
(1999) 02 BOM CK 0005

Bombay High Court

Case No: Writ Petition No. 4732 of 1986

Jnana Prabodhini

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Feb. 16, 1999

Acts Referred:

- Central Excise Rules, 1944 - Rule 11
- Central Excises and Salt Act, 1944 - Section 11B
- Civil Procedure Code, 1908 (CPC) - Section 151
- Constitution of India, 1950 - Article 265, 300
- Contract Act, 1872 - Section 72

Citation: (1999) 02 BOM CK 0005

Hon'ble Judges: Sharad Manohar, J; G.H. Guttal, J

Bench: Division Bench

Advocate: Mr. D.B. Shroff, Mr. J. Chandran and Mr. C.M. Korde, instructed by M/s. Little and Co, for the Appellant; Mr. R.V. Desai, for the Respondent

Judgement

Sharad Manohar, J.

Three questions arise in this petition.

The questions involved in the petition

(a) whether the petitioner-trust is entitled to the refund of the excise duty which they paid to the Excise Department under a mistake of law which they claim to have realised in the year 1982.

(b) whether the writ petition filed by it in the year 1986, after the expiry of three years, should be entertained by this Court in view of certain intervening proceedings to which the petitioner was directed by the respondent-Department itself.

(c) whether, in the peculiar facts of the case, this Court would be justified in ordering refund in favour of the petitioner-public trust or whether this would amount to the petitioner's unjust enrichment disentitling the petitioner to recover the refund for themselves.

2. The relevant facts stated chronologically

The facts relevant for the purpose of this petition may be briefly stated as follows :- The petitioner is a public charitable trust as also a society registered under the Societies Registration Act, 1860. The petitioner-trust was registered under the Public Trusts Act as early as on 31st March, 1983. The objects of the Trust are set out in paragraph 1 of the petition. Briefly speaking, the objects are to promote social service, including educational and rural development. One of the important objects of the Trust is to set up various financial self-sufficient and viable projects. The constitution of the Trust was placed before us. It has got quite some relevance for the purposes of the petition. There are quite a few laudable activities but activities Nos. 4.1, 4.3, 4.4, 4.8, 4.9, and 4.10 may be specially referred to. They are set out hereunder :-

"4.1 Creating facilities and offering guidance to intellectually gifted and other pupils as regards school, college, university and higher education.

"4.3 Encouraging students to achieve meritorious careers in business, industry, agriculture and such other areas, where persons can shape themselves on their own, almost independently.

"4.4 To provide special educational facilities and guidance to students who want to study or do research in various educational topics pertaining scientific, theoretical or technical area, to try to provide to them all other needed facilities.

"4.8 Starting industries and managing autonomous bodies for securing the financial stability of the Institution and in general for promoting its progress.

"4.9 Starting the activities of the Jnana Prabodhini firstly in Pune and later, as and when possible, at other places in India.

"4.10 In general, undertaking all such activities which are useful and needed for achieving the stipulated objectives of the Institution.

We may state here that there is no dispute about the fact that these are the petitioner's activities. The respondent-Department has been fair enough to concede that position. This position assumes importance in the context of the question as to whether the refund, if ordered in favour of the petitioner-trust, can be said to have been ordered in accordance with the observations made by the Full Bench of this Court in a recent judgment to which reference will be presently made.

In 1969, with a view to carry out the above-mentioned objects and activities of the Trust, the petitioner started manufacturing of condensers for electric motors.

The next event is being mentioned for completion of chronology of events, though it has no direct relevance with the main question at this stage.

On 8-5-1973, the Central Board of Excise and Customs issued a circular for the guidance of the various duty recovering agencies such as the Assistant Collector, the Collector etc. The gist of the circular is that these officers were directed by the circular to see to it that no unnecessary litigation was indulged in by the Department. This was sought to be done by telling the Department Officers concerned that, if the excise duty was recovered by the Department from any assessee which recovery subsequently turned out to be an illegal or unjustified recovery and if the assessee in question would be entitled to file a suit and get refund of the amount of the excise duty recovered from him by the Department, then the officers should see to it that the application for refund, if any, made by the assessee upon realisation of such mistake should not be turned down by the officers provided the application for refund was made within three years from the date of the assessee's knowledge about the excess payment. A general instruction was given to all the relevant officers concerned as to how they should conduct themselves so as not to burden the Department with unnecessary litigation and unnecessary costs. This is the gist of the circular. Plea appears to be that the circular has no relevance while considering the question whether the Assistant Collector should honour the application for refund.

To continue with the chronology in reaction to the present dispute, the starting point of the entire question is the year 1975. In that year, the petitioner classified the above-mentioned articles, viz., the condensers used for electric motors under Tariff Item No. 68. This they did by virtue of the general opinion expressed by the Department. The petitioner has contended that the Trust did it as per the advice received from the Department itself. This is not unequivocally admitted by the Department; but it may also be stated here that the Department has not come out with the plea that no such opinion was expressed by the Department. The plea of the Department is that that was their opinion which they expressed to the petitioner. However, according to the Department, no advice as such was given by the Department to the petitioner to file the classification under Tariff item No. 68.

Incidentally, it may be pointed out that Tariff Item No. 68 is the residuary article which came into force in the year 1975 itself. Till this Tariff Item No. 68 came on the statute book, the petitioner-trust was classifying the goods under some other specific item. As to how it started falling in a residuary article from the year 1975, because of the arrival of the residuary article under Item No. 68, is somewhat bewildering. Whatever that may be, the fact remains that, from the year 1975, the petitioner-trust started classifying these articles under the Tariff item meant for residuary article and started paying excise duty meant for the residuary article.

In July 1980, the petitioner filed a fresh classification under Tariff No. 30 and the Trust claimed benefit of exemption because, according to the petitioner, the article fell under Tariff item No. 30 and, as such, they were entitled to exemption. This new classification was rejected by the Assistant Collector and the matter went sliding till July 1981.

In July 1981, the petitioner got information that one of their competitors, Hind Condensers, had got exemption from the Central Board in respect of the self-same article.

The petitioner, therefore, wrote letter dated 16-7-1981 to the Superintendent of Central Excise informing him about this information and filing classification under Tariff item No. 30 and, further claiming exemption as a benefit emanating from such Entry 30.

On 22-4-1981, this position was, in fact, accepted by the Assistant Collector and the new classification submitted by the petitioner was, in fact, accepted. This clearly means, and there exists no dispute about this legal position, that, even according to the Assistant Collector, the previous classification made by the petitioner-trust itself was a wrong classification and that the article in question deserved classification under Tariff Entry 30 which gave the benefit of the exemption in question.

In March 1982, the petitioner-trust received the authentic copy of the order passed by the Board of Central Excise in favour of said Hind Condensers. Hence, on 15-3-1982, a refund claim for the sum of Rs. 76,126.36 was made by the petitioner by an application to the Assistant Collector for the period between 3-3-1978 and 21-9-1981.

We may mention here at this stage itself that the undisputed legal position is that, if the petitioner got the realisation of their mistake of law regarding the exemption which they could claim and if they could claim subsequently refund of the amount paid by them in the past under mistake, then, they would be entitled to refund under the general law of the land by filing a suit within three years from the date of the realisation of the said mistake. This means that they could have filed the suit for refund of the amount paid by them by way of excise duty, which they need not have paid because they were entitled to the complete exemption, for the entire period from 1975 when they had made a wrong classification of the goods under Tariff Item No. 68. Fact, however, remains that they were advised to make a claim for refund of the tax paid by them within three years before the date of the application to the Assistant Collector and this is the reason why the petitioner made the claim for refund for the period from 3-3-1978 and not from the earlier point of time.

Upon this application being made, a notice was issued by the Assistant Collector to the petitioner on 26-7-1982 to show cause as to why their application for refund should not be rejected, because it was filed beyond six months from the date of their payment. After receiving the petitioner's reply to the said show cause notice, on 31-12-1982, the Assistant Collector, in fact, rejected the petitioner's claim for refund.

We may mention here that there is a neat averment made in the petition, veracity of which is not denied, viz., that the petitioner made application to the Assistant Collector for refund by making a specific reference to the general direction given by the Board's circular dated 8-5-1973 which is referred to above. We may also mention here that, while passing the order of rejection of the application, the Assistant Collector specifically informed the petitioner that the petitioner-trust was entitled to file an appeal against that order to the Collector and the period for filing such appeal was also mentioned in the said order. The order was passed by the Assistant Collector rejecting the application for refund on two grounds-

(a) that the claim was not tenable, meaning thereby that the petitioner was not entitled to claim refund at all;

(b) that the claim was barred by time u/s 11B of the Central Excises and Salt Act, 1944 (hereinafter, the Act).

As informed by the order of the Assistant Collector, the petitioner filed an appeal against the said order to the Collector who, by his order dated 21-3-1986, rejected the appeal and, hence, the present petition was filed by the petitioner in this Court on 15-10-1986.

3. Petitioner's plea

The petitioner's contention is very simple. It points out that the fact that the earlier classification under Tariff Entry No. 68 was a mistaken classification is accepted by the Department itself as early as on 22-9-1981 and it is precisely on that ground that the petitioner has been allowed to classify the self-same goods under Tariff Entry 30 as from that date, with the result that the petitioner has been enjoying the exemption from payment of excise duty of those goods from that date. Neither the articles manufactured earlier were different from the articles manufactured now nor the law relating to excise tariff was different earlier than the one obtaining at present. The classification done by the petitioner under Tariff Entry 68 (the residuary article) was, therefore, patently erroneous. It follows that the tariff paid by it under that Tariff Entry was the result of a mistake. The petitioner has contended that the mistake was a result of the advice received from the Department itself. As stated above, this position is not admitted by the Department. The Department contends that they gave no advice as such; but they expressed the opinion that the Tariff Entry 68 would be the correct entry. Now, the petitioner is entitled to say that the opinion expressed by the Department was as good as their advice but, all that apart, point remains that the classification by the petitioner under entry 68 was a mistake of law on their part. The tax paid by them is, therefore, under a mistaken notion of law and the moment they realised that mistake, they should be held entitled to the refund of the amount from the Department. The cause of action for such claim would be the date of realisation by the petitioner about their mistake.

Now, in the present case, there is no dispute even on the question as to when the petitioner-trust realised the mistake. The facts stated above show that the mistake was realised by the Trust in July, 1980. They even made an application to the Assistant Collector for refund of the tax on the basis that they were entitled to exemption under Entry 30. The fact that the Assistant Collector rejected their claim at that time is a different matter. Position remains that the Trust got the information about the mistake not earlier than July, 1980.

As a matter of fact, the petitioner can and do legitimately contend that the real information in this behalf was received by them in June, 1981 when they got the information that Hind Condensers, one of their competitors, had, infact, got exemption from payment of excise duty on the identical article. That exemption was given by the Central Board and, when the petitioner learnt about that position, they submit, they became fully aware of the mistake committed by them. According to them, in a way, true realisation of the mistake, on the part of the petitioner-trust, was in July, 1981 and not in July, 1980. But we can even assume that this was, in fact, in July, 1980 and not in July, 1981. Fact remains that, as early as on 16-7-1981, the Trust made an application to the Superintendent of Excise informing him about this position and claiming benefit of the exemption arising out of Entry 30, as a result of which the petitioner, in fact, got the exemption by virtue of the order date 22-9-1981 on which date the new classification filed by the petitioner-trust based on entry 30 was, in fact, accepted by the Assistant Collector.

The entire factual position, therefore, leaves no room for doubt that, even according to the Assistant Collector, what was made by the petitioner before 1981 was a mistaken payment, the mistake being one of law. If this is the position, the inexorable provision emanating from Section 72 of the Contract Act must hold the field. Under that provision, any money paid by mistake or under coercion by any person must be refunded by that person to the former. This is a provision independent of any of the provisions of the Excise Act as such. It is a provision of the general law. No question of any provision arising out of the Act arises at all. The petitioner's right to refund of the amount paid by mistake cannot, therefore, be belittled.

4. The real question is as to whether the writ petition filed by the petitioner as late as on 15-10-1986, nearly four years after the accrual of the cause of action by the petitioner to file a suit for refund of the duty, can be entertained. Position strongly urged by Mr. Desai for the Department is that, if a suit was filed for recovery of such claim, it would have been barred by limitation because the period of three years provided by the residuary Article 113 of the Limitation Act has clearly expired and the contention is that, if the period for suit expired, then, as a normal rule, the Court would not or should not be inclined to exercise its writ jurisdiction which is subject to the condition relating to laches and delay.

5. It is in this connection that Mr. Shroff appearing for the petitioner-trust invited our attention to a few authorities but, before the authorities are examined, let us state the reasoning that he placed before the Court. According to him, firstly, if there was any delay

on the part of the petitioner-trust in the matter of approaching this Court in its writ jurisdiction, that delay was fully explained by intervening events and proceedings. The chronology of events set out above leaves no room for doubt that the petitioner filed an application for refund to the Assistant Collector because of the above-mentioned circular issued by the respondent-Board on 8-5-1973. The circular itself was not placed before us; but the fact that such circular existed is not denied. In fact, that circular has been set out by the Karnataka High Court before whom the existence and nature of the circular was a matter of admission. As per the said circular, there is a general direction given to all the relevant officers of the Department that, if a person is entitled to refund of the tax or excess tax paid by him under a mistaken notion of law relating to the liability for the tax and if he files the claim before the officers concerned for refund of this excess payment or unjustified payment, the officers concerned should not resort to uncalled for technicalities and should give the refund of the amount, provided such application for the claim is filed within three years from the date when suit could have been filed by the assessee in question. The rationale of the circular, to our mind, is quite obvious. An extremely welcome and healthy practice is recommended by the Board directing the officers concerned not to indulge in unnecessary litigation and not to require the Department to incur uncalled for costs. Indeed, it is well-known that, if a taxpayer makes payment of tax, which he was not required by law to make, but which he, all the same, made under the mistaken notion of law, he did get a cause of action for refund of the said payment made by him under the mistaken notion, he is entitled to get the refund of the amount from the Tax Authority itself.

6. There exists a thoroughly unwarranted belief in our country, particularly the legal community entrusted with the work of looking after the legal rights of the Taxing Department that, if any sum is due to the assessee from the Taxing Department, they are not liable to make it, unless the assessee files a suit against the Department. What is lost sight of is that, if an assessee is entitled to refund, it is because of the legal provision; not because he files a suit and gets a decree from the Court in that behalf. Existence of the legal right to recover the amount from the Department is the reason why he gets the refund; not because he gets a decree from the Court in that behalf. The decree postulates a legal right to refund. The Courts recognize it; but that does not mean that the Department will not refund the tax until the Court passes a decree.

Evidently, this position was realised by the Department and the Board had a healthy thought that the Department should not be involved in unnecessary litigation where the claim of the assessee is indefensible. In fact, it should be a healthy practice that the claim should be recognised even if no suit as such is filed. The claim should be accepted by reference to the provisions of law. The Excise Department and the other Tax Authorities have a platoon of Advocates and legal advisers at their beck and call to advise them on the legal position. They can see as to whether the claim is well-founded or not. They should not direct their clients, viz., the Departments, to wait until the decree is passed by the Court. Such a practice adds to the work of the Court, it also adds to the litigation

expenses and wastage of energy. The time and money spent by the Department in defending the rightful claims would be better utilised for other purposes with which the Taxing Department is concerned.

This was the obvious and evident view healthily taken by the Department and it was on this basis evidently, that the said circular was issued. The said circular is not only within the competence of the Department but it is a very welcome circular and it should be held as binding upon all the officers who are entrusted with the administration of law relating of Excise Taxation. It, therefore, follows that the petitioner was very much justified in filing an application to the Assistant Collector for refund of their tax. At one stage, it was argued by Mr. Desai that by directing the Assistant Collectors and Collectors to pay the amount within three years when Section 11B of the Act provided the limitation of three years was unjustified. He did not describe the circular as illegal; but he justified the action of the Assistant Collector in disregarding the circular and in rejecting the petitioner's claim despite the existence of the circular. But the point is that in spite of our repeated question to him he maintained that he was prepared to call in question the legality of the circular. We fail to appreciate as to how the Asstt. Collector or Collector would be justified in disregarding the circular if it was not illegal or invalid for any reason. It must be, therefore, held that the petitioner had taken resort to an appropriate remedy since the circular issued by the Department in the year 1973 was a valid circular. We repeat that it was not argued before us that it was not a valid circular. We repeatedly asked the question whether the circular had ever been withdrawn by the Board. No statement was made before us that it was withdrawn. The circular, thus, continues. The Board is undisputedly the authority to issue the circular as regards the way in which the officers should conduct themselves in the matter of administration of the Excise Law. The officers refused to obey the circular and what is sought to be justified before us is the conduct of the officer; not the circular. It is a strange manner in which instructions are given to the Counsel to argue the matter.

7. But there is a further point, rightly argued by Mr. Shroff. The point is that the Appeal was filed by the petitioner against the Assistant Collector's order as early as in the year 1983, immediately after the Assistant Collector's order dated 31-12-1982. The order passed by the Assistant Collector itself shows that the petitioner was entitled to file an appeal to the Collector against his order. Even the period of limitation for filing the Appeal is mentioned in that order. Accordingly, the petitioner filed the Appeal. It will, thus, be seen that the petitioner filed an application for refund in pursuance of the circular issued by the Board. It filed an appeal to the Collector in pursuance of the information given to it by the Assistant Collector himself.

That Appeal remained cooling its heels in the Office of the Collector for a full period of four years and, while disposing of the Appeal, the Collector does nothing but puts a virtual rubber stamp upon the order passed by the Assistant Collector.

In view of this, respectfully questions the learned Counsel, is it open for the Department to turn round and say that this petition should have been filed within three years from the date of realisation of the mistake, that is to say, within three years from July 1981 because if a suit was not filed within that time, it would be barred and, therefore, the present petition should not be entertained ? The learned Counsel rightly submits that there is no delay on the part of the petitioner as such. The boot is, in fact, on the other foot. It is the Collector who has kept the Appeal cooling its heels in his office for all this period and now he has kept advantage of his own wrong by setting up the plea of delay and laches on the part of the petitioner.

8. Authorities relied upon on behalf of the petitioner

As regards the authorities relied upon by Mr. Shroff, we will firstly make it clear as to the point which is sought to be supported by the authorities. The point in answer to the Department's plea that, though the petitioner had got a cause of action to file a suit for refund of the duty paid by the petitioner, the suit had to be filed within three years from the date of realisation by the petitioner of his mistake about the payment. The further part of the plea is that, in the instant case, if a suit was filed for the reliefs claimed in the petition, the suit would be barred as rarely as in July, 1984 (under residuary Article 113 of the Limitation Act) and, hence, the writ petition filed long after the suit would be barred by limitation cannot be or ought not to be entertained by the High Court.

The first authority is the judgment of the Supreme Court in *Salonah Tea Company Ltd., etc. v. Superintendent of Taxes, Nowgong & Ors. etc.* reported in : 1988(33)ELT249(SC) . It was held in that case that it is true that, in some cases, the period of three years is normally taken as a period beyond which the Court should not grant relief, but that is not an iron-cast rule. The supreme Court held that under Article 226 of the Constitution, the Court has power to direct the refund unless there has been an avoidable delay on the part of the petitioner. The evident argument, which has got to be accepted, is that, if there existed any case for holding that the delay was not of the making of the petitioner and, in fact, there is no delay on the part of the petitioner, it is the instant case. As pointed out above, the delay was the result of the inexplicable procrastination on the part of the Collector in deciding the Appeal which was filed by the petitioner as per the direction given by Assistant Collector himself. Even the remedy of application for refund was resorted to by the petitioner by virtue of the above-mentioned circular dated 8th May, 1973.

The next authority relied upon is the judgment of a learned single judge of this Court (Mrs. Sujata Manohar, J.) reported in 1988 (17) E.C.R. 143 (Bom) *Bhor Chemicals & Plastics Pvt. Ltd. v. Union of India & Anr.* Even in that case, the petitioner-assessee had filed an application for refund within less than two years of the realisation of its mistake in payment of the tax. Even in that case, its claim was not accepted and, hence, it had to file an Appeal to the Collector. The Collector took his own time for deciding the Appeal as appears to be his wont. He dismissed the Appeal and the petitioner-assessee filed a writ

petition in this Court, which is, as in the present case, without any delay. In those circumstances, the learned Single Judge held that the petitioner was not guilty of any unreasonable delay in filing the said writ petition. The facts of the present case are identical. While allowing the petition, the learned Judge has placed reliance upon the self-same judgment of the Supreme Court, referred to above, in *Salonah Tea Co.*'s case.

In the case of [Asstt. C.C. Ex. Vs. Kashyap Engineering and Metallurgicals \(P\) Ltd.](#), the facts were that the period during which the duty paid was from 1975 to 1980. On 12-4-1979, the petitioner in that case was orally informed about the Notification which existed in favour of the assessee by virtue of which Notification he would be exempted from payment of the duty. In November 1979, he was officially informed by the Officer of the Department that such Notification did exist. He was, therefore, informed that he would be entitled to the benefit of the Notification. Hence, in September 1980 and December 1980, he made claims for refund of the amount paid by him in spite of the existence of the Exemption Notification of which he was not aware. The claim was rejected after four years, in August 1984, and the writ petition was filed in the Karnataka High Court by the petitioner on 29-10-1984. It would, thus, be seen that this writ petition was filed long after the period of limitation for suit had expired. Even then, the learned Single Judge allowed the writ petition and ordered refund in favour of the petitioner-assessee.

It may be mentioned here that, on behalf of the petitioner in that case, reliance was placed on the self-same Circular, dated 8th May, 1973 and the trial Court had accepted the petitioner's plea in that behalf : In Appeal, it was sought to be contended on behalf of the Department that the Board could issue circulars for supplementing the express provision of Rules but not for supplanting them. The Appeal Bench observed that there might be quite some substance in the argument. However, the Appellant Bench held, in spite of this plea, that the order of the learned Single Judge granting refund was the correct order because the Court held that, if the Circular did not come to the rescue of the petitioner, the Supreme Court's power to order refund when there was recovery of tax without the authority of law was always present. It was contended also before the said Bench of the Karnataka High Court that the petition was barred by delay and laches; but even that contention was repelled by the High Court by making the following observation :-

"Even on the basis that the circular issued by the Central Board of Excise could not be enforced since the instructions were contrary to Rule 11, as contended on behalf of the appellant, it is clear that this Court, in exercise of its powers under Article 226 of the Constitution, can issue a writ of mandamus directing the Governmental authorities to refund tax or excise duty collected or paid without liability in law. Therefore, the order of the Single Judge directing the refund of the amount, has to be sustained on the ground that though the excise duty had been paid by mistake, its refund was refused".

The High Court further observed as follows :-

"The contention of the appellant is that there has been inordinate delay on the part of the respondent and therefore, the writ petitions were liable to be dismissed in limine. But the difficulty to accept this subscription is that the respondent believed that in view of Circular dated 8-5-1973 issued by the Central Board of Excise and Customs, they were entitled to make an application for refund within the time fixed for suit i.e. within a period of three years from the date on which the mistake came to be known. In fact, the applications for refund were made on 27-9-1980 and 29-12-1980 i.e. within three years from 12-4-1979 the date of discovery of the mistake. But for the circular issued on 8-5-1973 enabling the persons to apply for refund within a period of 3 years from the date of discovery of mistake cannot with any justification reject the applications made within three years and then take the stand that the respondent had filed the writ petitions after the time fixed for suit and therefore the writ petitions should be dismissed on the ground of delay and laches. It is the Circular dated 8-5-1973 which misled the respondent to file refund applications and further it is the respondent who kept the applications for over three years and rejected on 31-8-1984. It is the conduct of the 1st appellant which was responsible for the delay in presenting the writ petitions and not of the respondent. Hence, the plea of this appellant must fail."

We can say that the words have been taken from out of our mouth.

It is unnecessary to multiply the authorities, although Mr. Shroff relied upon two more.

9. Mr. Desai appearing for the Department came out with a two-fold answer. Firstly, he contended that there was no averment in the petition that the petitioner was misled by the circular in question. If he was not misled, then, runs the argument, it cannot be said that there was a justification for him to file the application for refund.

The answer is manifold. In the first place, we do not see any reason to hold that the circular was a wrong one. It is true that the Karnataka High Court has found some substance in the argument that the circular suffered from some defect. But our attention has not been drawn to any part of the law which makes the circular defective. The argument before the Karnataka High Court was that the circular could supplement the Rules, not supplant them. Our attention has not been invited to any position on the basis of which it could be said that the circular resulted in supplanting any of the Rules. In our opinion, it is the part of the general and essential power of the Board to give appropriate direction to the Administration as regards the best way in which they could conduct themselves so that the Department would not be faced with unnecessary litigation and expenses.

10. The circular directs strict adherence to law; nothing else. Hence, it is perfectly valid.

A few words need to be stated relating to the circular dated 8th May 1973, particularly its constitutional implication. It is already stated above that the Karnataka High Court has found some force in the argument of the Department's Counsel that the circular in effect

supplanted the Rules, rather than supplemented them.

It is evident that the said High Court has not given its final view on this question. All that the High Court has stated is that there is some force in the argument. We do not find that the petitioner in that case was called upon by the High Court to contest this view because, evidently, the said High Court could proceed upon the assumption that the circular had that effect and could still grant the relief to the petitioner in the writ petition for the reasons mentioned in the said judgment which reasons apply on all fours in the case, with which we are dealing.

But we make it clear that our view on this point is exactly the opposite. We do not see any force in the submission that the circular has the effect of supplanting the Rules. We are sure that the Karnataka High Court would have come to this same conclusion after full examination of this aspect of the question. We have mentioned the reasons for coming to this conclusion in the other part of the judgment. But it is worthwhile stating, once again, a few words on this point.

We may state once again what Mr. Desai stated before us. He specifically stated that he was not going to argue that the circular was illegal. This means that he has not done either of the two things. He

(a) has not denied the existence and continuance of the said circular;

(b) has not challenged the legality of the circular.

In our opinion, the result of this would be riotous if the abovementioned argument of the counsel is to be accepted. The Department will be deemed to be playing hide and seek with the Court and with the general tax paying persons in the country. Allowing the circular to remain in force and allowing the Collectors to ignore it on occasions which they choose is nothing but sowing the seeds of discrimination. One Assistant Collector or Collector or Tribunal or any other officer connected with this job of giving refund might follow the circular because it exists. Another may refuse to follow it, as has been done by the Assistant Collector and Collector in this case. No statement was made before us that the circular is not being followed or ought not to be followed by any body. It can be readily seen that this would afford a merry ground for picking and choosing

But we make it clear that, in our opinion, the Assistant Collector or Collector will be bound to entertain the application for refund in such cases even irrespective of the circular. The circular, after all, gives direction to the officers in conduct of the administration of Excise Law to pass orders in accordance with the law of the land without requiring or allowing the Department to waste its time, moneys and energies in unwarranted litigations. If any person in the country has made payment to another person by mistake of law, he is entitled to refund of that payment from the person who receives the payment. Really speaking, as per the law of the land, such a person making the payment is not required to go to the Court for getting the payment. There is a duty cast upon the person receiving

such mistaken payment to refund it even without waiting for any suit to be filed against him. It is only because the person who is at the receiving end chooses not to be guided by the dictates of the law that the person at the paying end has to undergo the ordeal of filing the suit. Such behaviour cannot be encouraged. The person, who does not make the refund of the mistaken payment in spite of the fact that he has realised that the payment is received by him under mistake of law, is committing an illegality. It is because he commits illegality that he is saddled by the Courts with costs when decree is passed against such person. The very rationale of costs is that the suit should not have been defended by the defendant and, in fact, the suit should not have been required to be filed by the plaintiff against the defendant at all.

The Government or the Department of Excise is in no way different from private persons so far as the general law contained in Section 72 of the Contract Act is concerned. In these matters of liabilities under the law, the Government is expected to set up model of behaviour. The Government is itself instrumental to the making of law; the Government should be the first person to abide by it. When the Department states that it will not refund the monies to the tax-payer which monies have been received by the Department under a mistaken understanding of law (and it knows it to be so), what the Department is, in fact, doing is that it is violating the law made by the Legislature with the help of the Government itself.

This conduct of the Government flies in the face of our constitutional injunctions. Article 372 of the Constitution recognizes all the laws existing in this country on 27th January, 1950. It means that it has recognized those laws (may be to the extent that they do not clash with the provisions of the Constitution). Contract Act is one such law and Section 72 of the Act is a part of it. This means that the Constitution has given recognition to Section 72 of the Contract Act as a law in force on 26th January, 1950. It is nobody's case that that law has ceased to hold the filed at any time after 26th January, 1950. The Constitution, therefore, declares that this Section 72 of the Act is binding upon every person throughout the length and breadth of this country and the Department of Excise is one of such persons. The Government cannot say that they will not be bound by Section 72. This means that the Government cannot say that they will not be liable to refund the amount received by them under the mistake of law.

Under Article 265 of the Constitution, there is a constitutional embargo upon the Government and its Departments in the matter of collection of tax without there authority of law. They collected it. u/s 72 of the Contract Act there is an embargo prohibiting them from retaining the amount with them. They, therefore, must pay it. There is no provision contained in any law or any part of the Constitution, (the position that every Department of the Government knows), requiring that they will be entitled to wait for repayment or they will be entitled to refuse the repayment unless a decree is passed against them by the Court. But this is the attitude invariably taken by the various Departments of the Government. No words are enough to deprecate this habit. By taking such an approach to the question of denying the liability of the Government, the Government is, in fact,

swelling the litigations in the Courts which are cracking under the burden of such litigations. Every person in this country, including the Government, must see to it that unnecessary litigation is not encouraged. If anybody tells the Government that they should conduct themselves as per the above principle, they are being told the right thing.

This is the precise thing the circular told the Assistant Collector and the Collector. This kind of direction is in keeping with each of the provisions of the Act as well as the principle and spirit underlying the Act. With respect, we are unable to agree with the Karnataka High Court that the healthy and beneficent direction given by the circular to the Excise Officers concerned to respect and honour the spirit and provisions of the relevant law is something which falls outside the Board's jurisdiction.

We make it clear that we are making these observations in spite of the absence of any argument that the circular was illegal. We have done so because, even though the Department's Advocate refused to comment upon the legality of the circular, in spite of our repeated questioning addressed to him in that behalf, what he has done in effect is that he has deprecated the circular. By saying that the circular has the effect of enlarging the period of limitation provided by Section 11B of the Act, he meant what he did not want to say. We could see the reasons why he could not do so. But we do not propose to set out the same in this judgment, mainly with a view to obviate avoidable acrimony. We only wish to state that the Department's Advocate found it fit to generate a lot of heat in the Court; but there was no light.

But assuming that there existed some defect in the circular, the fact remains that the circular is still kept alive by the Department. It has not been withdrawn. It, therefore, does not lie in the mouth of the Department to tell the citizenry that the circular issued by themselves, would not be followed by them. No Court has set aside or quashed the circular and no proceedings have been taken by the Department to do away with the circular. A neat plea of estoppel can be raised against the Department, although it is not necessary for us to do so, as regards the plea of delay imputed to the Trust who instituted proceedings on the basis of such circular. On account of the circular, the application for refund was made; the applications are adjudicated upon; appeals are directed to be filed against the order and at the end the Department turns round and says that the circular was without power and, hence, the time taken by the applicant in resorting to those remedies should not be taken into account. A more flagrant approach full of injustice and unfairness can hardly ever be witnessed.

But, assuming that the circular was invalid for any reason, is it not futile to contend that the petitioner was guilty of delay? The fact is that, on the basis of that circular, it filed the application. And it is being informed now that the beautiful circular has no legal effect at all. All the time taken for the proceedings by it was just wasted. The proposition of law urged by the Counsel, therefore, has just to be stated to be rejected.

11. Next, the learned Counsel relied upon the provisions of Section 11B of the Act and contended that the period of limitation for the application for refund was 6 months from the date of the payment. Plea was that the application should be made u/s 11B alone and, hence, it was rightly rejected by the Assistant Collector and the Collector.

We have grave doubt whether it can be said that the application should be only u/s 11B. The application was made in pursuance of the circular. Moreover, there must be a jurisdiction for every authority to correct the mistake committed by itself. By the application, all that the Assistant Collector was called upon to do was to correct his mistake of receiving payment of tax not due to the Department. That was a constitutional error committed by the department, the error being one which is squarely looked down upon by Article 265 of the Constitution of India as also by Article 300A of the Constitution. In our opinion, the basic misapprehension of the Department is that the Collector has no power to direct refund if what is done by him while recovering a tax is a constitutional error. The Department, like any other reasonable person, should have avoided indulgence in litigation in their own interest and doing such a thing must be held to be an inherent jurisdiction of every authority. This is not a jurisdiction in the nature of Section 151 of the Code of Civil Procedure; it is the basic jurisdiction of every administrative authority to conduct itself in a businesslike manner.

Then the learned Counsel relied upon the judgment of the Supreme Court reported in [D. Cawasji and Co. and Others Vs. State of Mysore and Another](#), . Cawasji and Co. and Others v. State of Mysore and Another. He relied upon some observation of the Supreme Court without reading the context in which the observation was made. In that case, it was held by the Supreme Court that, normally speaking, a writ petition for recovery of the tax paid by mistake should not be entertained by the High Court under Article 226 of the Constitution if a suit for the relief was barred by the time the writ petition was barred.

What is lost sight of is that, in that case, there existed no cogent reasons whatsoever explaining the so-called delay on the part of the petitioner in filing the petition. That was not a case in which the Department itself was at fault in allowing the petitioner to file the application for refund and in directing the petitioner to file the appeal against the order of the Assistant Collector refusing refund and, further, in delaying the disposal of the appeal for a full period of four years. That was a simple case where the petitioner filed application in the High Court after sleeping over his claim for a period exceeding three years and the Supreme Court held that this was an evident case of delay and laches; but whether a particular case falls under the description of delay and laches would depend upon the facts of each case. This is the precise ratio of the judgment of the Supreme Court in *Salonah Tea Co.'s case*, : 1988(33)ELT249(SC)

But the interesting part of the matter is that the learned Counsel himself relied upon the judgment of Madhya Pradesh High Court reported in [Bharat Commerce and Industries Ltd. Vs. Union of India \(UOI\)](#), . In that case, the High Court held that the writ petition filed for similar relief after more than three years from the date of the knowledge of mistake

without cogent reasons could not be entertained by the High court. The whole questions as to whether the petitioner has got cogent or explicable reasons for not filing the petition earlier. But, in the conspectus of the facts of this case, we fail to see how the petitioner could have filed the petition in this Court when it was diligently exhausting its remedy before the Appellate Authority, viz., the Collector. As a matter of fact, had it filed a writ petition earlier, a plea would have been raised by the Department, as is their usual practice, that an alternative remedy of appeal existed and that the writ petition would not be competent unless that remedy was exhausted. If the petitioner exhausts the remedy, the Department takes a volte face, knowing full well that the Department itself directed it to move the Collector in appeal. In our opinion, all this reasoning leaves extremely bad taste in the mouth in the matter of honest administration of the taxing statute.

The learned Counsel had no answer to the judgment of this Court in the case of *Bhor Chemicals & Plastics Pvt. Ltd. v. Union of India* Anr. 1988 (17) ECR 143 (Bom.). He did not even refer to the judgment of the Supreme Court in : 1988(33)ELT249(SC) *Salonah Tea Co. Ltd. etc. v. Superintendent of Taxes*.

There remains one more point viz. the question of unjust enrichment of the petitioner. In this connection, we are fully covered by the Judgment of the Full Bench of this Court in Writ Petition No. 1336 of 1987 (since reported in 1990 (46) ELT 23 (Bom.) decided by C. Mookerjee, C.J., and S. P. Bharucha and T. D. Sugla, JJ., on 27th November, 1989. It has been held there that though the plea of unjust enrichment by the petitioner who claims refund of the tax paid by him by mistake is a relevant plea, still, the Government, as such, is not entitled to retain the amount unjustly recovered by them in violation of the constitutional embargo contained in Article 265 of the Constitution of India. In this connection, the Full Bench has observed as follows :-

"..... the (High) Court has to exercise its own discretion according to the facts of each case for achieving the object of benefiting those who had borne the ultimate burden. Again, we may mention only some of the instances of forms in which such consequential relief may be granted. A fund may be created under a scheme for welfare of the particular industry and for the benefit of the consumers of the product. In case the excisable product is of mass-consumption, benefit of refund may be given by way of reduction of its price for a certain period or by promotion of research, rationalisation, etc. It would be always preferable in those cases to leave the discretion with the Court to decide how the consequential relief ought to be formulated."

We have already mentioned the function performed by the petitioner-trust. There is no dispute that the profits earned by the petitioner-trust are not enjoyed by the members for any personal benefit of any trustee; they are utilised for educational and industrial purposes; in other words, for purposes contemplated by the Full Bench. Directing the Department to refund the amount to the trust would, therefore, be eminently in the fitness of things.

12. We cannot part with the judgment without keeping on record our deep sense of unhappiness as regards the instructions which must be deemed to have been given to the Counsel to defend the petition even though, in spite of the existence of the circular and in spite of the fact that this would be a case of unjust enrichment by the Department itself if the tax was allowed to be retained by the Department. Loss to the Government is caused by not accepting the offer made by the petitioner. Delay was caused by the Department itself and blame for that was sought to be given to the petitioner for having delayed the filing of the petition.

The tax should have been refunded to the petitioner at least in the year 1982. They will receive it, hopefully, in the year 1990. The value of rupee has declined within these 8 years immeasurably. Justice demands that the department should pay interest to the petitioner at the rate of 12% p.a. from 1982 till the date of payment.

13. The petition, therefore, succeeds. The Rule earlier issued is made absolute. The respondents shall pay costs of the petition to the petitioner which are quantified at Rs. 5,000/-. The department shall also pay interest to the petitioner on the principal amount to be refunded at the rate of 12% per annum. The amount shall be deposited in this Court within 15 days from the date of this order irrespective of the question whether the respondents file an appeal against this order or not.

14. Mr. Desai applies for stay of the order. The application is rejected.