Act, 1941 as amended which provided for levy and collection of education cess, was beyond the competence of the legislature and claimed refund of the educational cess paid during the period from 1951-52 to 1965-66. The writ petition was dismissed by the High Court. It seems earlier they filed a writ petition challenging the validity of the said Act. The High Court struck down the impugned provisions in the earlier writ petition and that judgment was confirmed by the Supreme Court. In the present writ petitions again the validity of the Act was challenged as well as the refund of the amount paid under the impugned Act, was claimed. The High Court dismissed the writ petitions on the ground of delay. On appeal the Supreme Court held that the period of limitation prescribed

for recovery of money paid under mistake of law was three years from the date when the mistake was known, be it 100 years after the date of payment, and that was the reasonable standard by which the delay in seeking remedy under Article 226 of the Constitution could be measured. However, their Lordship declined to grant refund claim on the ground that in the earlier writ petition the relief of refund of the amount could have been claimed, but was not claimed. It was observed that the appellants could not be allowed to split up their claim for refund and file writ petitions on the piecemeal fashion.

10. What follows from the above judgment is that the claim for refund of the amount paid under mistake of law should be made within three years from the date the mistake was known and the date of the judgment laying down the law on the point of law in question can be taken as the date when the mistake was known.

11. In a recent case in *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, the Supreme Court held :-

"..... there is no such period (of limitation) prescribed in law in respect of petitions filed under Article 226 of the Constitution. Whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Art. 226 of the Constitution, it is appropriate ordinarily to construe that any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a right formula. There may be cases where even a delay of a shorter period may be considered to be sufficient to refuse relief in a petition under Art. 226. There may also be cases where there may be circumstances which may persuade the Court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to be judged on its own facts and circumstances touching the conduct of the parties, change in the situation, the prejudice which is likely to be caused to the opposite party or to the general public."

It was further held that having regard to Section 17(2) of the Limitation Act, where in the case or any suit or application for which a period of limitation is prescribed under that Act, the suit or application is for relief from the consequences of a mistake, the period of limitation would begin to run from the date when the plaintiff or the petitioner discovered the mistake, or could have discovered with reasonable diligence. In that case a company was engaged in the business of manufacturing different types of glasses from 1963. It was levied excise duty under Item 23A(1) of the First Schedule to the Central Excises and Salt Act and the same was collected from it. The appellants therein applied for refund of excess duty paid from October, 1963 upto the date of application filed in February, 1976, on the ground that the article does not fall under any of the

items mentioned in Item 23A(1) and that excise duty could be levied only under the residuary item which was introduced from 1st March, 1975. The Assistant Collector, Central Excise, rejected the claim holding that Item 23A(1) was applicable. The matter was unsuccessfully challenged before the Appellate Collector. Then a revision was filed before the Government of India, which was also dismissed. The order in the revision was challenged in writ petition before the High Court of Gujarat. The High Court found that Item 68 was applicable; but held that the appellants were not entitled to refund of excess duty for the period before raising of the dispute in February, 1976. On further appeal to the Supreme Court by special leave, the appeal was allowed. It was held that the earlier order levying duty under Item 23A(1) was in acceptance of the claim of the appellants that Item 23A(1) was attracted, so by that conduct they were not entitled to refund of excess duty paid prior to raising of the dispute in February, 1976, though their earlier stand would not preclude them from claiming that Item 68 was the right item which applies to their case.

From the above discussion what follows is :-

- (i) if at the instance of a person duty is levied accepting his stand, he can question the correctness of levying of the duty subsequently, but he would not be entitled to refund of the excess duty for the period before he disputes the same;
- (ii) where claim is made for refund of money paid under mistake of law, the period of limitation would start from the date when the mistake was discovered;
- (iii) if the petitioner can file a suit for the relief of refund he can also maintain a writ petition for the same relief; and
- (iv) no period of limitation is prescribed for filing writ petition; normally a writ petition filed within six months from the date of cause of action will not be hit by doctrine of laches but there may also be cases where a writ petition filed within six months might be held as barred by laches and there may also be cases where a writ petition filed beyond six months but within the period prescribed by the Limitation Act for a suit for the same relief or even beyond that period might not be treated as barred by laches; each case has to be decided on its own facts taking into consideration the conduct of the parties and the prejudice that would be caused to the opposite party or the general public.

12. In the instant case the petitioners themselves gave the price for approval of the respondents by letter dated 26-4-1973 which was later approved by the department on 7-8-1973. Therefore, they will not be entitled for refund of the duty for the period in question because during that period they did not dispute the correctness of the price given by them and their conduct would disentitle them for refund.

13. Further, the petitioners made a claim for refund of the differential excise duty on 29-11-1974 before the authorities on the basis of the judgment of the Supreme Court in Voltas case which was delivered on 1-12-1972. The present

writ petition was filed on 17-4-1985. A suit for recovery of the excise duty filed on that date, i.e., the date of filing of the writ petition, would have been clearly barred by limitation as it was filed after about 12 years of the discovery of the mistake of law. The fact that in a subsequent judgment of the Supreme Court the same principle was further elucidated, would make no difference. In paragraph 7 of the writ affidavit also the petitioners based their claim on the judgment of the Supreme Court in Voltas case, which reads as follows :-

"In the claim for refund filed by the petitioner before the Central Excise authorities on 29-11-1974, inter alia claiming deduction in respect of equalised freight from the price charged by the petitioner to its main dealers for the purpose of determining the excise duty chargeable under the Central Excise Act and Rules, the petitioner had contended that the collection of duty on equalised freight was in direct contravention of the Supreme Court judgment in Voltas case and was therefore illegal and liable to be refunded. It was also contended in the refund claim before the Central Excise authorities that the excise duties were paid under mistake and inadvertence and the petitioners were therefore entitled to refund of such excess amount collected from them without the authority of law. The Supreme Court gave its order in Bombay Tyres case on 9th May, 1983, and followed it up with a reasoned judgment on 7th October, 1983, wherein the view taken by the petitioner that no excise duty should be collected on equalised freight has been confirmed by the Hon"ble Supreme Court of India. Accordingly, the petitioner submits that the payments made by the petitioner to the Central Excise Department by including the equalised freight in the price charged by the petitioner to its main dealers during the relevant period for which the claim was preferred by the petitioner on 29-11-1974, was clearly under mistake of law as held in the judgment of the Supreme Court in Bombay Tyres case and hence it is liable to be refunded to the petitioner."

The writ petition claiming refund of excise duty paid during the period 1-10-1972 to 30-9-1973, is therefore barred by laches.

14. The third question remains to be considered. In so far as the first limb of the question is concerned, it may be noted that the petitioners do not clearly say that the burden of excise duty was not passed on to the consumers. What is stated is that the whole of the burden could not be passed on to the consumer having regard to the pricing of the product and the factors that go into the fixation of the price. There is also no categorical averment in the counter-affidavit that the burden of excise duty was passed on to the consumer. However, the 1st respondent in his order dated 11-4-1975, as a fact, held that the Central Excise duty paid by the company on the price fixed by the authority was collected from the consumer and the party did not suffer any loss, therefore, the refund claim was not in order and was liable to be rejected. The question, in a case where granting of refund claim results in unjust enrichment of a person, is the claim liable to be rejected ?, is a vexed question. However, in view of our finding on question 1 and 2, we do not consider it necessary to decide this

question in this writ petition.

15. For the above reasons, we do not find any merit in the writ petition. It is accordingly dismissed with costs. Advocate's fee Rs. 250/-.

Soon after the judgment has been delivered the learned counsel for the petitioners moved an oral application for leave to appeal to the Supreme Court. In our view the matter does not involve any substantial question of law of general importance which requires to be considered by the Supreme Court. Therefore, the leave is refused.