(1996) 03 BOM CK 0062

Bombay High Court

Case No: Writ Petition No. 1656 of 1987 and W.P. No''s. 2575 of 1984; 3081, 3841, 3056 and 3057 of 1987

Pfizer Ltd. and 5 ors. — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision: March 7, 1996

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (1996) 98 BOMLR 193 : (1996) 65 ECR 155

Hon'ble Judges: M.B. Shah, C.J; A.V. Savant, J

Bench: Division Bench

Advocate: Mr. A.J. Rana and Mr. K.K. Shroff, instructed by Crawford Bayley and Co.; Miss Anjali Chandurkar, instructed by M.K. Ambalal and Co.; Mr. D.H. Mehta and Mr. P.D. Shah, instructed by M.K. Ambalal and Co.; Mr. Mahendra Rathod, Mr. A.P. Sathe, Mr. D.H. Mehta and Miss. Anjali Chandurkar, instructed by Puranchand and Co.; Mr. H.C. Daruwalla, instructed by Crawford Baylay and Co, for the Appellant; Mr. M.I. Sethna Mr. R.V. Desai, Mr. H.V. Mehta and Mr. R. Ashokan, instructed by Mr. K.C. Sidhwa, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

M.B. Shah, C.J.
The only question involved in all these petitions is whether this Court by exercising its jurisdiction under Article 226 of the Constitution of India should order refund of excise duty paid because of erroneous interpretation of Tariff item or exemption Notification or ignorance of such Notification, despite the fact that such applications were filed before the authority beyond the prescribed period of six months as provided u/s 11B of the Central Excises & Salt Act, 1944 (hereinafter referred to as "the Act").

Re : Writ Petition No. 1656 of 1987.

2. The petitioners-Pfizer Limited-manufacture pharmaceuticals and bulk drugs liable to excise duty under Item 14E of the First Schedule to the said Act. In the manufacture of the said drugs, the Petitioners use guillotine capsules and rubber plugs, both liable to duty under the erstwhile Item 68 of the First Schedule to the Act.

3. In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (''Rules'', for short), the Central Government had issued a Notification, being Notification No. 201 of 1979 dated 4th June, 1979 (Exhibit "A" to the Petition) granting exemption to goods in which inputs classified under Item 68 of the First Schedule were used, from so much of the duty of excise as was equivalent to duty of excise on inputs, provided the conditions laid down and the procedure under the said Notification were followed.

4. The contention of the petitioners is that they had paid excise duty amounting to Rs. 1,01,48,300/- during the period from July, 1979 to February, 1986 in respect of which they were entitled to claim exemption from payment of excise duty and, therefore, the said amount ought to be refunded to them. A letter to that effect was addressed to the Collector of Central Excise on 17th November, 1986 (Exhibit "C" to the Petition). By his letter dated nil December, 1986 (Exhibit "D" to the Petition), the Assistant Collector informed the Petitioners that their request was considered carefully and since the petitioners had not complied with the requisite conditions stipulated in the aforesaid Notification, the Department was not agreeable to the petitioners contention and there was no question of condonation of delay and hence the petitioners'' request was rejected.

5. Being aggrieved by the rejection of their claim for refund, the petitioners have filed this petition in June, 1987 after having issued the letter on 7th May, 1987 to the Collector of Central Excise in that behalf.

6. In substance, it is the contention of the petitioners that though they were entitled to get benefit of exemption Notification dated 4th June, 1979, they paid the excise duty amounting to Rs. 1,01,48,300/- during the period from July, 1979 to February, 1986 and, therefore, the said amount should be refunded to them by the Respondents. For getting the said refund, a letter was written on 17th November, 1986 to the Collector of Central Excise. The prayer in the said letter was rejected by the Excise authorities without giving any hearing by holding that the petitioners had not complied with the requisite conditions of filing declarations and also because of non-filing of intimation and following other procedure prescribed in the Notification dated 4th June, 1979. On these grounds the application of the petitioners for refund was rejected.

7. The question that arises for our determination is whether in such cases this Court should exercise its writ jurisdiction under Article 226 of the Constitution of India and grant refund as prayed for by the petitioners on the alleged ground that there was

mistake of law or fact in not claiming benefit of the exemption Notification. In our view, no such refund can be granted for the reasons stated hereinafter.

8. Mr. Rana, the ld. Counsel for the petitioners, has raised the following contentions in support of the claim for refund :-

Contention No. 1 :

The amount paid by way of duty to the extent of exemption was paid under a mistake of law thinking that the money paid was due when in fact it was not due.

In support of this proposition, reliance has been placed by Mr. Rana on the following authorities :-

(i) Shiba Prasad Singh v. Maharaja Srish Chandra Nandi 52 Bom. L.R., 17 . The relevant observations are at pages 20, 21, and 22.

(ii) Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, .

The relevant observations are at page 138, paragraph 10, to the effect that Section 72 of the Indian Contract Act does not make any distinction between a mistake of law or a mistake of fact. In paragraph 21 at page 140 of Report it is pointed out that Section of the Indian Contract Act included not only a mistake of fact but also a mistake of law. Reliance was also placed by Mr. Rana on the observations in paragraphs 26 and 27 at pages 142 and 143 of the Report.

9. Contention No. 2 :

If the payment has been made under a mistake of law, then the assessee is entitled to the refund thereof irrespective of the internal or respective period of limitation prescribed by the statute under which the tax is payable. However, it would be subject to the circumstances and/or factors which may disentitle the assessee to the refund as, for example, unjust enrichment, estoppel, laches etc.

In support of the above proposition, reliance has been placed on the following authorities :-

(i) Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others, .

In that case the Court has observed, in paragraph 6, that an authority which recovered tax without jurisdiction cannot be permitted to retain the amount merely because the tax-payer was not aware that recovery was without jurisdiction.

(ii) Industrial Plastic Corporation Pvt. Ltd. Vs. Union of India, .

In that case the Court has relied upon the Supreme Court decision in Salonah Tea Company Ltd. v. Superintendent of Taxes, Nowgong & Ors. : 1988(33)ELT249(SC) nad rejected the contention of unjust enrichment. The following observations in the case of Salonah Tea Company (supra) have been relied upon :

"Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution, Court has power to direct the ..... unless there has been avoidable laches on the part of the petitioner. It is true that in some case the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule."

(iii) Union Bank of India and others Vs. Arphi Incorporated, , wherein the Court has observed as under :-

"12. It is now well established by several decisions of this Court and the Supreme Court that where duty has been collected without authority of law, it must be refunded. In the present case, indisputably duty was collected unjustly, without authority of law and worse still, in the teeth of the exemption Notification. The Writ Petition was filed within 3 years from the date of the discovery by the respondents of their mistake in paying such duty. The ld. Single Judge was correct in ordering its refund.

13. Mr. Rele queries : Why did the respondents pay the duty ? Answer : Because they were not aware of the exemption Notification. It is reasonable to assume that no sane person would go out of his way and voluntarily pay duty if he was aware that he need not. Mr. Rele''s query must give rise to another query : Pray, why did the Department collect duty without authority of law and in the teeth of the exemption Notification. Surely the Department was aware of the exemption Notification, and if not, was expected to be. The collection of this duty was manifestly illegal and without authority of law and must be refunded in a matter such as this.

14. Mr. Rele now takes refuge under the bogey of unjust enrichment on the ground that the burden has already been passed on to the consumer. None of this can be of assistance to the appellants. If this had been a case in reverse, and had the respondents been called upon to pay additional duty, could they have recovered it from their consumers after the sales were made ? Even Mr. Rele had to answer in the negative. Hence the dice must lie where they fall."

(iv) Parle Beverages Pvt. Ltd. Vs. Union of India, .

In this case the Court has observed that by catena of decisions it is settled that Department cannot retain excise duty recovered without any authority of law. For realisation of excise duty paid under mistake of law, the period of limitation set out u/s 11B is not attracted while granting relief in writ jurisdiction. Similar view is expressed in 966455--> .

(v) The ld. Counsel further relied upon the decision in the case of Union of India and others Vs. I.T.C. Limited, , particularly paragraph 8, wherein the Court has observed that High Court, while disposing of the Writ Petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation

which had been put against the respondent by the Collector of Central Excise (Appeals) to deny them the refund was not proper as admittedly the respondent had approached the Assistant Collector of Central Excise soon after coming to know of the judgment in A.K. Roy and Another Vs. Voltas Limited, and the assessee was not guilty of any laches to claim refund.

10. Contention No. 3 :

It would be unjust for the State not to refund the amount collected without the authority of law and in fact in teeth of the exemption Notification solely on the ground of non-compliance with the procedural requirement of the law, if the assessee is otherwise entitled to the refund.

In support of the above proposition, reliance was placed by Mr. Rana on the Supreme Court decision in the case of Kirpal Singh Duggal Vs. Municipal Board, Ghaziabad, . Relevant observations are to be found in paragraph 5 where the Supreme Court observed that the High Court had exalted what were merely matters of procedure, which the Municipality was entitled to require compliance with in granting refund, into conditions precedent to the exercise of jurisdiction of the Civil Court.

It was then contended that a public authority should not plead technical bar of limitation, as was observed by the Supreme Court in the case of Madras Port Trust Vs. Hymanshu International by its Proprietor V. Venkatadri (Dead) by L.R.s, .

11. Reliance was then placed on the decision in Rotogravurs Vs. Union of India, , where it has been held that Rule 233-B of the Central Excise Rules regarding "payment of duty under protest" was clearly procedural in nature and the occasion to obtain refund did not arise out of procedural provisions of the Rules, but a substantive right to get refund arose in view of the order passed by the appellate Collector in that case.

12. Contention No. 4 :

When goods are used captively, there is no question of passing on the incidence of levy and, therefore, the question of unjust enrichment cannot and does not arise.

In support of the above proposition, reliance was placed, firstly, on the Statement of Objects and Reasons relating to Central Excise and Customs Law (Amendment) Act, 1991 and it was contended that the provisions of Section 11B of the Central Excise Act are pari materia to the provisions of the amended Section 27 of the Customs Act. Similarly, it was pointed out that Section 12B of the Central Excise Act raising a presumption of passing on the full incidence of duty to the buyer of the goods is identical with the provisions of Section 28D of the Customs Act.

13. Having laid the above basis of similarity of provisions, reliance was placed on the decision of this Court in Solar Pesticides Pvt. Ltd. v. Union of India 1994 ECR 7 (Bom.)

:1992 (27) ELT 201 (Bom.) to contend that in respect of captive consumption, the question of unjust enrichment does not arise. In that case, what was sold was not the same goods as what was imported on which duty was paid. Imported copper scrap was not sold by the petitioners to anybody but was used for the manufacture of chemicals and what was sold was chemicals viz. copper oxychloride and it was difficult to ascertain how much of the original import duty on copper scrap was passed on to the buyer of copper oxychloride and in what proportion. In paragraph 24 of this decision a reference has been made to the decision of the Supreme Court in the case of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, , regarding payment of octroi duty on milk food powder imported in bulk, where the doctrine of unjust enrichment was held to be inapplicable since it was not the duty on going out of the finished product in respect of which duty might have been charged or added to the costs passed to the consumer. It must, however, be mentioned that SLP filed by the Union of India against the said decision of the Bombay High Court in Solar Pesticides'' case has been heard and judgment is awaited.

14. On the other hand, Mr. Sethna, ld. Counsel appearing for the Respondents, contended, in the first place, that the petitioners were proceeding on an erroneous assumption that they were entitled to claim exemption. Reliance was placed on the detailed conditions stipulated in the exemption Notification at Exhibit "A" to contend that this would contemplate investigation and scrutiny of facts at various stages of the process of manufacture. He then contended that it was well-settled that the provisions prescribing exemption should be strictly construed and if conditions have been stipulated requiring filing of any declarations in a stipulated form, failure to do so would disentitle the petitioners from claiming any concession or exemption.

15. Strong reliance was placed by Mr. Sethna on the decisions in :-

(i) Indian Aluminium Company Ltd. v. Thane Municipal Corpn. 1991 (55) ELT 464 (SC);

(ii) Navsari Oil Products Ltd. Vs. Assistant Collector of Central Excise, ;

(iii) Wigman Electrical Eng. Ind. P. Ltd. Vs. Union of India, ;

(iv) M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, ; and

(v) Indian Plastics Ltd. Vs. Union of India, .

16. In his rejoinder, Mr. Rana contended that this was a case of mutual mistake and once it was held that it was a mistake of law, it was immaterial as to who was responsible for the said mistake. Reliance was also placed on the decision of this Court in the case of Hindustan Cocoa Products Vs. Union of India, , particularly to the observations in paragraph 7 thereof.

17. Finally Mr. Rana placed reliance on the decision in the case of Ion Exchange (India) Ltd. Vs. Assistant Collector of C. Ex., , to contend that the respondents are

bound to refund the amount erroneously collected by them, irrespective of the period of limitation prescribed u/s 11B of the Act.

18. Having carefully considered the submissions of both the ld. Counsels in the light of the various decisions referred to above, we are of the view that the petitioners are not entitled to get refund as prayed for, mainly for the reasons stated below.

19. Re : Contention No. 1. With regard to Proposition No. 1 raised by the ld. Counsel for the petitioners that the amount paid by way of duty to the extent of exemption was paid under a mistake of law thinking that the money paid was due when in fact it was not due, in our view, this contention and the authorities upon which he has relied in support thereof are not required to be considered in the facts of the present case. As discussed above, whether the petitioners were entitled to get benefit of the exemption Notification would depend upon the facts of the case and on the finding whether the petitioners have satisfied the conditions precedent before claiming exemption. Further, even if the conditions precedent are satisfied, then also the procedure prescribed under the Notification is required to be satisfied before claiming exemption. The prescribed procedure provides constant scrutiny and verification of the goods by proper officer. Hence, in such cases when the requirements of the Notification are not at all satisfied, there is no question of payment of excise duty under mistake of law as if duty was not being leviable.

20. For getting benefit of the exemption Notification, it is for the assessee to establish that the goods manufactured by him come within the ambit of the said exemption. Further, it is for the assessee to establish that the conditions which are stipulated in the exemption Notification are complied with by him. In a case of exemption from duty, there is no question of any liberal construction to extend the term and the scope of the exemption Notification. Such exemption Notification must be strictly construed and the assessee should bring himself squarely within the ambit of a Notification, (Rajasthan Spinning and Weaving Mills Limited, Bhilwara, Rajasthan Vs. Collector of Central Excise, Jaipur, Rajasthan,).

21. In the present case, admittedly the petitioners have not filed any application for getting the benefit of the exemption Notification. Various conditions are required to be satisfied as provided in the exemption Notification before the exemption can be granted. The exemption Notification at Exhibit "A" to the petition itself provides that exemption would be granted provided the procedure set out in the Appendix to the said Notification is followed. It further provides that nothing contained in the said Notification shall apply to goods on which duty of excise is paid through "Central Excise Stamps". Apart from the aforesaid two conditions precedent which are required to be satisfied, there are various other conditions mentioned in the Appendix which would indicate that if benefit of the exemption Notification is claimed then there would be day-to-day monitoring of the goods manufactured by the petitioner and removed from the factory. Clause 5 of the said Appendix provides that a manufacturer of the said goods shall -

(a) give prior notice to the proper officer before the excise duty paid inputs are received in his factory to enable the proper officer to be present at the time of the receipt of the inputs;

(b) bring to the factory the inputs in original packing under the cover of gate pass or such other documents as may be approved in this behalf by the Central Board of Excise and Customs evidencing the payment of excise duty;

(c) produce the inputs when brought to the factory before the proper officer to enable him to identify the inputs and verify the actual quantity thereof;

and to maintain an account in the Forms mentioned therein. Various other conditions are also prescribed therein.

22. In our view, an assessee cannot say that even though he has not complied with the aforesaid conditions, still, however, because he came to known about the exemption Notification in the year 1986 he is entitled to get benefit of the said exemption Notification and the Respondents or their Officers should verify from the record which the petitioners have maintained in their office and grant refund of the amount of duty which is paid without any protest. In our view, such contention can never be accepted because granting of exemption depends upon various conditions precedent as well as the procedure which is required to be followed if such exemption is sought.

23. Re : Contention No. 2. It is the submission of the ld. Counsel for the petitioners that if the payment has been made under a mistake of law, then the assessee is entitled to refund thereof, irrespective of the internal or respective period of limitation prescribed by the statute under which the tax is payable, and that the Court should exercise its jurisdiction for grant of such relief. For this submission, the ld. Counsel himself has pointed out that granting of such relief would be subject to the circumstances and/or the factors which may disentitle the assessee to the refund as, for example, unjust enrichment, estoppel, laches etc. As discussed above, in such cases there is no question of payment of excise duty under mistake of law.

24. The petitioners'' claim would clearly be barred by delay and laches as it was the duty of the assessee to approach and apply to the authority for grant of exemption by showing that the petitioners were satisfying all the conditions precedent and have followed the procedure prescribed therein.

25. It is to be borne in mind that issuance of an exemption Notification in respect of a particular item does not render that item non-excisable. It only enables the manufacturer to claim exemption on the conditions specified therein being satisfied. Vee Kayan Industries, Batala Vs. Collector of Central Excise, Chandigarh, . So the levy and payment of excise duty in such cases are under the provisions of the law and cannot be said to be without authority of law or illegal.

26. Further, the Assistant Collector has rightly refused to consider the said application for refund as it was filed beyond the period prescribed u/s 11B of the Act. This aspect is also covered by the decision of the Supreme Court in the case of Paros Electronics (P) Ltd. Vs. Union of India and Another, .In that case, while dealing with the applications u/s 27 of the Customs Act, 1962 the Court held that in the proceeding which emanated for levy of duty the order became final and without having that order set aside by a competent Court there would be no question of grant of refund merely on the ground that in some other case a different view was taken, even if the payment is made under mistake of law. As long as the order which became final stands, the authority cannot grant refund. The Court further held that if the application is u/s 27 of the Customs Act, then the authority, being a creation of the statute, must act within the ambit of that provision and if the application is delayed he has no alternative but to reject it as barred by limitation.

27. However, it is pointed out by the ld. Counsel for the petitioners that in the case of Miles India Ltd. v. Assistant Collector of Customs 1985 ECR 289 (SC) : ECR 750 SC : ECR 1094 SC :1987 (30) ELT 641, the Supreme Court has observed that "We accord them leave to withdraw the appeal but make it clear that the order of the Customs, Excise & Gold (Control) Appellate Tribunal suffers from no infirmity. If really the payment of the duty was under a mistake of law, the appellant may seek recourse to such alternative remedy as it may be advised". Hence the petitioners submit that they have sought the remedy of filing this Petition. This aspect is clarified by the Supreme Court in the case of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, , wherein the Court has observed that where the duty has been levied without the authority of law or without reference to any statutory authority or the specificprovisions of the Act and the Rules framed thereunder have no application, the decision will be guided by the general law and the date of limitation would be the starting point when the mistake or the error comes to light. But in making claims for refund before the Departmental authority, an assessee is bound within the four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. The Court further observed that the authorities functioning under the Act are bound by the provisions of the Act and if the proceedings are taken under the Act by the Department, the provisions of limitation prescribed in the Act will prevail.

28. Now, taking into consideration the aforesaid observations made by the Supreme Court, it is clear that the question of resorting to alternative remedy for getting refund of the amount of duty would arise in cases where the authority has levied a duty or tax without the authority of law or without reference to the statutory authority or the specific provisions of the Act and the Rules framed thereunder. But in a case where the duty is paid under the provisions of the Act, then there is no question of resorting to civil proceedings for refund.

29. Further, after amendment of Section 11B of the said Act and addition of sub-section (3) therein, which provides that notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, grant of refund is subject to the provisions of Section 11B. This question is concluded by the decision rendered by the Supreme Court in Union of India and others Vs. I.T.C. Limited, . This would be clear from paragraph 13 of the judgment, which is as under :-

"Section 11B of the Act regulating refund of Central Excise Duty has undergone a vast change after its amendment by the Central Excise & Customs Laws (Amendment) Act, 1991 (No. 40 of 1991) with effect from 20th September, 1991. Sub-section (1) of Section 11B, after its amendment, provides that any person claiming refund of any duty of excise 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 in a prescribed form supported by documentary and other evidence intended to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty has not been passed on by him to any other person. The first proviso to the sub-section lays down that where an application for refund has been made before the commencement of Act No. 40 of 1991 such application shall be deemed to have been made under the amended provisions and shall be dealt with in accordance with the provisions of sub-section (2) as amended. In the second proviso, it is stated that the limitation of six months shall not apply where such duty has been paid under protest. Sub-section (2) of Section 11B inter alia provides that the Assistant Collector of Central Excise while entertaining the claim for refund of duty may order the refund of the amount of duty paid by the claimant provided he had not passed on the incidence of such duty to any other person. The thrust of the amendment vide Section 11B(2) of the Act is that refund of duty paid by the manufacturer can be allowed, if due, only in cases where the assessee has not passed on the incidence of such duty to any other person."

30. However, ld. Counsel for the petitioner relied upon paragraph 8 of the said judgment, wherein the Court has observed as under :-

"We are, therefore, of the opinion that the High Court, while disposing of the Writ Petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector of Central Excise (Appeals) to deny them the refund for the period 1.9.1970 to 28.5.1971 and 1.6.1971 to 19.2.1972 was not proper as admittedly the respondent had approached the Assistant Collector of Excise soon after coming to know of the judgment in Voltas case (supra) and the assessee was not guilty of any laches to claim refund."

It should be noted that the aforesaid observations are made by the Supreme Court with regard to the position of law prevailing prior to the amendment of Section 11B. In that case, the Delhi High Court had decided the matter by its judgment and order dated 12th April, 1982 and against that order appeal was filed before the Supreme Court which was decided on 16th July, 1993. While deciding the said matter, the Court has specifically held that after amendment of Section 11B, refund applications are required to be decided as per the provisions of Section 11B particularly after taking into consideration sub-section (3) of Section 11B. Thus, for all purposes, the finding given by the Court that the assessee was not guilty of any laches to claim refund would not be applicable in the facts of these cases.

31. Re : Contention No. 3 : It is contended that it would be unjust for the State not to refund the amount collected without the authority of law and in fact in teeth of the exemption Notification solely on the ground of non-compliance with the procedural requirement of the law, if the assessee is otherwise entitled to the refund. This contention also requires to be rejected. As discussed above, for getting benefit of the exemption Notification, the assessee is not only required to satisfy the competent authority that the conditions precedent mentioned in the Notification are complied with, but that he has followed the other procedural aspects of removing the goods under the supervision of the authority. After a lapse of five or ten years it is not possible for the authorities to verify whether the petitioners are entitled to get the benefit of the exemption Notification. Further, as stated above, issuance of an exemption Notification would not mean that excise duty is not leviable on the goods. It only means that if the assessee satisfies the conditions mentioned in the exemption Notification then he would be entitled to get the benefit thereof to the extent provided therein. In any case, this question is finally concluded by the Supreme Court in the case of Indian Aluminium Company Limited v. Thane Municipal Corpn. 1991 (55) ELT 464 (SC), wherein the Supreme Court has held that a concession can be granted only if the raw-material is used in the industrial undertaking seeking such concession. For that a verification was necessary and that is why in the rule itself it is mentioned that a declaration has to be filed in Form 14 facilitating verification. Failure to file the same would automatically disentitle the assessee from claiming any such concession. In that case the Court has considered its earlier decision in the case of Kirpal Singh Duggal Vs. Municipal Board, Ghaziabad, and distinguished it on facts. In paragraph 7 of its judgment, the Supreme Court has relied upon its judgment in Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, to the effect that the provision prescribing exemption must be strictly construed and for claiming exemption the procedure provided has to be complied with. If factual verification is contemplated at different stages of the process of manufacture and if the Rules so require, a declaration has to be made in a particular form facilitating verification. Failure to file such a declaration would automatically disentitle the Company from claiming any such concession. Hence, it cannot be held that it would be unjust for the State not to

refund the amount collected in the teeth of the exemption Notification on the ground of non-compliance with the procedural requirement of the Notification.

32. Further, assuming that excise duty was paid to the extent of exemption under mistake of law, that would hardly be a ground for grant of refund by exercising jurisdiction under Article 226 of the Constitution of India in such cases where amount is paid under the provisions of the Act without any protest. Even in cases where levy of duty is under the provisions which are declared invalid, yet the Court exercising jurisdiction under Article 226 of the Constitution has discretion in granting relief. In the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, , the Court has held that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The Court further held that the declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has and must be held to have a certain amount of discretion. The Court further held that in an application for refund or a suit for recovery of the takes paid for several years, the relief would be limited only to the period in regard to which the application or suit is not barred by limitation.
7th March, 1996 :

33. Further, presuming that the amount is paid by the petitioners under a mistake of law, as held by the Supreme Court in the case of Paros Electronics (P) Ltd. Vs. Union of India and Another, in the proceedings which emanated for levy of duty, the order became final and without having that order set aside by a competent Court there would be no question of grant of refund merely on the ground that in some other case a different view was taken, even if the payment is made under mistake of law. Further, as stated above, it cannot be said that the Respondents have recovered excise duty without any authority of law or without jurisdiction.

34. However, reliance is placed on the decision in the case of Indian Plastics Ltd. Vs. Union of India, , rendered by the Division Bench of this Court. In that case the Court has held that it is only the Excise authorities who had jurisdiction to decide whether a certain process amounts to manufacture and liable to payment of excise duty and the mere fact that the authorities constituted under the Act take an erroneous decision or the exercise of jurisdiction is irregular, that cannot lead to the conclusion that the orders passed were without jurisdiction and the recovery of duty was in breach of constitutional prohibition. The Court further held that the distinction between total lack of jurisdiction and irregularity in exercise of jurisdiction is well defined and error or irregular exercise of jurisdiction cannot be equated with lack of jurisdiction. The Court has further held that even though the respondents are bound by the period of limitation prescribed u/s 11B of the Act, it is open to this Court, while exercising jurisdiction under Article 226 of the Constitution, to direct the respondents to examine the claim for refund made by the petitioner without

treating any part of the claim as barred by limitation. We also agree that if the petition is filed under Article 226 of the constitution there is no question of period of limitation. However, the Court has to exercise its discretion judicially and in accordance with law. The period of limitation prescribed u/s 11B for refund application is six months. Under the amended provisions of Section 11B(3) of the Act, all the applications for refund are required to be decided as per the procedure prescribed u/s 11B of the Act. In view of the amendment of Section 11B and its interpretation by the Supreme Court in ITC Limited''s case (supra), it is not necessary to discuss the other judgments upon which reliance is placed by the ld. Counsel for the Petitioners.

35. Re : Contention No. 4 : That when goods are used captivity there is no question of passing on the incidence of levy and therefore the question of unjust enrichment cannot and does not arise, in our view, once we arrive at the conclusion that the application for refund of excise duty paid without any protest on so-called erroneous or mistake of fact or law requires to be rejected on the ground of delay, laches and acquiescence, it is not necessary for us to decide this contention.

36. For the foregoing discussion, in our view, this petition challenging the order dated nil December, 1986 (Exhibit "D" to the Petition) passed by the Assistant Collector of Central Excise rejecting the prayer for refund of Rs. 1, 01, 48, 300/- which was paid as excess duty by the petitioners for the period from July 1979 to February, 1986 requires to be and is hereby dismissed.

37. Rule is discharged with costs.

38. In other Petitions, ld. Counsel for the petitioners have adopted the above contentions.

Writ Petition No. 2575 of 1984.

39. It is the contention of the petitioners, United Phosphorus Pvt. Ltd., that pursuant to the order dated 25th February, 1983, Shroff Industrial Chemicals Pvt. Ltd., was amalgamated with the Petitioner-Company. In this petition the petitioners seek refund of excise duty paid under mistake of law by contending that the petitioners'' goods were wrongly classified under Tariff Item 14D and hence the petitioners were paying duty accordingly. By two Trade Notices dated 5th March, 1981 and 14th March, 1981 the Department has clarified that the goods manufactured by the petitioners were correctly classifiable under Tariff Item 68. Therefore, the petitioners wrote to the Department on 5th September, 1981 claiming a refund of Rs. 4,48,630.45 for the period from 25th November, 1977 to 8th September, 1980, being the excessive excise duty paid under Tariff Item 14D. Their application was rejected by the Assistant Collector of Central Excise by his order dated 31st December, 1981 on the ground that it was filed beyond the period of six months. The petitioners'' appeal to the Collector of Central Excise (Appeals) was also dismissed on 21st June, 1984. Hence the petitioners have challenged the said orders by filing this Petition.

40. For the reasons recorded above (in Writ Petition No. 1656 of 1987), this Petition also is required to be dismissed. This case is also directly covered by the decision rendered by the Supreme Court in the case of Paros Electronics (P) Ltd. Vs. Union of India and Another, . The Petition is accordingly dismissed. Rule is discharged with costs.

Writ Petition No. 3081 of 1987.

41. This petition is filed by the petitioners, Larsen & Toubro Ltd., praying that the order dated 10th February, 1985 passed by the Assistant Collector of Central Excise rejecting their claim for refund of excise duty paid under mistake of law and the order dated 12th December, 1986 passed by the appellate authority confirming the said order be quashed and set aside.

42. It is the case of the petitioners that they are manufacturing Aluminium Capsules; the petitioners purchase duty-paid aluminium foil for making aluminium capsules; after purchasing the duty-paid aluminium foils, the petitioners merely apply lacquer on one side and gum on the other side; the gummed and lacquered foils are then slit into strips; at this stage the petitioners pay duty on such activity viz. gumming, lacquering and slitting; the said duty is being paid from 1st February, 1973; the strips are then fed into machines for being made into aluminium capsules and the petitioners pay duty on these aluminium capsules also.

43. The petitioners came across the judgment of CEGAT in the case of 1983 ECR 799D and realised that it was their mistake in treating the activity of gumming, lacquering and slitting as manufacturing activity and making payment of duty thereon. Therefore, the petitioners filed classification list under protest for gummed, lacquered and slit aluminium foils. The petitioners also filed refund application for the excess duty paid during the period from 26th September, 1981 to 31st October, 1984 claiming refund of Rs. 20,93,108.55 on the aluminium foils after slitting stage. Respondent No. 2 rejected the refund application on the ground that the petitioners'' liability to pay the duty was decided on the classification list. Against that order, the petitioners preferred an appeal to the Collector of Central Excise (Appeals). That appeal was partly allowed by order dated 12th December, 1986 by holding that the petitioners were entitled to have refund for a period of six months immediately preceding the date on which the claim was filed. The said orders are challenged in this Petition.

44. In our view, for the reasons recorded above in Writ Petition No. 1656 of 1987, this Petition is also required to be dismissed. An order classifying the goods manufactured by the petitioners under a particular Tariff Item would not be a ground for holding that the said order is without jurisdiction. If the petitioners were aggrieved by the said order of classification it was open to them to challenge the same by following the procedure prescribed under the Act. On the contrary, the petitioners have accepted it and paid duty accordingly. [Re : Paros Electronics (P) Ltd.

(supra)].

45. Hence, this Petition is dismissed. Rule is discharged with costs.

Writ Petition No. 3841 of 1987.

46. This petition is filed by the Bombay Miscellanies Pvt. Ltd. challenging orders dated 10th October, 1984 and 22nd December, 1984 passed by the Assistant Collector of Central Excise and orders dated 20th March, 1987 and 24th August, 1987 passed by the Collector of Central Excise (Appeals) confirming in appeal the orders passed by the Assistant Collector of Central Excise.

47. It is the case of the petitioners that they were entitled to get a refund of Rs. 92,898.28 as they were entitled for exemption under Notification No. 83/83 dated 1st March, 1983, which was applicable with effect from 1st April, 1983, on their products, namely, sensitized paper falling under Tariff Item 37(2). Prior to filing of the refund application, the petitioners have cleared the said product on payment of duty in normal course on the strength of Classification List No. 3 of 1981 approved earlier. That application was partly rejected by holding that the petitioners were entitled to get refund only for a period of six months prior to the date of the said application. The said application was, therefore, partly allowed. Against the said order the petitioners preferred two appeals. The said appeals were dismissed on the same ground.

48. For the reasons recorded above in Writ Petition No. 1656 of 1987, this petition is also required to be dismissed and is hereby dismissed. Rule is discharged with costs.

Writ Petition No. 3056 of 1987.

49. Petitioner No. 1 is a Private Limited Company having their registered office at Rajkot in the State of Gujarat. Petitioner No. 2 is one of the Directors of the said Company. Petitioner No. 1 purchased industrial alcohol known as "Octonol" and "Butanol" during the period from July, 1980 to February, 1984 from petitioner No. 3 (original Respondent No. 4). The statement showing purchase of alcohol under various bills at different rates from time to time is annexed to the Petition as Exhibits A, B, C and D. It is the contention of petitioner No. 1 that by acting under mistake of law, the Department collected amount of excise duty under diverse gate passes when the said goods came to be cleared for the purpose of effecting delivery thereof to petitioner No. 1. It is also contended that on the alcohol purchased by petitioner No. 1, the Respondents are not entitled to recover any excise duty under Tariff Item 68 of the Act. The petitioners came to know about this only when this Court pronounced its judgment in Writ Petition No. 2840 of 1986 on 18th December, 1986 Raman Kantilal Bhandari Vs. Union of India and others, .

50. This petition was filed on 16th September, 1987. The petitioners contended that an amount of Rs. 9,14,704/- is wrongly recovered by the Respondents. It is to be noted that in the Petition itself nowhere it is stated as to when the petitioners came

to know about the judgment in Raman Kantilal Bhandari''s case (supra).

51. When this Petition came up for admission, objection was raised that the purchasers'' Petition for refund was not maintainable. So, at that time, on behalf of original Respondent No. 4-assessee (present Petitioner No. 3), it was stated that Respondent No. 4 has no objection to the amount being paid to the 1st petitioner. By an Order dated 1st October, 1987 this Court directed that Respondent No. 4 be transposed as Petitioner No. 3 in the Petition. The Court also directed that Respondent Nos. 1 and 2 shall treat the Petition as an application filed by the 4th Respondent for refund within the meaning of the Act and shall dispose of the application within a period of three weeks from the date of that order.

52. Subsequently, on 20th October, 1987 the Assistant Collector of Central Excise, by order dated 20th October, 1987, rejected the application holding that no protest was lodged at any time before making payment of the excise duty; that the period of six months from the date of filing of the said application is to be counted from 15th September, 1987 as provided u/s 11B of the Act and that the refund which was claimed upto 7th February, 1984 was clearly time-barred. That order is challenged by amending the Petition.

53. In the present case, admittedly, the person who has paid the excise duty has not filed any application for refund i.e. original Respondent No. 4 who is transposed as Petitioner No. 3. The ld. Counsel appearing on behalf of Petitioner No. 3 has also stated that petitioner No. 3 has not filed any such application. He, however, submitted that Petitioner No. 3 has no objection if the amount paid towards excise is refunded to Petitioner Nos. 1 and 2.

54. It is an admitted fact that Petitioner No. 3-assessee has passed over the burden of excise duty to Petitioner Nos. 1 and 2. In this view of the matter, u/s 11B of the Act, the petitioners are not entitled to get refund of the excise duty. Sub-section (2) of Section 11B specifically provides that duty amount could be refunded if it was paid by the manufacturer and it had not passed on the incidence of such duty to any other person. In the case of Union of India v. ITC Ltd. (supra), the Supreme Court has held that in view of the amended provisions of Section 11B of the Act, since the manufacturer has failed to establish that it has not passed the excise duty to any other person, it is not entitled to refund of the amount claimed by it.

Petitioner No. 3 (original Respondent No. 4) has not challenged levy and collection of excise duty.

55. Admittedly, Petitioner No. 3 had cleared the goods between 7th July, 1980 and 7th February, 1984. The Petitioner No. 3 has filed classification list at nil rate only in the month of March, 1983. That matter was adjudicated by the Assistant Collector of Central Excise who, by his order dated 29th November, 1984, held that the petitioners'' products were not falling within the ambit of Tariff Item 68 and the classification list dated 9th March, 1983 was approved. Thereafter Petitioner No. 3

has, admittedly, not paid any excise duty.

56. However, Petitioner Nos. 1 and 2, who are buyers from Petitioner No. 3 of the said products, have filed this Petition contending that this Court in the case of Raman Kantilal Bhandari v. Union of India (supra) has held that Tariff Item 68 excludes payment of duty on every kind of alcohol and the item imported being one of alcohol the recovery of duty is without authority of law and, therefore, the entire amount of duty recovered by the Respondents from 7th July, 1980 to 7th February, 1984 should be refunded.

57. In our view, this Petition also is required to be rejected on the same grounds which we have recorded above. The classification list submitted by petitioner No. 3 was previously approved. On that basis petitioner No. 3 went on paying excise duty. Subsequently Petitioner No. 3 submitted fresh classification list in the month of March, 1983. That was adjudicated and approved only in February, 1984. Hence from that date petitioner No. 3 was not required to pay any excise duty. If Petitioner No. 3 was aggrieved by the previous order of classification they ought to have challenged the same either by filing an appeal or a Writ Petition. Hence the petitioners are not entitled to get refund of any amount which they have paid on the basis of the classification order which remained in force till February, 1984.

58. In this petition, by an order dated 29th October, 1987, this Court had directed the Respondents to deposit Rs. 9,14,704/- in this Court. It was also ordered that upon such deposit, petitioner No. 1 would be at liberty to withdraw the said amount on furnishing 100% Bank Guarantee of a Nationalised Bank in favour of the Prothonotary & Senior Master equivalent to the said amount of deposit. The Court has specifically made it clear that the ad-interim order was subject to the outcome of the petition.

59. Pursuant to the said order dated 29th October, 1987, the Respondents have deposited Rs. 9,14,704/- and petitioner No. 1 has withdrawn the said amount by furnishing a Bank Guarantee.

60. As this petition is required to be rejected, the Petitioner No. 1 is required to return the amount which it has withdrawn on the basis of the order passed by this Court. Hence, Petitioner No. 1 is directed to deposit in this Court on or before 1st May, 1996 the amount withdrawn by it with interest thereon at 12% per annum from the date of its withdrawal from this Court. If Petitioner No. 1 fails to deposit the said amount within the stipulated time, the Prothonotary and Senior Master is directed to encash the Bank Guarantee and pay the said amount to the Respondents. It is also directed that with regard to the interest, further orders will be passed if Petitioner No. 1 fails to deposit the said amount within the stipulated time. It is also ordered that on such deposit being made by Petitioner No. 1, it would be open to the Respondents to withdraw the said amount along with any other amount lying to their credit with the Prothonotary and Senior Master on the basis of the order dated

29th October, 1987.

61. With the above directions, without deciding the question whether or not Petitioner Nos. 1 and 2 are entitled to file this petition, this petition is dismissed. Rule is discharged with costs.

Writ Petition No. 3057 of 1987.

62. Facts of the present case are identical to those in Writ Petition No. 3056 of 1987. This petition is filed on 16th September, 1987. Here also the refund is claimed by Petitioner Nos. 1 and 2 on the ground that Petitioner No. 3 has recovered excise duty in respect of alcohol purchased by petitioner No. 1 from Petitioner No. 3. The refund is claimed for the excise duty paid during the period from July, 1980 to October, 1983. This Petition is filed on 16th September, 1987 for refund of an amount of Rs. 5,43,106/-.

63. As in the case of Writ Petition No. 3056 of 1987, in this case also on the basis of an order dated 29th October, 1987, the Respondents have deposited in this Court an amount of Rs. 5,43,106/- and Petitioner No. 1 has withdrawn an amount of Rs. 4,67,940/- on furnishing a Bank Guarantee.

64. For the reasons recorded in Writ Petition No. 3056 of 1987, this petition is also required to be dismissed.

65. Hence, Petitioner No. 1 is directed to deposit in this Court on or before 1st May, 1996 the amount withdrawn by it with interest thereon at 12% per annum from the date of its withdrawal from this Court. If Petitioner No. 1 fails to deposit the said amount within the stipulated time, the Prothonotary and Senior Master is directed to encash the Bank Guarantee and pay the said amount to the Respondents. It is also directed that with regard to the interest, further orders will be passed if Petitioner No. 1 fails to deposit the said amount within the stipulated time. It is also ordered that on such deposit being made by Petitioner No. 1, it would be open to the Respondents to withdraw the said amount along with any other amount lying to their credit with the Prothonotary and Senior Master on the basis of the order dated 29th October, 1987.

66. With the above directions, without deciding the question whether or not Petitioner Nos. 1 and 2 are entitled to file this Petition, this Petition is dismissed. Rule is discharged with costs.

67. Issuance of certified copy of this judgment is expedited.