Mafatlal Industries Ltd. And Ors. vs Union Of India (Uoi) And Ors. on 19 December, 1996

Equivalent citations: 2002(83)ECC85, 1997(89)ELT247(SC), JT1996(11)SC283, 1996(9)SCALE457, (1997)5SCC536, [1996]SUPP10SCR585, [1998]111STC467(SC)

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Bench: A.M. Ahmadi, J.S. Verma, S.C. Agrawal, B.P. Jeevan Reddy, B.L. Hansaria, Suhas C. Sen, K.S. Paripoornan, B.N. Kirpal

JUDGMENT

B.P. Jeevan Reddy, J.

1. Significant questions concerning the refund of Excise and Customs duties collected contrary to law - in all its shades - arise for consideration in these appeals and writ petitions. They involve the correctness of certain earlier decisions of this Court, concept of unjust enrichment, interpretation of Article 265 of the Constitution of India and of the provisions of the Central Excises and Salt Act, 1944 and the Customs Act et al. As far back as August 14, 1984, Civil Appeal No. 1794 of 1984 and the connected special leave petitions were referred to a Bench of seven Judges by a Bench of two learned Judges, since the referring Bench doubted the correctness of the five-Judge Bench decision in Sales Tax Officer, Benaras and Ors. v. Kanhaiyalal Mukundlal Saraf [1959] S.C.R. 1350. When the matter came up before a seven-Judge Bench, it was brought to our notice that a seven-Judge Bench has followed the decision in Kanhaiyalal in State of Kerala v. Aluminium Industries Limited (1965) 16 S.T.C. 689. Accordingly, the matters were directed to be posted before a nine-Judge Bench. Meanwhile, several matters raising identical or connected issues got tagged on. Leave granted in Special Leave Petitions.

2. In the year 1991, the Parliament enacted the Central Excises and Customs Law (Amendment) Act, 1991 (being Act 40 of 1991) substantially amending the provisions relating to refund in both the Central Excises and Salt Act and the Customs Act, besides introducing several new provisions therein. Writ petitions challenging the validity of the said amendment are also posted before us. Apart from the validity, the meaning and purport of the amended provisions also falls for consideration. For the sake of convenience, we would refer to the relevant provisions in the Central Excises and Salt Act inasmuch as the relevant provisions in both the enactments are identical.

3. The Central Excises and Salt Act, 1944 (the Act) was enacted with a view "to consolidate and amend the law relating to Central Duties of Excise and Salt". The Statement of Objects and Reasons [vide Gazette of India, 1943, Part-V, P. 243) stated inter alia:

> The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto the introduction of a new central duty of excise has required the enactment of self-contained law and the preparation of a separate set of statutory rules. There are no less than 10 separate excise Acts...and 11 sets of statutory rules; and there are also 5 Acts relating to salt....This agglomeration of statutes and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organized administrations...
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> (2) It is accordingly proposed to consolidate in a single enactment all the laws relating to central duties of excise and to the tax on salt and to embody therein a Schedule, similar to that in the Indian Tariff Act, 1934, setting forth the rates of duty leviable on each class of goods. At the same time, the statutory rule will be similarly amalgamated and disembarrassed of their unnecessary details. The Act and the consolidated statutory rules, together with as many manuals of departmental instructions as may be necessary, will then form a complete Central Excise Code, which will simplify the administration of this branch of the revenue system and aid such further development as may be necessary...

(emphasis added)

4. Section 2 defines the several expressions occurring in the Act. Section 3 is the charging section while Section 4 deals with valuation of excisable goods for the purposes of charging of duties of excise. Section 5 provides for remission of duties on goods found deficient in quantity. Section 5A empowers the Central Government to grant exemption from duty of excise in public interest. Section 9 provides for punishment for violation of the provisions of the Act and the Rules. Section 11 provides for recovery of sums due to Government as arrears of land revenue. Section 11A, which was introduced with effect from November 17, 1980, provides for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Section 11B, which too was introduced with effect from the same date and by the same Amendment Act (Act 25 of 1978), provides for refund of duties. Chapter-III deals with powers and duties of officers and land holders while Chapter-IV deals with transport by sea. Chapter-V contains special provisions relating to salt. Chapter- VI deals with adjudication of confiscations and penalties while Chapter VI-A introduced by the Finance (No. 2) Act, 1980 (with effect from October 11, 1982) provides for appeals against the orders of the original and appellate authorities. In certain matters, a reference is provided to the concerned High Court and in other cases, a direct appeal to this Court is provided from the orders of the Tribunal. Chapter-VII contains supplementary provisions. Section 37 confers upon the Central Government the power to make rules to carry into effect the purposes of the Act and in respect of several matters mentioned therein.

5. Rules have been made by the Central Government in exercise of power conferred upon them by Section 37. The rules are very elaborate and provide for various matters and situations, to all of which it is not necessary to refer for the purposes of this case. Suffice it to mention that, broadly speaking, there are two methods of removal of excisable goods. One is, what may be called, general method where the goods are cleared on payment of duty and the other is what is called the self-removal procedure. The Rules provide for approval of classification list and price list. In case of dispute regarding classification of excisable goods or valuation (approval of the price list), there are provisions under which provisional orders can be made which would be operative pending the dispute and shall be subject to final decision in the matter. The Rules also provide for self-determination of duty in certain cases. In short, the Rules provide for all possible situations that may arise under the Act.

6. The particular provisions in the Act and the Rules relevant to the controversy herein may now be noticed a little more closely. Sections 11A and 11-B are complimentary to each other. While Section 11-A provides for recovery of duties not collected or short-collected by Revenue, Section 11-B provides for refund of taxes collected in excess of what is legitimately due under the Act. Section 11-A has remained untouched by the Amendment Act 40 of 1991 though it has been amended in certain minor respects by subsequent enactments. Omitting portions not necessary to the present controversy, Section 11-A, as it stands today, reads as follows:

> 11-A. Recovery of duties not levied or not paid or short- levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words 'six months', the words 'five years' were substituted.
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> Explanation.- ...
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> (ii) 'relevant date' means, -
>
> (a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid...
>
> (C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder ;

7. Coming to Section 11-B, before it was amended by Act 40 of 1991, it read as follows (again omitting portions not necessary for the present purposes):

> 11B. Claim for refund of duty.- (1) 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:
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> Provided that the limitation of six months shall not apply where any duty has been paid under protest.
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> (2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.
>
> (3) Whereas a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.
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> (4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.
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> (5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation. - For the purpose of this section...

(B) 'relevant date' means-

(f) in any other case, the date of payment of duty.

8. Section 11-B along with Section 11-A was introduced by Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 with effect from November 17, 1980, a fact mentioned hereinbefore. Until the enactment and enforcement of Sections 11-A and 11-B, the recovery and refund of excise duties was governed by the Rules. Rules 11 which dealt with claims for refund of duty, as in force prior to August 6, 1977 read as follows:

> Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months. -- No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rules 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid

> through inadvertance, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be.

9. Rule 11 was amended with effect from August 6, 1977 and it remained in force till the coming into force of Section 11-B. Rule 11, as it obtained during the said period, read as follows:

> Rule 11. Claim for refund of duty. - (1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.
>
> Provided that the limitation of six months shall not apply where any duty has been paid under protest.
>
> Explanation. - Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.
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> (2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.
>
> (3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.
>
> (4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation. -- For the purposes of this rule, 'refund' includes rebate referred to in Rules 12 and 12A.

10. We may now set out Section 11-B, as amended by Act 40 of 1991. (Even subsequent to 1991, there have been certain minor amendments to the said section.) As it stands today. Section 11-B reads as follows (portions not necessary for the purposes of the present controversy omitted):

> 11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish 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 had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to --

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, Specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

> (3) 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, no refund shall be made except as provided in Sub-section (2).

Explanation. -- For the purposes of this section,...

(B) 'relevant date' means--

(f) in any other case, the date of payment of duty.

11. The said Amendment Act also amended Section 11-C, besides introducing Section 11-D and an entire new chapter, Chapter II-A. Since Section 11-C does not fall for our consideration, we need not refer to it. Section 11-D reads as follows:

> 11-D. Duties of excise collected from the buyer to be deposited with the Central Government. -- (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise.

12. Chapter II-A comprises of four section, Sections 12-A to 12-D. They read thus:

> 12A. Price of goods to indicate the amount of duty paid thereon. -Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.
>
> 12B. Presumption that incidence of duty has been passed on to the buyer. - Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer Welfare Fund. - (1) There shall be established by the Central Government a Fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by Central Government the purposes of this Fund.

12D. Utilisation of the Fund. -- (1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the Authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

13. The refund of excise duties - which is the main topic of the controversy herein - was thus governed by different provisions over the years. To wit:

(i) upto August 6, 1977, the refund of duties was governed by Rule 11, as it stood upto that date;

(ii) between August 6, 1977 and November 16, 1980, refund of duties was governed by Rule 11, as it obtained during the said period;

(iii) From November 16, 1980 upto September 19, 1991 (date of coming into force of 1991 (Amendment) Act), the refund of duties was governed by Section 11B, as it stood during the said period;

(iv) with effect from September 19, 1991, the refund of duties is governed by Section 11B, as amended by Act 40 of 1991 and the allied provisions.

14. Though different provisions governed the subject of refund during different times, there is one feature uniformly common to them all, viz., they purport to be exhaustive on the subject of refund and they provide a period of limitation for making such claims. Rule 11, as it stood prior to August 6, 1977, not only carried the title "No refund of duties or charges erroneously paid unless claimed within three months", it provided specifically that no duties/charges "shall be refunded unless the

claimant makes an application for such refund under his signature and lodges it to the proper officer within three months from the date of such payment or adjustment, as the case may be". Similarly, Rule 11, as it obtained between August 6, 1977 and November 16, 1980, provided that claims for refund shall be made "before the expiry of six months from the date of payment of duty". (Of course, this period of limitation did not apply where the duty was paid under protest.) Sub-rule (4) of Rule 11 provided in express terms that "save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained". The situation obtaining under Section 11B, as it stood during the period November 16, 1980 to September 19, 1991, was no different. Sub-section (1) provided that a claim for refund shall to be filed "before the expiry of six months from the relevant date" and Sub-section (4) provided in specific terms that "save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Section 11B, as amended by 1991 (Amendment) Act, is similarly worded. Sub-section (1) now provides that a claim for refund has to be filed "before the expiry of six months from the relevant date" and Sub-section (3) declares in emphatic terms that "notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or any other provisions of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2)". Sub-section (2), it may be mentioned, provides the circumstances in which and the grounds on which a refund shall be made, or shall be denied, as the case may be. It is necessary to emphasise that the exclusivity of these provisions relating to refund - and conversely the bar to other proceedings created by them - is specific to the subject of refund and is apart from and in addition to the general bar implicit in the Act or expressed in some of its other provisions, as the case may be. Because the Act creates new rights and liabilities and also provides the machinery for assessment and adjudication of those rights and liabilities, a bar to the jurisdiction to civil court arises by necessary implication - an aspect dealt with at some length later. (Also see Principle No. 3 enunciated in Kamala Mills Ltd. v. State of Bombay dealt with in Paras 30 to 33.) The point to be stressed is that the exclusive nature of the refund provision expressly declared in Rule 11 and Section 11-B, at all points of time, is an express and specific one contained in a special statute. It is not the usual finality clause found in several statutes; it is much more.

15. The validity of the aforesaid provisions (providing a period of limitation for making claims of refund and declaring that no refund claim shall be entertained except under and in accordance with the said provisions) has never been challenged seriously. Though in certain with petitions now before us, validity of Section 11-B (as amended in 1991) is challenged - which challenge is dealt with hereinafter and rejected - the main submission of Sri F.S. Nariman, leading the arguments on behalf of the appellants- petitioners has been that these provisions do not preclude the filing of a suit or the filing of a writ petition claiming refund where the tax has been collected contrary to law by virtue of Article 265 of the Constitution and that the question of passing on the burden of duty is totally irrelevant in the matter of refund. Once the provisions of the Act including the aforesaid provisions, viz., Rule 11 and Section 11-B, as they stood from time to time, are taken as valid and effective, they constitute "law" with the meaning of Article 265, It may be remembered that the aforesaid provisions relating to refund have always been accompanied by and are complimentary to the provisions relating to recovery of duties legitimately due under law, but not collected. The recovery provisions also contained and do contain a corresponding period of limitation, i.e., three months or six months, as the case may be. This period of six months can be extended upto a maximum period

of five years in cases where non-payment of duty was on account of fraud, collusion, wilful mis-statement or suppression of fact or contravention of the provisions of the Act and the Rules indulged in with intent to evade payment of duty.

16. Article 265 of the Constitution is declaratory in nature. It says that "no tax shall be levied or collected except by authority of law". This no doubt means that taxes collected contrary to law have to be refunded. But where a taxing enactment contains provisions providing for and governing the refund of taxes collected without the authority of law, the validity of such provisions, if and when questioned, has to be examined with reference to other provisions of the Constitution. Article 265 does not itself lay down any criteria for testing the validity of a statute. When it speaks of "law", it no doubt refers to a valid law but the validity of a law has to be determined with reference to other provisions in the Constitution.

17. We must, however, pause here and explain the various situations in which claims for refund may arise. They may arise in more than one situation. One is where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing the constitutional limitations. This class of cases, we may call, for the sake of convenience, as cases of "unconstitutional levy". In this class of cases, the claim for refund arises outside the provisions of the Act, for this is not a situation contemplated by the Act.

18. Second situation is where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. This class of cases may be called, for the sake of convenience, as illegal levy. In this class of cases, the claim for refund arises under the provisions of the Act. In other words, these are situations contemplated by, and provided for by, the Act and the Rules.

19. The above distinction is not only accepted in all jurisdictions but is also not disputed before us.

20. So far as the first category (unconstitutional levy) is concerned, there is no dispute before us that it is open to the person claiming refund to either file a suit for recovery of the tax collected from him or to file a writ petition under Article 226 of the Constitution for an appropriate direction of refund. The only controversy on this score is whether the manufacturer/payer is entitled to such refund where he has already passed on the burden of the duty to others.

21. With respect to the second category of cases, there is a good amount of controversy. While the Union of India says that such claims of refund should be put forward and determined only under and in accordance with the provisions of the Act and the Rules, the contention of the appellants-petitioners is that even in such cases a suit or writ is maintainable on the ground that the tax has been collected without the authority of law, i.e., contrary to Article 265 of the Constitution. In other words, while according to the Union of India, such claims of refund should be filed within the time prescribed by the Act and the Rules and should and can be dealt with only under the provisions of the Act and the Rules, the appellants-petitioners say that such claim can be made in suits and writ petitions as well and that too without reference to the period of limitation prescribed

in Rule 11 or Section 11-B, as the case may be.

22. There is as yet a third and an equally important category. It is this : a manufacturer (let us call him "X") pays duty either without protest or after registering his protest. It may also be a case where he disputes the levy and fights it out upto first Appellate or second Appellate/Revisional level and gives up the fight, being unsuccessful therein. It may also be a case where he approaches the High Court too, remains unsuccessful and gives up the fight. He pays the duty demanded or it is recovered from him, as the case may be. In other words, so far as "X" is concerned, the levy of duty becomes final and his claim that the duty is not leviable is finally rejected. But it so happens that sometime later - may be one year, five years, ten years, twenty years or even fifty years - the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law. (We must reiterate - we are speaking of a case where a provision of the Act whereunder the duty is struck down as unconstitutional. We are speaking of a case involving interpretation of the provisions of the Act, Rules and Notifications.) The question is whether 'X' can claim refund of the duty paid by him on the ground that he has discovered the mistake of law when the Supreme Court has declared the law in the case of another manufacturer and whether he can say that he will be entitled to file a suit or a writ petition for refund of the duty paid by him within three years of such discovery of mistake? Instances of this nature can be multiplied. It may not be a decision of the Supreme Court that leads 'X' to discover his mistake; it may be a decision of the High Court. It may also be a case where 'X' fights upto first appellate or second appellate stage, gives up the fight, pays the tax and then pleads that he has discovered the mistake of law when the High Court has declared the law. The fact is that such claims have been entertained both in writ petitions and suits until now, purporting to follow the law declared in Kanhaiyalal, and are being allowed and decreed, sometimes even with interest. The Union of India says that this can never be. It says, a manufacturer must fight his own battle and only if he succeeds therein, can he claim refund. He cannot take advantage of success of another manufacturer and that no suit or writ is maintainable by him for refund on the ground of alleged discovery of mistake of law on the declaration of law by this Court or a High Court (or a Tribunal or any other authority under the Act) in the case of another person. The Union of India denies that such a person can plead payment of duty under a mistake of law within the meaning of Section 72 of the Contract Act. It also denies that such a writ petition or a suit can be filed within three years of such " discovery of mistake of law".

23. The Union of India submits that Kanhaiyalal has been wrongly decided. They submit that no suit or a writ petition lies for refund of duty except in the case of "unconstitutional levy" as specified hereinabove and even here, they say, such claim is subject to the proof that burden of the duty has not been passed on to the purchaser. In all other cases, they say, claims of refund can be made, and must be made, only under and in accordance with the provisions of the Act/Rules aforesaid, governing the subject of refund - and in no other manner and in no other forum. It is also suggested that, in any event, since Kanhaiyalal does not deal with the effect of passing on the duty to a third party - it was neither raised nor considered therein - it is no authority for the proposition that the manufacturer/payer can recover the duty paid in any of the above three categories of cases even if he has passed on the burden to others. The petitioners-appellants, on the other hand, support the reasoning of, and the law declared in, Kanhaiyalal and say that it has been the law over the last thirty seven years and has been followed consistently, without a demur, by larger and smaller

Benches of this Court and that there are no good or compelling reasons to depart from or over-rule the said decision.

THE FACTS OF AND THE PRINCIPLES ENUNCIATED IN KANHAIYALAL:

24. The respondent, Kanhaiyalal Mukundlal Saraf, was a partnership firm. It had entered into certain forward contracts in silver bullion at Benaras. For the Assessment Years 1948-49, 1949-50 and 1950-51, the forward transactions were brought to tax under assessment orders dated May 31, 1949, October 30, 1950 and August 22, 1951 respectively. On February 27, 1952, the Allahabad High Court held in Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur (1952) A.L.J. 332, that the provisions of the Uttar Pradesh Sales Tax Act taxing forward contracts were ultra vires the Uttar Pradesh Legislature. The respondent applied for refund of tax paid by it basing its claim on Budh Prakash Jai Prakash. It was declined by the Commissioner of Sales Tax. Thereupon, the respondent filed a writ petition in the Allahabad High Court seeking the quashing of the aforesaid three assessment orders and for a direction to refund the tax collected. Meanwhile, the judgment of the Allahabad High Court in Budh Prakash Jai Prakash was affirmed by this Court on May 3, 1954. The writ petition filed by the respondent came up for hearing before a learned Single Judge on November 30, 1956 and was allowed, as prayed for. In the special appeal filed by the department, it was contended that the said amount having been paid under a mistake of law was not recoverable. The department, however raised no objection to the maintainability of the writ petition. Indeed, it expressly gave it up. The Division Bench applied Section 72 of the Contract act and affirmed the judgment of the learned Single Judge. The matter was then brought to this Court . In this Court , it was sought to be contended that the only course open to the respondent was to follow the procedure prescribed by the Uttar Pradesh Sales Tax Act and that since that was not done, the assessee could not approach the civil courts. It was also contended that a writ petition would not lie for refund of money. These two contentions were not allowed to be raised by this Court (N.H. Bhagwati, J. speaking for the Constitution Bench) in view of the categorical statement made on behalf of the department before the special Bench of the High Court. The Court then referred to Section 72 of the Contract Act and observed that it does not make any distinction between a mistake of law and a mistake of fact and that it takes in both kinds of mistakes. The Court referred to the legal position obtaining in England, United States of America and Australia that money paid under a mistake of law is not recoverable but observed that so far as India is concerned, Section 72 governs the situation and since the language of the section is plain and unambiguous, it is not permissible to rely upon the position of law obtaining in England or, other countries. The Court then referred to the decisions of High Courts in India on the meaning and interpretation of Section 72, viz., the decisions of the Bombay and Madras High Courts in Wolf & Sons v. Dadyaba Khimji & Co. (1919) I.L.R. 44 Bom. 631 and Appavoo Chettiar v. South Indian Railway, A.I.R. (1929) Mad. 648 holding that money paid under a mistake of law is not recoverable and to the contrary decision of the Calcutta High Court in Jagdish Prasad Pannalal v. Produce Exchange Corporation Ltd., A.I.R. (1946) Cal. 245. The Court observed that the said conflict has since been resolved by Privy Council in Shiba Prasad Singh v. Srish Chandra Nundi (1949) L.R. 76 I.A. 244, expressly approving and affirming the view taken by the Calcutta High Court and holding further that the expression 'mistake' in Section 72 should be given its due and natural meaning which means that it takes in both mistakes of fact and law. The Privy Council observed : "It may be well to add that their Lordships judgment does not

imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise". This Court expressed its approval of the view taken by the Privy Council and proceeded to deal with the contention urged on behalf of the appellant (Revenue) that having regard to the fact that the payment of tax by the respondent was voluntary and also because the monies so received by the State have been spent away by it, the respondent was not entitled to recover the said amounts. (The appellant-Revenue sought to bring its case within the observations of the Privy Council, quoted hereinabove, which speak of the plaintiff being disentitle to relief on grounds of "estoppel or otherwise".) Both the objections were rejected by this Court. With respect to the objection that the payments were voluntary and, therefore, not recoverable, this Court observed that "if the State of U.P. was not entitled to receive the sales tax on these transactions, the provision in that behalf being ultra vires, that could not avail the State and amounts were paid by the respondent even though they were not due by contract or otherwise. The respondent committed the mistake in thinking that the monies paid were due when in fact they were not due and that mistake, on being established, entitled it to recover the same back from the State under Section 72 of the Indian Contract Act". The Court then dealt with the argument that under Section 72, monies paid by way of tax could not be recovered and rejected it. It held : No distinction can therefore be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made to America...To hold that tax paid by mistake of law cannot be recovered under Section 72 will be not to interpret the law but to make a law by adding some such words as 'otherwise than by way of taxes' after the word 'paid'. "The Court accordingly observed that both the parties were labouring under a mistake of law since they were not aware of the true position which they came to know only when Allahabad High Court delivered its judgment in Budh Prakash Jai Prakash and when it was affirmed by this Court in appeal. The Court proceeded to observe that "the State of mind of the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law...it was entitled to recover back the said amounts and the State of U.P. was bound to repay or return the same to the respondent irrespective of any other consideration." The Court also observed that there was nothing in circumstances of that case to support a plea of estoppel against the respondent and reiterated its understanding of the legal position thus : "On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like". With respect to the plea of estoppel put forward by the appellant-Revenue, the Court held that there was no question of estoppel in that case because both the parties were labouring under a mistake of law. The Court went further and observed : "equitable considerations...could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him". The Court also observed that the fact that the State of Uttar Pradesh had not retained the monies paid by the respondent but had spent them away in the ordinary course of the State business would not make any difference to the position and that the respondent was entitled to recover back the monies paid by it under a mistake of law under the plain terms of Section 72.

25. It is well to remember that (a) this was a case where the relevant provisions of the Uttar Pradesh Sales Tax Act were held to be ultra vires the Uttar Pradesh Legislature, i.e., beyond the legislative competence of the State Legislature and (b) it was a case were the assessee filed a writ petition in the High Court seeking the quashing or relevant assessment orders and for a consequential order of refund, basing its claim upon the judgment of the High Court in another assessee's case. In other words, orders in the assessee's own case had become final. He sought to reopen them, by way of a writ petition, in view of the invalidation of the relevant provisions of the Act by High Court and this Court in the case of another assessee. Yet another circumstance to be noticed is that though the Uttar Pradesh Sales Tax Act contained a provision providing for refund, it was neither referred to nor discussed.

26. Now, what are the propositions emerging from this decision? They are : (1) Section 72 of the Contract Act does not make any distinction between a mistake of law and the mistake of fact; it takes in both kinds of mistake. (2) The Rule then obtaining in England and certain other countries that paid under a mistake of law are not recoverable has no relevance to this country. Here, the matter is governed by Section 72 of the Contract Act. (3) Where the taxes are paid under a mistake of law, the person paying is entitled to recover the same from the State on establishing the mistake. This consequence flows from Section 72 of the Contract Act. On such mistake being established, the State is bound to repay or return the amounts irrespective of any other consideration. (4) The right to recover or the obligation to refund mentioned in (3) above is subject, however, to "questions of estoppel, waiver, limitation or the like". (5) There is no question of estoppel where both parties were labouring under a mistake of law. (6) Equitable considerations cannot be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him. (7) The fact that the State has spent away the taxes for the purposes of State is no defence to a claim for refund of taxes paid under a mistake of law, in view of the plain terms of Section 72.

SUBSEQUENT DECISIONS OF THIS COURT ON THE QUESTION OF REFUND:

27. Before we deal with the correctness of the proposition in Kanhaiyalal, it would be appropriate to refer to the subsequent decisions of this Court on the subject of refund of taxes collected without the authority of law and see how Kanhaiyalal has been followed, understood or distinguished, as the case may be.

28. The first decision to be referred in this behalf is the decision of a seven-Judge Bench in State of Kerala v. Aluminium Industries Ltd. (1965) 16 S.T.C. 689. The respondent was a dealer registered under the Kerala Sales Tax Act. During the year 1950-51, it paid certain amounts by way of sales tax. Subsequently, it filed a writ petition claiming refund of Rs. 80,048-13-6 on the ground that sales on which tax has been levied were exempt from tax under Article 286(1)(a) of the Constitution, as it then stood. The High Court allowed the writ petition partly directing refund of Rs. 54, 375-5-0. Only the State of Kerala appealed. The respondent-assessee's case was that when it paid the tax, it did not know that the said transactions were not exigible to tax. It claimed that it discovered its mistake only after the payment. The claim for refund was resisted by the State of Kerala contending inter alia that inasmuch as the tax was paid voluntarily, it was not recoverable in law. The High Court had rejected the State's plea relying upon the decision of this Court in Kanhaiyalal. The appeal was heard by a

seven-Judge Bench of this Court which observed that in the light of the decision in Kanhaiyalal, money paid under a mistake of law is recoverable under Section 72 of the Contract Act and that there can be no question of estoppel when the mistake of law is common to both the parties. The Bench further observed, "in such a case where tax is levied by mistake of law it is ordinarily the duty of State, subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice), to refund the tax. If refund is not made, remedy through court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake (see State of Madhya Pradesh v. Bhailal Bhai)". The Court held that "it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation". It is clear from a reading of the Judgment that neither party questioned the correctness of the decision in Kanhaiyalal and accordingly it was followed implicitly. This decision, though rendered by a larger Bench, does not itself lay down any principle.

29. In State of Madhya Pradesh and Ors. v. Bhailal Bhai , the tax imposed upon the tobacco imported by the respondents was held to be unconstitutional on the ground that it was violative of Article 301 of the Constitution and not saved by Article 304(a). The claim for refund of such taxes was also upheld on the ground that it was a case of a tax paid under a mistake within the meaning of Section 72 of the Contract Act. Kanhaiyalal was followed. It was also observed that though there is no limitation prescribed for filing a writ petition under Article 226 of the Constitution, the maximum period fixed by the Legislature as the time within which a suit for similar relief has to be filed can be taken as the reasonable period for approaching the High Court.

30. Kamala Mills Ltd. v. State of Bombay , decided by a Special Bench of seven learned Judges, lays down several propositions which are of crucial relevance to the issues arising herein. The appellant was a dealer registered under the Bombay Sales Tax Act. During the year 1950-51, it was assessed to sales tax on certain sales treating them as 'inside' sales. However, according to the ratio of the decision of this Court in Bengal Immunity Co. Ltd. v. State of Bihar and Ors. , delivered on September 6, 1965, the said sales were in truth 'outside sales, not taxable under the Bombay Act. Since the time for adopting the remedies provided by the Bombay Act had become barred meanwhile, the appellant filed a suit for recovery of the sales tax illegally collected from it in respect of 'outside' sales. The respondent-State contended inter alia that the suit was barred by virtue of Section 20 of the Bombay Act. The plea was upheld by the trial court and the suit dismissed. On appeal, the High Court affirmed. The matter was then brought to this Court. Three questions were raised for consideration before this Court, viz. (1) whether an assessment in violation of a statutory provision could claim the status of an assessment made under the Act within the meaning of Section 20; (2) whether the decision by the appropriate authority as to the nature of the transaction was a decision on a collateral fact, the finding on which alone conferred jurisdiction on the authority to levy the tax, or was it a decision on a question of fact which had to be determined by the authority before itself as one of the issues before it; and (3) whether Section 20 was valid if construed as being a complete bar to a suit such as filed by the appellant.

31. Section 20 of the Bombay Act read as follows.

20. Save as is provided in Section 23, no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed under Section 3 to assist him shall be called into question in any Civil Court, and save as it provided in sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order.

32. The answers given by the seven-Judge Bench are to the following effect:

> (a) As held by this Court in Firm & Illuri Subbayya Chetty & Sons v. State of Andhra Pradesh , the words "any assessment made under this Act" were wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments were correct or not. The words "an assessment made" cannot mean an assessment properly and correctly made. Since the appellant was calling in question the orders of assessment made against it, its challenge in the suit was plainly prohibited by Section 20.
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> (b) The provisions of the Bombay Act make it clear that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax, or not, are all matters to be determined by the authorities under the Act. It is impossible to accept the argument of the appellant that the finding of the appropriate authority that a particular transaction is taxable under the provisions of the Act is a finding on a collateral fact and, therefore, the resort to civil court is open. On the contrary, the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. Even if the appropriate authority, holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction which is an 'outside' sale is not an 'outside' sale and proceeds to levy sales tax on it, it cannot be said that the decision of the appropriate authority is without jurisdiction.
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> (c) Where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right a liability shall be determined by the Tribunal so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are provided by the statute or not. In other words, if the court comes to the conclusion that the Act does not provide any remedy to make a claim for recovery of illegally collected tax and yet Section 20 prohibits such a claim being made before an ordinary civil court, the court might hesitate to construe Section 20 as creating an absolute bar. If for any reason, Section 20 is construed strictly as constituting an absolute bar, the question may arise with respect to its constitutionality. Looked at from the above angle, it cannot

be said that the Bombay Act does not provide an alternative remedy for the claim which the appellant put forward in the suit. Section 22-B empowered the appellate/revisional authority under the Act to extend the period of limitation if they are satisfied that party applying for such extension had sufficient cause for not preferring the appeal and revision during the prescribed period. Section 23-A further provided for rectification of mistakes. In this view of the matter, it cannot be said that the claim of the appellant could not have been agitated under and in accordance with the provisions of the Bombay Act.

(d) Section 20 was constitutionally valid on the same reasoning on which Section 18-A of the Madras General Sales Tax Act was held to be valid in Firm & Illuri Subbayya Chetty & Sons.

(e) Insofar as the challenge to the constitutionality of Section 20 of the Bombay Act is concerned, the suit cannot be said to be barred. Section 20 does not take in the challenge to the validity of the section itself. But inasmuch as Section 20 is found to be constitutional, the plaintiff cannot get any relief.

33. Sri F.S. Nariman strongly emphasised the provision in Section 22-B of the Bombay Act and the absence of a similar provision in the Central Excise Act/Customs Act. With respect, we are not able to appreciate this argument. Section 22-B merely empowered the appellate/revisional authorities to extend the time prescribed for filing an appeal or revision, as the case may be. Section 22-B did not provide for extension of the time prescribed for making an application for refund under Section 13 of the Act. Even in the Central Excise and Customs Act, there are provisions empowering the appellate authorities to extend the time prescribed for filing the appeal. (There is no provision for revision now.) Of course, there is no provision for extending the time limit prescribed in Section 11-B. But there was no such provision in the Bombay Act either. If so, we are unable to see any distinction between the Bombay Act the enactments concerned herein in this behalf. We must say that we are in respectful agreement with the propositions enunciated in this decision and propose to apply them to the provisions concerned in these matters.

34. K.S. Venkataraman & Co. v. State of Madras is significant for the reason it differs from the decision of the Privy Council in Raleigh Investment Co. Ltd. v. The Governor General in Council (1947) L.R. 74 I.A. 50. The appellant was assessed to sales tax in respect of certain works contracts executed by them during the years 1948-49 to 1952-53. On 5th April, 1954, the Madras High Court declared that the relevant provisions of the Madras General Sales Tax Act, 1939 empowering the State to assess indivisible building contracts were beyond the competence of the State Legislature. On March 23, 1955, the appellant instituted a suit for recovery of the amount paid by it on building/works contracts. Both the trial court and the High Court dismissed the suit relying upon the decision of the Privy Council in Raleigh Investment Co. Ltd. and observing that the only remedy of the appellant was to pursue the machinery provided by the statute. This Court by a majority (Subba Rao, Wanchoo and Sikri, JJ. -Shah and Ramaswami, JJ. dissenting) did not agree with the proposition in Raleigh Investment Co. Ltd. that a contention relating to the validity of the Act can be raised before the authorities under the Act. The Court held that an authority created by a statute

cannot question the vires of the statute or any of its provisions and that the authorities must act under the Act and not outside it. The Court further held that if the authorities act under a provision which is invalid being beyond the competence of the legislature enacting it, it cannot be said that the authorities are acting under the Act. The question relating to the validity of the Act, the Court held, cannot also be gone into by the High Court acting in its special advisory jurisdiction provided by Section 64 of the Madras Act. Accordingly, it was held that the suit for refund was maintainable and that the period of limitation is three years from the date on which the mistake became known to the plaintiff. This again was a case where the provisions, under which the disputed tax was levied, were declared unconstitutional on the ground of lack of legislative competence.

35. In Dhulabhai and Ors. v. State of Madhya Pradesh and Anr. , a Constitution Bench of this Court discussed at length the question when does a suit lie for recovery of taxes imposed and collected under a taxing enactment, to wit, the Madhya Bharat Sales Tax Act, 1950 and enunciated seven propositions. Suits were filed by the appellants for recovery of certain taxes on the ground that the same were collected from them against the constitutional prohibition contained in Article 301. Hidayatullah, CJ., speaking for the Constitution Bench, summarised the position emerging from the decisions of this Court on the subject in the following words:

> (1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
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> (2) Where there is an express bar on the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunal constituted under that Act. Even the High Court cannot go into that question on the revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace

a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

36. In the above summary, Proposition No. 5, however, requires a little elucidation. A reading of the judgment shows that the said proposition is based upon the earlier decisions of this Court in K.S. Venkataraman Bharat Kala Bhandar Ltd. v. M.C. Dhamangaon . K.S. Venkataraman, as pointed out hereinabove, was a case where the suit was filed for refund of amounts collected under provisions declared ultra vires the State Legislature, i.e., a case of what we have called 'unconstitutional levy. Bharat Kala Bhandar Ltd. was a case were there was no machinery provided in the Central Provinces and Berar Municipal Act for refund of tax assessed and recovered in violation of the constitutional limitations. It was held that "one of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against the violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution". As a matter of fact, the tax levied in this case was found to be void being violative of the provisions in Article 276 of the Constitution and Section 142-A of the Government of India Act, 1935. The words "in excess of the constitutional limits" must, therefore, be understood in the context of the ratio of the above two decisions. So for as the words" illegally collected" in Proposition No. 5 are concerned, it is obvious that they go along with the preceding words, i.e., where a tax is collected in disregard of the constitutional limitations, it will be a tax illegally collected and a suit lies. It would not be reasonable to understood the words "illegally collected" dissociated from their context or in a manner contrary to the ratio of Kamala -Mills, which was expressly referred to and followed in this decision.

37. The facts of the decision in Tilokchand Motichand and Ors. v. H.B. Munshi and Anr. are rather interesting. They tell us how the Court viewed the attempt of a person who tried to take advantage of the decision in another person's case rendered several years later. The authorities under the Bombay Sales Tax Act refunded certain amounts to the petitioners-dealers on the condition that they should pass on the said amounts to their customers (these amounts were earlier collected by the dealers from their customers and paid to the State). On the ground that the dealers have failed to pass on the said amounts to their customers, the authorities forfeited the said amounts under Section 21(4) of the Bombay Sales Tax Act, 1953. The dealers filed a writ petition in the Bombay High Court challenging the constitutional validity of Section 21(4). A learned Single Judge dismissed the writ petition holding that inasmuch as the petitioners-dealers have defrauded their customers, they were

not entitled to any relief under Article 226. The appeal preferred by the dealers was dismissed by the Division Bench of the High Court holding that even if there was a violation of petitioners' fundamental right, the High Court was not bound to come to their help in view of their conduct. The dealers accordingly paid up the said amount in instalments between August, 1959 and August, 1960. More than seven years later, i.e., on September 29, 1967, this Court struck down Section 12(A)(iv) of the Bombay Sales Tax Act, 1946 corresponding to Section 21(4) of the 1953 Act in Kantilal Babulal v. H.C. Patel, 21 S.T.C. 174. On February 9, 1968, the petitioners filed a writ petition in this Court under Article 32 of the Constitution for refund of the aforesaid amounts on the assumption that Section 21(4) is unconstitutional in view of the decision of this Court in Kantilal Babulal. They submitted that though they had raised other grounds in support of their attack upon the validity of Section 21(4) in the High Court, they were not aware of the particular ground upon which the corresponding provision in the 1946 Act was struck down by this Court in Kantilal Babulal, This Court, by majority (Hidayatullah, CJ., Bachawat and Mitter, JJ.) dismissed the writ petition holding that the judgment of the High Court dismissing the writ petition filed by the writ petitioner operates as res judicata and bars the petition under Article 32. Hidayatullah, C.J. made the following relevant observations:

> The petitioner moved the High Court for the relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is: can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court, His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconstitutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced in may be questioned in a fresh litigation revived only with the argument, that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of my brethren Bachawat and Mitter, JJ. that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might also have decided the question of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High Court decided against it. Not having done so and having abandoned his own litigation years ago, I do not think that this Court should apply the analogy of the Article in the Limitation Act and

give him the relief now.

(Emphasis added)

38. Bachawat, J. held that a writ under Article 32 will no doubt issue as a matter of course where infringement of fundamental right is established but that does not mean that in giving relief under the said article, this Court would ignore all laws and procedure. The learned Judge also emphasised the discretionary nature of jurisdiction.

39. Reference may also be made to the decision of K.K. Mathew, J. (sitting with Alagiriswami, J.) in D. Cawasji & Co. Etc. v. State of Mysore and Anr. . The appellant paid education cess levied under the Mysore Elementary Education Act, 1941 (as amended in 1968). The Mysore High Court struck down the relevant provisions levying the cess in 1968 on a writ petition filed by the appellant, which was affirmed by this Court in 1971. In the middle of the year 1968, the appellant filed a writ petition claiming refund of the cess amount paid by him. The claim was rejected by the High Court on the ground of delay. On the matter being brought to this Court, this Court held following Bhailal Bhai and Aluminium Industries that taxes paid without the authority of law can be recovered by way of a writ petition and that by virtue of Section 17(1)(c) of the Limitation Act, 1963, the period of limitation does not begin to run, in a suit for relief on the ground of mistake, until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it. Mathew, J. did realise the implication of the said holding. The learned Judge make these perceptive observations:

> We are aware that the result of this view would be to enable a person to recover the amount paid as tax even after several years of the date of payment, if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person within three years from the date of declaration of the invalidity of the law. That might both be inexpedient and unjust so far as the State is concerned.
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> (Emphasis added) The learned Judge proceeded to observe further:
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> A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years, be it a hundred years' after the date of payment. Nor is there any provision under which the court deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so1.

40. The appeals were, however, dismissed holding that since the appellant has failed to claim the relief of refund in the first writ petition filed by him, he is disentitled from doing so by way of a separate subsequent writ petition. It was observed that it is not open to the appellant to split up his claim for refund and file writ petitions in a piece-meal fashion. The decision is significant for pointing out the irrational and unjust consequences of the holding in Bhailal Bhai and Aluminium

Industries which implicitly followed Kanhaiyalal. The decision is also significant for pointing out the adverse impact of public interest inherent in holding (See Kanhaiyalal again) that the plea that the State has expended the taxes on public purposes is no defence to a claim for refund.

41. We may at this juncture refer to a very significant decision in R.S. Joshi v. Ajit Mills rendered by a seven-Judge Constitution Bench. Section 46 of the Bombay Sales Tax Act, 1959 provided that no person shall collect any sum by way of sales tax which is not exigible according to law. Section 37 provided for penalties in case of violation of the provisions of Section 46. Not only the person so collecting was liable to pay a penalty not exceeding Rupees two thousand but in addition thereto, any sum collected by the person by way of tax in contravention of Section 46 was also liable to be forfeited to the State Government. The constitutionality of the said provision was questioned on the basis of the earlier decision of this Court in R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad . The challenge was repelled. The following observations of Krishna Iyer, J. are apposite:

> The professed object of the law is clear. The motive of the legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or 'ex abundanti cautela' excesses in the working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare state. One potent prohibitory process for this consummation is to penalize the trader by casting a no-fault or absolute liability to 'cough up' to the State the total 'unust' taking snapped up and retained by him 'by way of tax' where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers may include 'many a little makes a mickle'. If these steps in reasoning have the necessary nexus with the power to tax under Entry 54 List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a 'colourable device' or as 'supplementary, not complimentary' ....In our view, the true key of constitutional construction is to view the equity of the statute and sense the social mission of the law, language permitting, against the triune facets of justice high-lighted in the Preamble to the Paramount Parchment, read with a spacious signification of the listed entries concerned.

42. The learned Judge also observed that social justice clauses integrally connected with the taxing provisions cannot be viewed as a mere device. The Court held that since the forfeiture of the sums collected by way of tax contrary to law was by way of penalty, the legislation was within the purview of Entry 54 of List II and constitutionally valid. In our view, the approach adopted in this case in of great relevance in the matters before us.

DECISIONS OF THIS COURT WHICH HAVE APPLIED THE DOCTRINE OF UNJUST ENRICHMENT

43. Shiv Shanker Dal Mills Etc. v. State of Haryana and Ors. Etc. arose with reference to market fees collected under a provision which was struck down by this Court in Kewal Krishan Puri v. State of Punjab and Ors. . The enhancement of market fee from two to three percent was held to be bad,

whereupon the traders demanded refund of the excess market fee collected from them. This Court held that though refund of the fee so collected my be legally due to the traders, the traders may be repaid amount only to the extent they have not passed on the burden to their customers. To the extent they have passed on, it held, they were not entitled. This principle was deduced from the concept of distributory justice underlying Article 38 and 39 of the Constitution of India as from the discretionary nature of the power under Article 226 of the Constitution. Following the Principle enunciated by this Court in Newabgunj Sugar Mills v. Union of India and Ors. , the Court devised a scheme of refund by the market committees providing for refund of amounts to those from whom illegal collections had been made by the traders.

44. Amar Nath Om Prakash v. State, of Punjab and Ors. Etc. was also a case arising with reference to market fee, i.e., an indirect tax. Section 23-A of the Punjab Agricultural Produce Markets Act enabled the market committees to "retain the fee levied and collected by it from a licensee in excess of that leviable under Section 23, if the burden of such fee was passed on by the licensee to the next purchaser of the Agricultural Produce in respect whereof such fee was levied and collected". The validity of the said provision was called in question in this case. This Court negatived the challenge holding that the primary purpose of the said section was to prevent refund of licence fee to dealers who have already passed on the burden of such fee to purchasers and who want to unjustly enrich themselves by obtaining refund from the market committee. The said provision, it was held, recognised that the consumer public who have borne the ultimate burden are the persons really entitled to refund and since the market committee represents their interests, it is entitled to retain the amount. It was pointed out that the provision for retention by market committee had to be made because of the practical impossibility of tracing the individual purchasers and consumers who have ultimately borne the burden. It was held that it was "really a law returning to the public what it has taken form the public, by enabling the Committee to utilise the amount for the performance of services required of it under the Act. Instead of allowing middlemen to profiteer by illgotten gains, the legislature has devised a procedure to undo the wrong item that has been done by the excessive levy by allowing the Committees to retain the amount to be utilised hereafter for the benefit of the very persons for whose benefit the Marketing legislation was enacted." The Court observed that Section 23-A was akin to the provision concerned in Orient Paper Mills Limited v. State of Orissa which too disabled a dealer from claiming a refund of the fee paid by him, in case he has already passed on the burden to the next purchaser. The approach adopted by this Court in this case meets our respectful approval.

45. State of Madhya Pradesh v. Vyankatlal and Anr. marks a definite milestone in the application of the doctrine of unjust enrichment. In exercise of the powers conferred upon him by the Madhya Bharat Essential Supplies (Temporary Powers) Act, the Director of Civil Supplies, issued a notification fixing ex-factory prices of sugar for different sugar factories. The supply price was a little higher than the ex-factory price. The notification required the difference between the supply price and the ex-factory price to be credited to the Madhya Bharat Government Sugar Fund. Pursuant to the demands made by the State, the sugar mills deposited certain amounts into the said Fund under protest and then instituted suits for refund of the amounts so deposited. The High Court upheld the plea of the sugar mills that the Director of Civil Supplies had no authority in law to fix the ex-factory prices. This meant that the sugar mills were entitled to the refund of the amounts paid by them into

the Fund. The State appealed to this Court against the said decision. Following the principle of Shiv Shankar Dal Mills and Amar Nath Om Prakash, this Court held that even though there is no specific provision in Madhya Bharat Act providing that the sugar mills are not entitled to refund in case they have passed on the burden to the purchasers, the said principle can safely be applied to the facts of the case before them. The Court observed:

> The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. The amount deposited towards the Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment.

46. We express our respectful agreement with the above approach.

47. The same approach was adopted in the case of entry tax in Indian Aluminium Company Ltd. v. Thane Municipal Corporation [1992] Supp. 1 S.C.C. 480, Indian Oil Corporation v. Municipal Corporation, Jallandhar [1992] 1 S.C.C. 333 and in Entry Tax Officer v. Chandanmal Champalal .

DECISIONS OF THIS COURT DEALING DIRECTLY WITH THE 1991 (AMENDMENTS) ACT:

48. The first decision of this Court to consider the amended Section 11-B is in Union of India and Ors. v. Jain Spinners Ltd. and Anr. . The validity of the 1991 (Amendment) Act was, however, neither raised nor considered by the court. The impugned orders of the High Court, made before the coming into force of the 1991 (Amendment) Act, directing refund of the excess duty collected to the manufacturers, this Court held, would defeat the provisions of amended Section 11-B which had come into force during the pendency of the refund proceedings. The Court held that so long as the refund proceedings are pending, the amended provisions get attracted and disentitle the manufacturer-payer from claiming any refund contrary to the said provisions. In other words, the contention of the manufacturers that the amended Section 11-B applies only to claims of refund arising after the coming into force of the said Amendment Act was rejected.

49. In Union of India v. I.T.C. [1993] Suppl. 4 S.C.C. 326, it was held by this Court (Kuldip Singh and Dr. A.S. Anand, JJ.) that the amended Section 11-B applies to all pending cases, including those pending in appeal before the Supreme Court. It was held that the amended provisions do apply to such a case a well, notwithstanding the fact that the refund amount was drawn out by the manufacturer, under the orders of the Court, whether subject to furnishing of adequate guarantees or otherwise. The Court held further that by virtue of the 1991 (Amendment) Act, the court is bound to, take notice of the change in law governing refunds and accordingly it called upon the manufacturer-assesses to furnish documentary or other evidence to establish that the amount of

duty of excise in relation to which the refund is claimed had not been passed on by him to any other person. Since the manufacturer could not establish the said fact, the Court declined to grant refund in terms of the amended Section 11-B. It must be noted that the plea of unjust enrichment was not specifically raised before the High Court and was raised only in the appeal before this Court. The objection of the manufacturer on this Court was repelled saying that since the 1991 Amendment was not there, the non-raising of the said defence cannot preclude the Revenue from raising the said plea after the coming into force of the Amendment Act. The Court also invoked the presumption contained in Section 12-B holding that the said presumption is attracted to pending proceedings as well.

DECISIONS OF FOREIGN COURTS ON THE SUBJECT:

50. A number of decisions rendered by foreign courts have been brought to our notice, of which we may notice a few - only with a view to note how different constitutional courts are viewing the problem, of refund of taxes collected contrary to law.

51. United Kingdom ; Until 1992, the law in England was that taxes paid under a mistake or law were not recoverable whereas taxes paid under a mistake of fact or under compulsion were held recoverable. This position was radically altered by the decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No.2) (1992) 3 All. E.R. 737 : (1993) 1 A.C. 70.

52. The first thing to be noticed with respect to the decision in Woolwich Building Society is that it deals with a direct tax, viz., income tax and not with a indirect tax. Secondly, it is a case where the Regulations under which taxes were demanded and collected, were held to be ultra vires and void. In other words, it was a case "in which an excessive assessment was made on a taxpayer due to some error of fact or law". For this reason, it was held that the remedy of the taxpayer lay in common law and not the ones provided by the statute itself. The majority (Lord Goff, Lord Browne-Wilkinson and Lord Slynn of Hadly), even while holding that taxes paid under a mistake of law are recoverable, hedged the rule with certain riders. Lord Goff held that where a tax or duty is paid by a citizen pursuant to an unlawful demand "common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right" (P. 759). This principle he deduced from the Bills of Rights (1688) which proclaimed inter alia that taxes should not be levied without the authority of Parliament. The learned Law Lord indicated that same rule may also govern cases where excess tax is collected by misconstruction of law, though he declined to express a final opinion on the question. He also did not express any definite opinion on the question - what would be the position, if the plaintiff passes on the burden of tax to another. The learned Law Lord agreed that the law can place shorter time-limits for making such claims of restitution and referred in that connection to the position obtaining in German Law where formal objection has to be lodged within one month of the notification to enable a citizen to claim refund of amounts collected unlawfully. The German Law further provides that one citizen cannot benefit from the successful formal objection of another citizen; the rule is that the person should himself object and take proceedings within the prescribed time-limit. The minority (Lord Keith of Kinkel and Lord Jauncey of Tullichettle), however, stuck to the prevailing view that taxes paid under a mistake of law are not recoverable.

53. Strictly speaking, this decision is of little relevance to us. Firstly, it deals with a direct tax. In the case of a direct tax, there can be no question of passing on the burden of the tax to others as in the case of an indirect tax. All that the decision says, reversing the hitherto prevailing theory, that taxes paid under a mistake of law ought to be refunded.

54. CANADA : In Air Canada et al v. The Queen in Right of British Columbia et al (59 D.L.R. (4th) 161), the learned Judges (including Wilson, J. who dissented on one issue to be indicated shortly) looked at the claim of refund of taxes recovered contrary to law from two standpoints, viz., Constitutional Law and Law of Restitution. They held that the distinction between mistake of fact and mistake of law should play no part in Law of Restitution and further that the rule that "taxes paid under a mistake of law are not recoverable" should have no place in Constitutional Law. La Forest, J. put the position in the following words:

> In my view the distinction between mistake of fact and mistake of law should play no part in the law of restitution. Both species of mistake, if one can be distinguished from the other, should, in an appropriate case, be considered as factors which can make an enrichment at the plaintiff's expense 'unjust' or 'unjustified'. This does not imply, however, that recovery will follow in every case where a mistake has been shown to exist. If the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment, then restitution will be denied. Even were I not of the opinion that this 'rule' should be abolished, I would not be prepared to extend to the constitutional plane a rule so replete with technicality and difficulty as the mistake of law rule. Constitutional adjudication invites the formulation of broad principles suitable to the accommodation and resolution of broad social and political values, and this much criticized rule seems singularly unsuited for that purpose.

55. Even so, the learned Judge held that the claim of the Airlines should be denied on the ground that it passed on the burden to its customers notwithstanding the fact that by doing so, the province would be benefitted at the expense of the Airlines. The learned Judge, in fact, went further and held that even if the Airlines could show that they themselves bore the burden of taxes, recovery of ultra vires taxes should be denied, at least in the case of unconstitutional statutes except where the relationship between the State and a particular taxpayer resulting in the collection of taxes is unjust or oppressive in the circumstances. This rule against recovery, the learned Judge held, is based on concerns for the protection of the treasury and the recognition of the reality that if the tax was refunded, modern government would be driven to the inefficient course of re-imposing it either on the same or a new generation of taxpayers to finance the operations of the government. This rule, however, was held inapplicable where the tax is extracted from a taxpayer through a misapplication of law. The following observations from his opinion are relevant:

> While it will take some time for the courts to work out the limits of the developing law of restitution, it is useful on this point to examine the American experience. Professor George C. Palmer, in his work, the Law of Restitution, makes the following comment (1986) Supplement, at p. 255):

> There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer.
>
> In my view there is merit to this observation, and if it were necessary I would apply it to this case as the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense.
>
> This alone is sufficient to deny the airlines' claim. However, even if the airlines could show that they bore the burden of the tax, I would still deny recovery. It is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, but in this kind of case, where the effect of an unconstitutional or ultra vires statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area...A related concern, and one prevalent through many of the authorities and much of the academic literature is the fiscal chaos that would result if the general rule favoured recovery, particularly where a long-standing taxation measure is involved. That this is not an unfounded concern can be seen by reference to one incident in the United States. A provision has been inserted in the United States Internal Revenue Code removing the distinction between mistakes of fact and mistakes of law because of the harsh and unjust results that had occurred under the general rule. This, however, placed a severe strain on the United States Treasury when the Supreme Court in United States v. Butler, 297 U.S. 1, 80 L.Ed. 477 (1936), held unconstitutional the Agricultural Adjustment Act making almost one billion dollars in invalid taxes (a respectable amount now but overwhelming during the depression) repayable by the government. Faced with this situation, Congress immediately passed an Act which provided that no refunds for such taxes would be allowed unless the claimant could establish the burden of the tax.
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> (Emphasis added)

56. Wilson, J., however, differed with the majority on the effect of passing on of the burden of tax by the plaintiff. The learned Judge opined that where taxes are recovered under an unlawful statute,

they must be returned irrespective of the fact whether the taxpayer has passed on the burden to its customers or not. The learned Judge refused to accept the plea of fiscal chaos, as a sufficient ground for denying the refund.

57. It is brought to our notice by Sri F.S. Nariman that in another Judgment delivered on the same day by the Canadian Supreme Court in Canadian Pacific Airlines Limited v. British Columbia (1989) 59 D.L.R. (4th) 218, the Court held that the C.P. Air could recover the social service tax paid on purchases of equipment and parts but that the tax paid by it on alcoholic beverages is not recoverable for the reason that the latter tax was imposed on passengers who consume the liquor - and not on C.P. Air. Sri Nariman has also placed a copy of the judgment in this case before us. It is evident from a reading of the judgment that it was not a case of tax levied and collected under an invalid statute but a case where the tax was collected wrongly by misinterpreting the provisions of the statute - in which situation, the taxes are refundable according to the decision in Air Canada. In this view of the matter, it may not be necessary to refer to the opinions of learned Judges. It is not suggested that any contrary principle is enunciated in this case.

58. The law in Canada appears rather paradoxical to an Indian Lawyer. It says that while taxes collected under an unconstitutional statute need not be refunded (even if the Burden of tax has not been passed on to a third party), taxes collected by misinterpreting/misapplying the provisions of the statute ought to be refunded. This circumstances emphasises how the jurisprudence in each country has developed differently. We, on our part, have to evolve appropriate principle to meet the emerging situation, keeping in mind the development of law in our own country, our own circumstances and above all, our own constitutional philosophy. At the same time, we express our broad agreement with the approach and thinking of the majority Judges in Air Canada.

59. AUSTRALIA : In Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1995) 69 A.L.J. 51, the Australian High Court rejected the plea of the State that inasmuch as the plaintiff has passed on the burden of illegally collected tax to others, it is not entitled to restitution, Mason, C.J. observed:

> The argument that a plaintiff who passes on a tax or charge will receive a windfall of will unjustly be enriched if recovery from a public authority is permitted rests at bottom upon the economic view that the plaintiff should not recover if the burden of the imposition of the tax or charge has been shifted to third parties. In the context of the law of restitution, this economic view encounters major difficulties. The first is that to deny recovery when the plaintiff shifts the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffers loss or damage without a remedy. That consequence suggests that, if the economic argument is to be converted into a legal proposition the proposition must be that, the plaintiff's recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And finally, it has long been thought that, despite Lord Mansfield's statement in Moses v. Macferian, the basis of restitutionary relief is not compensation for loss or damage sustained but

> restoration to the plaintiff of what has been taken or received from the plaintiff without justification.
>
> (Emphasis supplied)

60. It is obvious that the learned Chief Justice looked at the matter from the point of view of the law of restitution alone which fact would also be evident from the following observations (at P. 63):

> As between the plaintiff and the defendant, the plaintiff having paid away its money by mistake in circumstances in which the defendant has no title to retain the moneys, the plaintiff has the superior claim. The plaintiff's inability to distribute the proceeds to those who recoup the plaintiff was, in my view, an immaterial consideration.

61. Dawson, J. also took the same view. The following observations of the learned Judge, however, indicate the nature of the violation in this case, which is of quite some significance:

> No question such as that which arose in Air Canada v. British Columbia, (1989) 59 DLR (4th) 161 would arise in the present case. In the Canadian case a majority of the Supreme Court held that, whilst moneys paid under a mistake of law might be recovered upon the basis of unjust enrichment, that doctrine did not extent to moneys paid under unconstitutional legislation. No question of unconstitutionality arises in this case. The application of the common law would also raise the question whether the principle of unjust enrichment can be invoked when moneys paid under a mistake of fact or law constitute an expense which has been passed on to someone else, as the respondent insurer is said to have passed on the overpayments of stamp duty to its insured in this case. The better view would seem to be that it is the unjust enrichment of the payee rather than loss suffered by the payer which should govern entitlement to restitution but, having regard to the view which I take, it is unnecessary to determine that question in these proceedings.
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> (Emphasis supplied)

62. E.E.C. : Administration Delle Finanze Dello Stato (State Finance Administration) v. San Giorgio SPA (1985) 2 C.M.L.R. 658 was decided by the Court of Justice of the European Community.

63. Italy, which is a member of a European Economic Community made a law, Section 10(1) whereof provided that a "person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is not entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error". Sub-section (2) further provided that "the charge is presumed to have been passed on whenever the goods in respect of which payment was effected have been transferred even after processing, transformation, erection, assembly or adaptation in the absence of documentary proof to the contrary". The question before the Court was whether the said provision was contrary to Article 12 of the E.E.C. Treaty (Treaty of

Rome) which prohibited imposition of any customs duties between the member States. It was held that it does. The entire discussion in the judgment revolves around the incompatibility of both the provisions. We do not, therefore, see any relevance of the decision to the question at issue before us.

64. USA. : In this context, we may refer to a decision of the Supreme Court of the United States of America in United States v. Jefferson Electric Manufacturing Co., 78 L.Ed. 859. Section 424 of the Revenue Act, 1928 provided that "no refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or sub-division (3) of Section 900 of Revenue Act of 1921, or of the Revenue Act of 1918, unless...(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article, subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount although collected from the purchaser or lessee, was returned to him". The said provision was attacked as violative of the due process clause in the Fifth Amendment to the United States Constitution. The attack was repelled holding that the provision being based upon equitable principles which underlie an action in assumpsit for money had and received is not an unreasonable provision. The Court further observed that an action in assumpsit for money and received is of equitable character aiming at the abstract justice of the case and is less restricted and fettered by technical rules and formalities than any other form of action. The Court conceded that if the tax was illegally levied, under the system then in force, the taxpayer had acquired a right to have it refunded without showing whether he bore the burden of the tax or had shifted it to the purchases. Even so, it was held that the requirements imposed by Section 424 which the taxpayer should satisfy before he can claim refund were reasonable and equitable. The following observations of the Court are apposite:

> But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> We do not perceive in the restriction any infringement of due process of law. If the tax payer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition of refunding the tax to him, that he give a bond to use the refunded money in reimbursing them....The present contention is particularly faulty in that it overlooks the fact that the Statutes providing for refunds and for suits on claims therefore proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said : 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of thereon. It aims at the abstract justice of

> the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo at bono belongs to the plaintiff. If was encouraged and, to a great extent, brought into used by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.

65. We express our broad agreement with the approach adopted by the United State Supreme Court.

66. Sri Nariman, however, referred to the second alternate condition imposed by Section 424 which provided that if the manufacturer gives a bond undertaking to refund the same to purchaser within a particular period, he would be entitled to claim refund. Learned Counsel submitted that such a condition could have been imposed in the Central Excises and Customs Act as well. He submitted that even if it is legitimate for the Parliament to prescribe that in case the money was passed on, it must be made over to the person from whom it was collected, all this should be done through the medium of the manufacturer/taxpayer and not through any other medium. We must say that we are not concerned with the question of desirability of a provision which could have been made but with the legality of the provision which has been made. It cannot be suggested that the Parliament should necessarily have made such a provision or that in the absence of such a provision, the provisions made are violative of Article 265 of the Constitution.

PART-II WAS KANHAIYALAL CORRECTLY DECIDED AND IF NOT, IN WHAT RESPECTS:

67. The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to re-open the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or re-opening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.

68. Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excise and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11-B (as it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question of refund, Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted...shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained Sub-rule (4) which expressly declared : "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11-B, as in force to April, 1991 contained Sub-section (4) in

identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub-section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this Section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11-B, as it now stands, it to the same effect - indeed, more comprehensive and all-encompassing. It says, "(3) 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 in any law for the time being in force, no refund shall be made except as provided in sub-section". The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provision has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11-B is questioned, no specific reasons have been assigned why a provision of the nature of Sub-section (3) of Section 11-B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11-B (both before and after amendments valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation for delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge, To repeat - and it is necessary to do so - so long as Section 11-B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11-A and 11-B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11-A and 11-B are complimentary to each other. (To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz.,) where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf

and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available -except to the limited extent pointed out in Kamala Mills. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The jurisdiction of a civil Court is expressly barred - vide Sub-section (5) of Section 11-B, prior to its amendment in 1991, and Sub-section (3) of Section 11-B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11-B/Rule 11. Since 1981, an appeal is provided to this Court also from the order of the Tribunal. While Tribunal is not a departmental organ, this Court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11-B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken taken under the "authority of law", within the meaning of Article 265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provisions, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11-B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11-B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11-B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction for this Court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

69. There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11-B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11-B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the

Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic Justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assesses on the declaration of invalidity of the provisions by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 78 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right following from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.

70. Re.: (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quite. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet2. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis- construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the

period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long at that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law. The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturer/assesses all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excises Act and the Rules made thereunder including Section 11-B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11-B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a misinterpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11-A and 11-B. As held by a seven-Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole

activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of Central Excise Act also constitute "law" within the context of Bombay Sales tax Act and the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11-B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable, as demonstrated hereinbefore. As a matter of facts, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have becomes final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11-B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case a similar point is decided in favour of the manufacturer/assesses. (see the pertinent observations of Hidayatullah, CI. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and arc accordingly overruled herewith.

71. Re. : (III) : For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty his been paid or collected, as the bases, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore subject, to one exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision

has become final and cannot be re-opened on the basis of the decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F,S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is un-understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in Kanhaiyalal, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver...or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be re compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T.C. In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rules of equity but also because both the Central Excises duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64A of the Sale of Goods Act, 1930 (which was introduced by Indian Sales of Goods (Amendment) Act, 1940 and substituted later by Act 33 of 1963). As originally introduced, Section 64-A read:

64A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time -

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction.

72. As substituted in 1963, and as it stands today, Section 66-A reads thus:

64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. - (1) Unless different intention appears from that terms of the contract in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time, --

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, on be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely:

(a) any duty of customs or excise on goods ;

(b) any tax on the sale or purchase of goods.

73. Sub-section (2), it may be noted, expressly makes the said provisions applicable to duty of customs and duties of excise on goods. This fact was also recognised by the Federal Court in The Province of Madras v. Boddu Paidanna & Sons (1942) F.C.R. 90 and by this Court in R.C. Jall v. Union of India [1962] suppl. S.C.R. 436. In such a situation, it would be legitimate for the court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a court is entitled to draw under Section 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund (plaintiff/petitioner) and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed. This is the position de hors 1991 (Amendment) Act and as we shall point out later, the said Amendment Act has done no more than to give statutory recognition to the above concepts. This is the position whether the refund is claimed by way of a suit or by way of a writ petition. It needs to be stated and stated in clear terms that the claims for refund by a person who has passed on the burden of tax to another has nothing to commend itself; not law; not equity and certainly not a shred of justice or morality. In the case of a writ petition under Article 226, it may be noted, there is an additional factor : the power under Article 226 is a discretionary one and will be exercised only on furtherance of interests of justice. This factor too obliges the High Court to inquire and find out whether the petitioner has in fact suffered any loss or prejudice or whether he has passed on the burden. In the latter event, the court will be perfectly justified in refusing to grant relief. The power cannot be exercised to unjustly enrich a person.

74. Re. : (IV) : We are also of the respectful opinion that that Kanhaiyalal is not right in saying that the defence of spending away the amount of tax collected under an unconstitutional law is not a good defence to a claim for refund. We think it is subject to this rider : where the petitioner- plaintiff alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be refused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or writ petition. It is a case of balancing public interest vis-a-vis private interest. Whether the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. The money really belongs to a third party - neither to the petitioner/plaintiff nor to the State - and to such third party it must go. But where it cannot be so done, it is better that it is retained by the State. By any standard of reasonableness, it is difficult to prefer the petitioner-plaintiff over the State. Taxes are necessary for running the State and for various public purposes and this is the view taken in all jurisdictions. It has also been emphasised by this Court in D. Cawasji wherein Mathew, J. not only pointed out the irrational and unjust consequences flowing from the holding in Bhailal Bhai and Aluminium Industries but also pointed out the adverse impact on public interest resulting from the holding that expending the taxes collected by the State is not a valid defence (see Paras 39 and 40). This would not be a case of unjust enrichment of the State, as suggested by the petitioners-appellants. The very idea of "unjust enrichment" is inappropriate in the case of the State, which is in position of parens patrea, as held in Charan Lal Sahu v. Union of India . And even if such a concept is tenable, even then, it should be noticed that the State is not being enriched at the

expense of the petitioner- plaintiff but at someone else's expense who is not the petitioner-plaintiff. As rightly explained by Saikia, J. in Mahabir Kishore and Ors. v. State of Madhya Pradesh , "the principle of unjust enrichment requires - first that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense of the plaintiff; and thirdly, that the retention of the enrichment be just. This justifies restitution." We agree with the holding in Air Canada (quoting Professor George C. Palmer) that in such a case, "it seems preferable to leave the enrichment with the tax authority instead of putting judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer". The Canadian Supreme Court has further emphasised - and, in our opinion, rightly - the "fiscal chaos that would result if the general rule favoured recovery, particularly where the long standing taxation measure is involved". In this connection, the majority decision refers to what happened in United States. In United States v. Butler (1936) 80 L.Ed. 477, the Agricultural Adjustment Act was held unconstitutional, the result of which was refund of almost one billion dollars collected under the said statute. In such a situation, it is pointed out, the Congress passed an Act which provided that no refunds shall be allowed unless the claimant establishes that he himself bore the burden of tax. Similar provision was also made in another enactment, viz., Section 424 of the Revenue Act, 1928, the validity of which has been upheld by the United Stated Supreme Court in Jefferson (supra).

75. In this connection, Sri K. Parasaran has rightly emphasised the distinction between the constitutional values obtaining in countries like United States of America, Canada and Australia - or for that matter, United Kingdom - and the values obtaining under our Constitution.3 Unlike the economically neutral - if not pro-capitalist - Constitutions governing those countries, the Indian Constitution has set before itself the goal of "Justice, Social, Economic and Political" - a total re-structuring of our society - the goal being what is set out in Part-IV of the Constitution and, in particular, in Articles 38 and 39. Indeed, the aforesaid words in the preamble constitute the motto of our Constitution. If we can call it one. Article 38 enjoins upon the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life". Article 39 lays down the principles of policy to be followed by the State. It says that the State shall, in particular direct its policy towards securing "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". Refunding the duty paid by a manufacturer/assesses in situations where he himself has not suffered any loss or prejudice (i.e., where he has passed on the burden to others) is no economic justice; it is the very negation of economic Justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturing community thereby contributing to concentration of wealth in a small class of persons which may not be consistent with the common good. The preamble and the aforesaid articles do demand that where a duty cannot be refunded to the real persons who have bore the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good (See Amar Nath Om Prakash). Indeed, even in an economically neutral Constitution, like that of United States of America, such a course has been adopted by the State and upheld by the Courts. It would be rather curious - nay, ridiculous - if such a course were held to be bad under our Constitution which speaks of economic and distributive justice, opposes concentration of wealth in a

few hands and when the Forty - Second (Amendment) Act describes our Republic as a Socialist Republic.

76. It is true that some of the concepts now affirmed by us, e.g., effect of passing on and the relevance of our Constitutional values in the matter of judging the legitimacy of a claim for refund were not presented to the Bench which decided Kanhaiyalal but that can be no ground for not entertaining or accepting those concepts. As observed by Thomas Jefferson, as far back as 1816, "laws and institutions must go hand-in-hand with the progress of the human mind...as new discoveries are made, new truths are discovered and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the time...." The very same thought was expressed by Krishna Iyer, J. in State of Karnataka v. Ranganath Reddey with particular reference to our Constitutional philosophy and values:

> Constitutional problems cannot be studied in a socio- economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality...It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels of feudal roots, invades our lives and fashions our destiny.
>
> The learned Judge quoted Granville Austin, saying:
>
> The Judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days....The courts were also idealised because, as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians.

77. That "the material resources of the community" are not confined to public resources but include all resources, natural and man-made public and private owned" is repeatedly affirmed by this Court. (See Ranganath Reddy, Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal and State of Tamil Nadu Etc. Etc. v. L. Abu Kavur Bai and Ors. Etc. . We are of the considered opinion that Sri Parasaran is right in saying that the philosophy and the core values of our Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle) - for that matter, in construing any other provision of the Constitution and the laws. Accordingly, we hold that even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked - we have held, it cannot be - for claiming refund of taxes collected by misinterpretation or misapplication of a provision of law, rules notifications or regulation.

PART-III VALIDITY AND MEANING OF THE PROVISIONS INTRODUCED BY THE 1991 (AMENDMENT) ACT:

78. While examining the validity and reasonableness of the provisions introduced by the 1991 (Amendment) Act, it is necessary to bear in mind certain principles relevant in that behalf. In R.K. Garg v. Union of India , this Court held that:

> laws relating to economic activities should be viewed with grater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial defence to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved....The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaptation of remedy are not always possible and that 'judgment is largely a prophecy based on meagre and uninterrupted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig. Refining Co. (1950) 94 L.ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

79. To the same effect are the observations by Khanna, J, in Keshavananda Bharati v. State of Kerala [1973] Suppl. S.C.R. 1 at Page 755. The learned Judge said, "in exercising the power of judicial review the courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some

chances. Opportunity must be allowed for vindicating reasonable belief by experience". To the same effect are the observations in Tamil Nadu Education Department Ministerial and General Subordinate Service Association v. State of Tamil and Anr. (Krishna Iyer, J.). It is equally well-settled that mere possibility of abuse of a provision by those in-charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr. [1962] 3 S.C.R. 786, this Court observed : "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity". It was said in State of Rajasthan v. Union of India , "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief. (Also see Commissioner, Hindu Religious Endowment, Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt [1954] S.C.R. 1005 at 1030.

80. Section 11-B, as amended in 1991, has been set out in Para 10 hereinabove. Sub-section (1) of Section 11-B says that every claim for refund shall be made before the Assistant Commissioner of Central Excise within six months of the relevant date. The application shall have to be in the prescribed form and manner and shall be accompanied by documentary and other evidence including those referred to in Section 12-A to establish that the duty claimed by way of refund has not been passed on by him to any other person. The proviso to Sub-section (1) expressly states that pending applications for refund made before the commencement of the 1991 (Amendment) Act shall be deemed to have been made under subsection (1) of Section 11-B as amended in 1991 and that the same shall be dealt with in accordance with Sub-section (2). Sub-section (2) provides that only in situations specified in Clauses (a) to (f) therein will the refund be granted to the applicant; in all other cases, the amount will be credited to the Fund established under Section 12-C. Sub-section (3) declares that notwithstanding anything to the contrary contained in (a) any judgment, decree, order, or direction of the Appellate Tribunal or any Court or (b) any other provision of this Act or the rules made thereunder or (c) any other law for the time being in force, not refund shall be made except as provided in Sub-section (2). Sub-section (1) of Section 11-D too opens with a non-obstante clause. It provides for making over of excise duty, realised by a person from his buyer, to the Central Government forthwith. Sub-section (2) says that duty so paid shall be adjusted against the duty payable by him on finalisation of assessment. The sub-section further says that if on such adjustment, any surplus duty is left, it shall be dealt with in ,. accordance with Section 11-B. Section 12-A requires every person liable to pay duty to indicate prominently in sales invoices, documents of assessment and other similar documents, the amount of duty forming part of the price at which the goods are sold. Section 12-B creates a rebuttable presumption of law that every person paying the duty shall be deemed to have passed on the full incidence of duty to the buyer of such goods. Section 12-C provides for the establishment of the Consumer Welfare Fund (Fund) while Section 12-D provides for rules being made to specify the manner in which the monies in the Fund shall be utilised. Rules have indeed been made under Section 12-D, which provide for grants being made to Consumer's Welfare Organisations for being spent on welfare of consumers.

81. The challenge to the validity of the provisions introduced by the 1991 (Amendment) Act has been presented under various heads which we now proceed to deal with separately.

MEANING AND SCOPE OF SUB-SECTION (3) OF SECTION 11-B:

82. A good amount of debate took place before us on the question whether Sub-section (3) makes Section 11-B exhaustive of all kinds of refund claims including those which are refundable as a consequence of appellate/revisional order and/or as as consequence of orders made by the High Court/Supreme Court. Sri Nariman pointed out that in Rule 11 (as it was in force during the period August 6, 1977 to November 17, 1980), Sub-rule (3) expressly provided that "where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf' and that Sub-section (3) of Section 11-B, before its amendment in 1991, was also in identical terms. But, Sri Nariman says, Sub-section (3) of Section 11-B has now been dropped; there is no corresponding provision in Section 11-B as it now stands, which means, says the counsel, that even a refund claim arising as a result of an appellate order or an order of a court has also got to be made under and in accordance with Sub-sections (1) and (2) of Section 11-B and will be disposed of in terms of Sub-section (2) of the said section, as amended in 1991. This consequence, learned Counsel says, is unjust, unreasonable and arbitrary. There is no reason why a period who becomes entitled to refund of duty as a result of appellate or court order should also be made to apply and satisfy all the requirements of Sub-sections (1) and (2) of Section 11-B (amended) when he is entitled to such refund as a matter of right. Sri Nariman submits that if a manufacturer/assesses, who succeeds in vindicating his claim after a long fight - may be, upto this Court - and applies for refund is asked to satisfy that he has not passed on the burden of tax to another, he would rather keep quite than fighting the levy. There would be no incentive for him to file the appeal/appeals or approach the higher courts which also involves substantial expense. If after all this fight and expense, he is to be denied the refund on the ground that he has passed on the burden of duty to third parties, why should he fight and spend money for fighting the litigation, says the counsel. Sri Sorabjee and Sri Salve too emphasised this aspect and said that this situation would lead to many an undesirable consequence. The assessing/approving officer (original authority) would become the monarch; whatever he says would be the law since there would be nobody interested in challenging his order. Illegal levies would become the order of the day. Such a situation, the learned Counsel point out, is neither in the interest of law nor in the interest of consumer or the larger public interest. It is accordingly submitted that it would be just and proper that the amended Section 11-B is held not to take in refund claims arising as a consequence of appellate or a superior court order. We do not think it is possible to agree. Such a holding would run against the very gain of the entire philosophy underlying the 1991 Amendment. The idea underlying in the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11-B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since 1991-92, the manufacturer's self interest lies in producing more and selling it at competitive prices - the urge to grow. A favourable decision does not merely mean

refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists or the benefit of exemption notifications. The dis-incentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no different under Rule 11, or for that matter Section 11-B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between August 6, 1977 and November 17, 1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11-B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as Sub-rules (3) and (4) of Rule 11; if anything, Sub-section (5) was more specific and emphatic. It made the provisions of Section 11-B exhaustive on the question of refund and excluded the jurisdiction of the civil court in respect of all refund claims. Sub-rule (3) of Rule 11 or Sub-section (3) of Section 11-B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or court are outside the purview or Rule 11/Section 11-B. They only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/Section 11-B alone. That is the plain meaning of Sub-rule (3) of Rule 11 and Sub-sections (3) and (4) of Section 11-B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11-B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so.

83. It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 11-B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11-B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to Sub-section (1) of Section 11-B to mean the date of payment of duty in case other than these falling under Clauses (a) (b) (c) (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11-B. The second proviso to Section 11-B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second

proviso to Sub-section (1) of Section 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned Counsel.

84. It was then submitted that Rule 233B which prescribes the procedure to be followed in cases where duty is paid under protest requires the assessee to state the grounds for payment of duty under protest and that it may well happen that the authority to whom the letter of protest is submitted may refuse to record it, if he is not satisfied with the ground of protest. In our opinion, the said apprehension is not well-founded. Sub-rules (1) (2) and (3) of Rule 233-B read as follows:

> RULE 233B. Procedure to be followed in cases where duty is paid under protest. - (1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.
>
> (2) On receipt of the said letter, the proper officer shall give an acknowledgement to it.
>
> (3) The acknowledgement so given shall, subject to the provisions of the Sub-rule (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer.

85. The rule no doubt requires the assessee to mention the "grounds for payment of the duty under protest" but it does not empower the proper officer, to whom the latter of protest is given, to sit in judgment over the grounds. The assessee need not particularise the grounds of protests. It is open to him to say that according to him, the duty is not exigible according to law. All that the proper officer is empowered to do is to acknowledge the letter of protest when delivered to him - and that acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he paid the duty under protest. The period of limitation of six months will then have no application to him.

86. We may clarify at this stage that when the duty is paid under the orders of Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending an appeal/reference/writ petition, it will certainly be a payment under protest; in such a case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233-B. WHETHER SECTION 11-B IS RETROSPECTIVE?

87. It is submitted by the learned Counsel for the petitioners- appellants that the amended Section 11-B is prospective in operation and cannot apply to pending proceedings. In support of this contention, it is submitted that according to Sub-section (1), the application for refund has to be accompanied by "documentary or other evidence including the documents referred to in Section 12-A" to prove that the incidence of duty has not been passed on by the applicant to any other person. It is submitted that Section 12-A was also inserted by the very same 1991 (Amendment) Act

and, therefore, it is not expected of any manufacturer/assesses to maintain the records required by Section 12-A, prior to its coming into force. It is submitted that in respect of an application filed before the commencement of the said Act, it is not possible to comply with the requirement of Sub-section (1) insofar as it requires the filing of documents referred to in Section 12-A. This circumstance is pointed out as a ground for holding that the amended Section 11-B applies on to refund applications filed after coming into force of the 1991 (Amendment) Act. It is further submitted that the right to recover excess duty paid is both a constitutional and a statutory right. It is also a substantive right, it is submitted, as held in Commissioner of Sales Tax, Uttar Pradesh v. Auriaya Chamber of Commerce, Allahabad and Patel India Private Limited v. Union of India and Ors. . All these factors, it is submitted, militate against giving retrospective effect to Section 11-B. It is difficult to agree with the propositions in the light of the specific and clear language of the first proviso to the Sub-section (1). The first proviso expressly declares that "where an application for refund has been made before the commencement of the Central Excises and Customs (Amendment) Act, 1991, such application shall be deemed to have been made under this Sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act". In the face of this proviso, it is idle to contend that Sub-sections (1) and (2) of Section 11-B do not apply to pending proceedings. They apply to all proceedings where the refund has not been made finally and unconditionally. Where the duty has been refunded under the orders of the court pending disposal of an appeal, writ or other proceedings, it would not be a case of refund finally and unconditionally, as explained in Jain Spinners and I.T.C. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the period prescribed for filing the appeal against such order has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and/or be governed by Section 11-B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us. So far as the difficulty or impossibility of filing the documents referred to in Section 12-A is concerned, it is obvious that the said requirement cannot be insisted upon in cases where the application is filed prior to the commencement of the Act or for the period anterior to the commencement of the said Amendment Act, though the burden of proving that the burden of duty has not been passed on by him is still upon the applicant. Sub-section (1) of Section 11-B of general application. It not merely governs the pending applications but also provides for future applications. Reasonably construed and read together, the said provisions mean that in respect of pending applications, the requirement is only to produce such documentary and other evidence as is sufficient to establish that the incidence of duty, refund of which is claimed, has not been passed on by the applicant to any other person. The requirement of enclosing the documents referred to in Section 12-A is obligatory only where the claim or refund pertains to the period subsequent to the commencement of the 1991 (Amendment) Act.

88. There is yet another circumstance : Section 12B does not create a new presumption unknown till then; it merely gives statutory shape to an existing situation, as explained hereinbefore. At the most, it can be said that there were two views on the subject and Section 12B affirms one of them. Even without Section 12-B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a pre-condition to claim of refund. It cannot also be said that by giving retrospective effect to Section

11-B, any vested rights or substantive rights are being taken away. The deprivation, if at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. By applying for refund yet, he is trying to reap a windfall; deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer had no vested legal right to refund even when he had passed on the burden of duty to others. No law conferred such a right in him - not Article 265, nor Section 11-B. It was only on account of an incorrect view of law taken in Kanhaiyalal - and that cannot be treated as a vested legal right. Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the over-ruled decision, In cases, where the burden is not passed on, there is no prejudice; he can always get the refund.

IS SECTION 11-B A MERE DEVICE TO RETAIN ILLEGALLY COLLECTED TAXES?

89. A major attack is mounted by the learned Counsel for petitioners-appellants on Section 11-B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12- D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Sri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Sri Nariman. It is a colourable device - declaimed Sri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Sri Parasaran to this criticism runs thus : it ill-becomes the manufacturer/assesses to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said Provisions. Clause (e) of the proviso to Sub-section (2) of Section 11-B does provides for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Sri Parasaran.

90. We agree with Sri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12-C which creates the Consumer Welfare Fund and Section 12-D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not

contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provides for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that Clause (e) of the proviso to Sub-section (2) of Section 11-B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in Clause (e) of Explanation-B appended to Section 11-B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. Certain practical difficulties may arise as pointed out by the appellants-petitioners : (i) the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund, he has to go to the place where the duty has been paid by the manufacturer and apply there; (ii) purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg and other decisions cited in Paras 78 and 79).

DO SECTIONS 11-B AND 12-B HAVE THE EFFECT OF CHANGING THE VERY NATURE OF EXCISE DUTY?

91. It is next contended that in a competitive atmosphere or for other commercial reasons, it may happen that the manufacturer is obliged to sell his goods at less than its proper price. The suggestion is that the manufacturer may have to forego not only his profit but also part of excise duty and that in such a case levy and collection of full excise duty would cease to be a duty of excise; it will become a tax on income or on weightiness. We are unable to appreciate this argument. Ordinarily, no manufacturer will sell his products at less than the cost-price plus duty. He cannot survive in business if he does so. Only in case of distress sales, such a thing understandable but distress sales are not a normal feature and cannot, therefore, constitute a basis for judging the validity or reasonableness of a provision. Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable. A manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale again. Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive. Generally speaking, every manufacturer will sell his goods at something above the cost-price plus duty. There may be a loss-making concern but the loss occurs not because of the levy of the excise duty -which is uniformly levied on all manufacturers of similar goods - but for other reasons. No manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends. The requirement complained of (prescribed by Section 11-B) is thus beyond reproach - and so

are Sections 12-A and 12-B. All that Section 12-A requires is that every person who is liable to pay duty of excise on any goods, shall, at the time of clearance of the goods, prominently indicate in all the relevant documents the amount of such duty which will from part of the price at which the goods are to be sold, while Section 12-B raises a presumption of law that until the contrary is proved, every person who has paid the duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods. Since the presumption created by Section 12-B is a rebuttable presumption of law -and not a conclusive presumption - there is no basis for impugning its validity on the ground of procedural unreasonableness or otherwise. This presumption is consistent with the general pattern of commercial life. It indeed gives effect to the very essence of an indirect tax like the excise duty/customs duty. A manufacturer who has not passed on the duty can always prove that fact and if it is found that duty was not leviable on the transaction, he will get back the paid. Ordinarily speaking, no manufacturer would take the risk of not passing on the burden of duty. It would not be an exaggeration to say that whenever a manufacturer entertains a doubt, he would pass on the duty rather than not passing it on. It must be remembered that manufacturers as a class are knowledgeable persons and more often than not have the benefit of legal advice. And until about 1992, at any rate, Indian market was by and large a sellers' market.

92. For a proper appreciation of the learned Counsel's contention, it would be appropriate to examine the scheme of the Act and the Rules concerning the valuation of excisable goods and their clearance/removal. Section 4 deals with valuation of excisable goods. The assessable value under Section 4 determined on the basis of the normal price referred to in Section 4(1)(a) and in certain cases under Section 4(1)(b). In either case, the excise duty and certain specified amounts are deductible. More important, in the documents submitted by the manufacturer for determination of the assessable value, he has to clearly state the excise duty payable as well as other charges and discounts which he claims to be deductible. Ordinarily speaking, a manufacturer has to file a classification list first (Rule 173-B) for approval by the Proper Officer. On the basis of the approved classification list and the rate of duty approved therein, he files a price list for approval as contemplated by Rule 173-C. Prior to April 1, 1994, the price list has to be declared in the form prescribed for the purpose which form required the manufacturer to disclose clearly and separately the excise duty and other deductions claimed by him. The Form requires the manufacturer to declare that the facts stated therein are true. After the price list is approved, "removal" begins. Under the Self Removal Procedure (S.R.P.), the procedure in vogue until recently - speaking broadly - was that at the time to removal of goods, gate pass in Form G.P. I had to be issued which required the manufacturer to mention several particulars of the goods removed including the rate of duty and the total duty paid. Form G.P. I too had to be verified by, the manufacturer declaring that the facts stated therein are true. From the price list and the gate pass, therefore, it was easy to ascertain the duty component of the price. It may also be mentioned that G.P. I required the name and address of the consignee as well as the manner of transport to be mentioned therein. (More often than not the sale of excisable goods is simultaneous with the removal/clearance.) In addition to the above, the manufacturer was required to file monthly returns (RT-12) as provided by Rule 173-G. The monthly returns had to be filed every month, within seven days of the succeeding month in respect of all clearances during that month. The RT-12 also provides for several particulars including the rate of duty and duty payable. These documents clearly and cogently disclose the excise duty that has been paid. Since April 1, 1994, however, there is said to have occurred a change in the procedure. Under

the new Rules, a proforma has been provided under which a declaration is to be filed indicating inter alia the tariff-chapter heading applicable and the effective rate of duty assessable on the goods. This Form has to be filled in and filed by the manufacturer with a declaration that the particulars stated therein are true. In the place of gate pass, provision is now made for a special form of invoice which gives full particulars of the price, assessable value, rate of duty and duty actually paid. From the invoice and the proforma now prescribed, it is equally easy to ascertain the duty component, i.e., the effective duty paid and passed on to the purchaser.

93. We may also mention that, in case of S.R.P., the Rules require that every assessee shall keep a current account with the Collector/Commissioner. He has to make periodical credits in the current account by cash payment into the treasury so as to keep the balance sufficient to cover the duty due on the goods intended to be removed at any time. On each consignment removed by him, he has to pay the duty determined by him by debiting the same to the current account before removal of the goods. As stated already, in the case of S.R.P. also, the manufacturer has to file the monthly returns in Form RT-12 which have to be assessed by the Proper Officer as required by Rule 173-I. The Proper Officer adjusts the duty paid by the manufacturer against the duty assessed by him. if as a result of such adjustment, it is found, during the course of assessment of RT-12 Forms, that duty has not been levied or paid or has been short-levied or short-paid, the authority is entitled to make a demand for the same according to law.

94. Indeed, it is suggested on behalf of the Union of India that if, in any case, a manufacturer is obliged to sell his goods at a price lower than the normal price declared under Section 4 (for the purposes of determining the assessable value), it is always open to him to approach the excise authorities for re- determination of the assessable value. In other words, he can ask for reduction in the excise duty component on the ground that he is obliged to sell his goods at a lower price on account of various commercial compulsions.

95. Rule 9-B provides for provisional assessment in situations specified in Clauses (a) (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be. However, if the final orders passed under Sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) re- agitating the issues already decided under Rule 9-B -assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation.

NATURE AND CHARACTER OF REFUND CLAIMS UNDER THE CENTRAL EXCISES AND SALT ACT AND THE CUSTOMS ACT:

96. It would be evident from the above discussion that the claims for refund under the said two enactments constitute an independent regimen. Every decision favourable to an assessee/manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11-B of the Central Excises and Salt Act and Section 27 of the Contract Act, whether before or after 1991 Amendment - as interpreted by us herein - make every refund claim subject to proof of not passing-on the burden of duty to others. Even if a suit is filed, the very same condition operates. Similarly, the High Court while examining its jurisdiction under Article 226 - and this Court while acting under Article 32 - would insist upon the said condition being satisfied before ordering refund. Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceeding and whichever be the forum. Section 11-B/Section 27 are constitutionally valid, as explained by us hereinbefore. They have to be applied and followed implicitly wherever they are applicable.

MEANING AND PURPORT OF SECTION 11-D:

97. It was contended by the learned Counsel for the appellants-petitioners that Section 11-D provides for double taxation. It was contended that Sub-section (1) of Section 11-D makes the manufacturer liable to pay duty which he collects from the buyer as part of the price of goods even where the manufacturer has already paid the duty at the time of removal. We do not think that there is any foundation for the said understanding or apprehension. There are no words in the section which provided for payment of duty twice over. All that the section says is this : the amount collected by a person/manufacturer from the buyer of goods as representing duty of excise shall be paid over to the State; even if the tax collected by the manufacturer from his purchaser is more than the duty due according to law, the whole amount collected as duty has to be paid over to the State; if on the assessment being made it is found that the duty collected and paid over by the manufacturer is more than the duty due according to law, such surplus amount shall either be credited to the Fund or be paid over to the person who has borne the incidence of such amount in accordance with the provisions of Section 11-B. It is obvious that if in a given case, the manufacturer has collected less amount as representing the duty of excise than what is due according to law, he is not relieved of the obligation to pay the full duty according to law. This is the general purport and meaning of Section 11-D. There may be cases where goods are removed/cleared without effecting their sale. In such a case, Section 11-D is not attracted. It is attracted only when goods are sold. The purport of this section is in accord with Section 11-B and cannot be faulted.

98. A clarification : The situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open.

PART - IV

99. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis- applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way or a suit or by way of a writ petition. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in

Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of Sub-section (1) of Section 17 of the limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. It other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to' the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to

such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner- plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in Income Tax Officer Benaras v. Kanhaiyalal Mukundlal Saraf [1959] S.C.R. 1350 must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions (i) to (vii) above - shall not however entitle the State to recover to taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of Sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in Sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution - or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent

manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners and Union of India v. I.T.C. [1993] Suppl. 4 S.C.C. 326 have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and/or governed by Section 11-B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11-B does provide for the purchase making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.

100. We take note of the fact that writ petitions/writ appeals/suits claiming refund of excise duties/customs duties may be pending as on today. They are liable to fail on the ground of maintainability by virtue of the law declared herein. Since the law is being declared and clarified by us now, we make the following directions : in cases where writ petitions, writ appeals (by whatever appellation they are called) or suits (at whatever stage they may be, as on today) are pending as on today, and provided they have not already taken proceedings for refund under the Act, it shall be open to the petitioners/appellants/plaintiffs to file applications for refund under Section 11-B within sixty days from today. If the applications are so filed by them, they shall not be rejected on the ground of limitation and shall be dealt with according to law. We make it clear that this direction applies only to petitioners/appellants/plaintiffs in pending writ petitions/writ appeals/suits (pending as on today), as explained hereinabove, and not to any others. The applications so filed under Section 11-B shall be disposed of under Section 11-B, as interpreted herein, and in accordance with law. It is obvious that if any of such petitioners/appellants/plaintiffs already taken proceedings for refund under the Act and having failed therein - either partly or wholly - have resorted to writ petition or suit, they shall not be entitled to the benefit of this direction.

101. The individual cases may now be listed before a Division Bench for being disposed of in this light of the judgment.

There shall be no order as to costs.

Ahmadi, CJ.

1. I have had the benefit of studying the judgments of my learned brothers Reddy, Sen and Paripoornan, JJ. Pursuant to the discussions that I have had with them and with all my other learned brothers on this bench, I find myself to be broadly in agreement with the conclusions recorded by Reddy, J. subject to the two aspects on which I have recorded my views hereunder:

> The first of these is the issue regarding the extent to which the jurisdiction of ordinary courts is ousted in respect of claims for refund of taxes illegally levied and collected. In my view, it would be incorrect to hold, as Reddy, J. has done, that every claim for refund of illegal or unauthorised levy of tax is necessarily required to be made in accordance with the provisions of the Central Excise Act, 1944 (hereinafter called "the Excise Act"). The leading authority governing this issue is the decision of this Court in Dhulabhai and Ors. v. State of Madhya Pradesh and Anr. . In this case, after analysing the leading decisions in the field, this Court laid down the following propositions with a view to determining the extent to which the jurisdiction of civil courts can be ousted:
>
> (1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular act to find out the intendment becomes necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

2. In view of these propositions, which have been reiterated by this Court on several occasions and thus constitute sound law, it is clear that actions by way of suits or petitions under Article 226 of the Constitution cannot be completely eliminated. The claims for refund can arise under three broad classes and the issue of ouster of jurisdiction of civil courts can be understood by focussing on the parameters of these classes which are as follows:

> Class I ; Unconstitutional levy" - where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.
>
> Cases falling within this class are clearly outside the ambit of the Excise Act. In such cases assessees can either file a suit under Section 72 of the Contract Act, 1872 (hereinafter called "Contract Act") or invoke the writ jurisdiction of the High Court under Article 226 of the Constitution.
>
> Class II: "Illegal levy" - where claims for refund are founded on the ground that there is misinterpretation/misapplication/erroneous interpretation of the Excise Act and the Rules framed thereunder.
>
> Ordinarily, all such claims must be preferred under the provisions of the Excise Act and the Rules framed thereunder by strictly adhering to the stipulated procedure. However, in cases where the authorities under the Excise Act arrogate to themselves jurisdiction even in cases where there is clear want of jurisdiction, the situation poses some difficulty. Reddy, J. has held that in all cases, except where unconstitutionality is alleged, the remedy is to be pursued within the framework of the Excise Act. This is a dangerous proposition for it will not cater to situations where the authorities under the Excise Act assume authority in cases where there is an inherent lack of jurisdiction. This is because, if one were to follow Reddy, J.'s reasoning, the authorities under the Act will have the final say over situations in which they totally lack inherent jurisdiction. In such a situation, there is nothing to prevent the authorities from exercising jurisdiction in cases which are ultra vires the Excise Act but intra vires the Constitution. To that extent, I would hold that in cases where the authorities under the Excise Act initiate action though lacking in inherent

> jurisdiction, the remedy by way of a suit under Section 72 of the Contract Act or a writ under Article 226 of the Constitution, will lie. Such a conclusion will not frustrate the exclusion of jurisdiction of civil courts by the Excise Act because the areas where as authority acting under a statute is said to lack inherent jurisdiction have been clearly demarcated by several decisions of this Court.
>
> Class III: "Mistake of Law" - where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction.

3. Ordinarily, no assessee can be allowed to reopen proceedings that have been finally concluded against him on the basis of a favourable decision in the case of another assessee. This is because an order which has become final in the case of an assessee will continue to stand until it is specifically recalled or set aside in his own case.

4. In cases where the levy of a tax has been held to be (1) unconstitutional; or (2) void for want of inherent jurisdiction (as explained in Class II), it is open for the assesses to take advantage of the declaration of the law so made and claim refunds on the ground that they paid the tax Under a mistake of law. This is because such claims are outside the ambit of the Excise Act. In such cases, the limitation period applicable will be that specified in Section 17(1)(c) of the Limitation Act.

5. Reddy, J. has moulded an exception to the above stated principle. He has held that where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be ignored or put aside as if it did not exist on the basis of the decision in another person's case. However, in my opinion, since the levy of tax has been held to be unconstitutional (which would lead to the conclusion that it should never have been levied in the first place) such an interpretation would be unfair to an assessee who had the foresight to discern the unconstitutionality of the provision (albeit on a different ground) but was unfortunate in not being able to convince the concerned court of the unconstitutionality of the provisions. Considering the gravity of the case, in my opinion, it should be left open to such an assessee to use legal remedy as may be available to him to have the earlier order reviewed or recalled on the basis of the order made in the subsequent case. If he succeeds, well and good; if he fails, he must take the consequence of an adverse order against him.

6. On the issue of the retrospective application of the amended provisions of the Excise Act, I wish to emphasise on practical difficulty that may arise. Reddy, J. has held that in respect of proceedings that have been finally culminated, there is no question of reopening proceedings, and retrospectively applying the amended Section 11B. However, in respect of decrees and orders that have become final but have not been executed, the non obstante clause, Section 11B(3), provides as follows:

> (3) 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, no refund shall be made except as provided in Sub-section (2).

(Emphasis added)

7. It is, therefore, clear that in respect of such decrees and orders, the procedure and conditions prescribed in Section 11B will have to be complied with. However, under the scheme of the amended Excise Act, the application for refund which is a pre- requisite for invoking Section 11B(2), is required to be made within six months from the payment of duty. It is obvious that this requirement cannot be complied with in respect pending decrees and orders. But it must at the same time be realised that in such a case, the assessee was protesting the recovery of the excise duty from him for which he had even initiated legal proceedings. It would therefore be in order to assume that he had paid the duty even though he was protesting its recovery. To ensure that such orders and decrees are not frustrated, it must be deemed that the duties of excise in such cases were paid "under protest" within the meaning of the second proviso to Clause (1) of Section 11B. This would enable the assessees in such cases to file fresh applications under Section 11B(2), thereby complying with the scheme of the amended Excise Act.

8. Subject to the above, I agree with the rest of the conclusions reached by Reddy, J.

Paripoornan, J.

1. Common questions of law arise for consideration in this batch of cases. Initially the matter came up before a two Member Bench. The said Bench felt that the decision of the Constitution Bench comprising of 5 Judges in Sales Tax Officer, Benaras and Ors. v. Kanhaiya Lal Mukundlal Saraf requires reconsideration and referred the matter to a larger bench of 7 Judges. When the matter came up before a Bench of 7 Judges, it was noticed that Kanhaiya Lal's case (supra) was expressly approved by a bench of 7 Judges in the decision reported in State of Kerala v. Aluminium Industries Ltd. (1965) 16 STC 689, and so, by order dated 28.7.1993, the said Bench directed that the matter may be placed before the learned Chief Justice for constituting a still larger Bench. That is how this batch of cases came up before a Bench of 9 Judges. We heard, Sri F.S. Nariman, Sri Soli Sorabjee and Sri Harish Salve, Senior Advocates, who appeared for the different assessees (claimants) and Sri K. Parasaran and Sri M. Chandrashekhar, Senior Advocate who appeared for the Union of India.

2. Stated briefly, the controversy centers round the tenability or otherwise of the claim for refund of the amounts paid be way of excise duty under the Central Excises and Salt Act, 1944, now titled as Central Excise Act, 1944 (hereinafter referred to as 'the Excise Act') on the ground that it was so done under "mistake of law". It will be convenient to deal with the controversy by adverting to the minimal facts in the main appeal argued before us - Civil Appeal No. 3255 of 1984 - Mafatlal Industries Ltd., Ahmedabad v. Union of India. The appellant is a textile mill situate at Ahmedabad. The appellant and a few other mills manufacture "blended yarn". The said blended yearn was captively consumed by the various mills for manufacture of fabric, popularly known as "art silk" fabric. For the period prior to March 16/17, 1972, the mills paid excise duty on blended yarn manufactured for captive consumption under Tariff Item 18 or 18A of the First Schedule to the

Excise Act. In Special Application No. 1058/72 filed by M/s. Calico Mills, who manufactured fabrics and was captively consuming blended yarn, produced by it for manufacturing fabric known as "art silk fabric", a Division Bench of the Gujarat High Court by judgment dated 15.1.1976, held that the levy of the excise duty on blended yarn prior to March 16/17, 1972, under tariff Item 18 or 18A was clearly ultra vires. The High Court directed refund of the excise duty levied for 3 years prior to institution of the petition, which was instituted on 6.5.1972. The appellant and other mill-owners stated that as a result of the declaration of the law as aforesaid by the Court, they were not liable to pay excise duty on blended yarn up to March 16/17, 1972 and that they had paid the excise duty on the same upto that date under mistake of law. They requested for refund of the excise duty so paid till March 16/17, 1972, stating that such duty was illegally recovered from them. The Revenue did not refund the excise duty as claimed. So, the appellant and others filed suits within three years of the aforesaid judgment (15.1.1976) for refund of excise duty illegally recovered from them, with interest. The trial court decreed the suits. In the appeals filed by the Union of India against the aforesaid decrees passed by the trial court, the High Court of Gujarat allowed the appeals and set aside the decrees passed by the trial courts, by judgment dated 6.4.1984. It was held that in order to successfully sustain the claim of restitution based on Section 72 of the Contract Act, the person claiming restitution should prove "loss or injury" to him, and in the cases before them, the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric, and so the claim for restitution will not lie. In other words, in cases where an assessee has "passed on" the duty paid by or realised from him, he has suffered no loss or injury, and the action for restitution is unsustainable. The aforesaid statement of the law is seriously disputed by the appellants in Civil Appeal No. 3255/84 and others.

3. In the ultimate analysis, the main question that falls for consideration in this batch of cases is, whether in an action claiming refund of excise duty (tax) paid under mistake of law, is it essential for the person claiming such refund, to establish "loss or injury" to him? In other words, in cases where the person from whom the excise duty (tax) is collected, has "passed on" the liability or deemed to have passed on the liability, is it open to him to claim refund of the duty paid by him, placing reliance on Section 72 of the Indian Contract Act? The further question as to whether an action by way of civil suit or a writ petition under Article 226 of the Constitution will lie in the light of various amendments to the Act, claiming "refund" or "restitution", also arises for consideration.

4. I perused the draft judgment prepared by my learned brother Jeeven Reddy, J., wherein on the main question, he has held that if the person claiming the refund has passed on the burden of duty to another and has not really suffered any loss or prejudice, there is no question of reimbursing him and he cannot successfully sustain an action for restitution, based on Section 72 of the Indian Contract Act. With great respect, I fully concur with the aforesaid conclusion of my learned brother. But, in view of the importance of the question raised, I would like to record my own reasons for the aforesaid conclusion. I shall separately deal with the maintainability of the action either by way of suit or petition under Article 226 of the Constitution - the extent to which there is ouster of jurisdiction of Courts.

5. In this batch of cases, the claims by different assessees for refund of excise duty paid by them under mistake of law arise over a period of years, and the claims were made in different proceeding -

before the departmental authorities, by way of civil suits and writ petitions under Article 226 of the Constitution, which are in appeal before us.

Broadly, the basis for the various refund claims can be classified into 3 groups or categories:

> (I) The levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.
>
> (II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.
>
> (III) Mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.

For the periods during which the refund were claimed, there were different statutory provisions which governed the subject. They are -

(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the then Central Excises & Salt Act;

(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.

The circumstances and grounds on the basis of which the refund can be claimed, the period within which it should be so done, the forum before which the claim should be preferred and whether the decision thereon is subject to the jurisdiction of ordinary courts, vary from period to period. We shall advert to such provision and their impact on various aspects regarding the claim for refund a little later.

Rule 11 of the Central Excise Rules which dealt with claims for refund of duty as it was in force prior to 7.8.1977, is to the following effect:

> Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months. - No duties or charges which have been paid or have been adjusted in an

> account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertance, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be.
>
> It should be noted that Rule 11 before amendment did not provide for any ouster of jurisdiction of courts. We shall deal with Rule 11-A as amended and Sections 11A and B of the Excise Act a little later. The Revenue states that in view of these later provisions, there is ouster of jurisdiction of courts, relating to claims for refund.

6. The claims by different assessee for refund arose and are/were preferred during different periods. After Rule 11 was amended and Sections 11A and B were inserted in the Act, the statute contained provisions making them exclusive for claiming refund. Be that as it may, it is only relevant to state at this juncture that in all cases, irrespective of the relevant statutory provisions in the Excise Act and/or the Rules, the claims for refund were made in different proceedings mainly based on Section 72 of the India Contract Act. So the main issue, in all the cases, that arises for consideration is, whatever be the nature of the attack regarding the levy, or the basis put forward for claiming refund, or the period for which refund is claimed or the character of the proceedings in which it was so done, or the different nature or character of the statutory provisions either providing or not providing as to how and in what manner the claim should be made, - whether the claim for refund is tenable in any of the proceedings, for any period, based on Section 72 of the Contract Act, if the assessee has "passed on" the liability to the consumer or third party?

7. The levy under the Excise Act is an indirect tax (duty). A duty of excise is levied on the manufacture or production of goods. Ordinarily, it is levied on the manufacturer or producer of goods. (Since the levy is in relation to or in connection with the manufacture or production of goods, it may be levied even at a point later than manufacture or production of the goods.) The duty levied will form part of the total cost of the manufacturer or producer. The levy being a component of the price for which the goods are sold, is ordinarily passed on to the customer. It is a matter of common knowledge that every prudent businessman will adjust his affairs in his best interests and pass on the duty levied or leviable on the commodity to the consumer. That is the presumption in law.

8. The claim for refund in these cases is based upon the plea that excise duty was paid when it was not exigible. It was so done under mistake of law. Refund is claimed basing the action under Section 72 of the Contract Act, which is to the following effect:

> Liability for person to whom 72. A person to whom money has money is paid or thing been paid, or anything delivered, delivered, by mistake or under by mistake or under coercion, coercion. must repay or return it.
>
> Illustrations

> (a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.
>
> (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Chapter V of the Indian Contract Act is styled thus : "Of Certain Relations Resembling Those Created By Contract". The Chapter contains five sections - Section 68 to 72. The rights and liabilities dealt with in those Sections accrue from relations resembling those created by contract. It is not a real contract, but one implied in law or a quasi-contract.

Law is fairly settled that "Money paid under a mistake or on a consideration which has wholly failed or under duress falls under the general head of money "had and received." An action for money "had and received." An action for money "had and received" is an action "founded on simple contract" which has been called quasi contract or restitution". Pollock & Mulla Indian Contract And Specific Relief Acts (10th Edition) page 598.

9. The Law of Restitution is founded upon the principle of "unjust enrichment". As stated by the learned authors, Lord Goff of Chieveley and Gareth Jones "The Law of Restitution" (3rd Edn.) 1986. "It presupposes three things : first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit. These three subordinate principles are closely interrelated." (page 16).

Cheshire Fifoot & Furmston's "Law of Contract" (12th Edn.) 1991, page 649.)

10. The second aspect aforesaid, namely, that the defendant has been enriched "at the plaintiffs' expense", has been considered by Peter Birks (Professor of Civil Law, University of Edinburgh) "introduction to the Law of Restitution" rather elaborately. The principles discernible from the above discussion has bee succinctly stated by Endrew Burrows : The Law of Restitution (1993), at page 16, thus:

> It is the major theme of Birks' work that this phrase ambiguously conceals two different ideas in the law of restitution. The first, and most natural meaning, is that the defendant's gain represents a loss to the plaintiff : in Birks' terminology a 'subtraction from' the plaintiff'. The second, and less obvious meaning, is that the defendant's gain has been acquired by committing a wrong against the plaintiff.
>
> (Emphasis supplied) The person claiming restitution should have suffered a "loss of injury". In my opinion, in cases where the assessee or the person claiming refund has passed on the incidence of tax to a third person, how can it be said that he has

> suffered a loss of injury? How is it possible to say that he has got ownership or title to the amount claimed, which he has already recouped from a third party? So, the very basis requirement for a claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him; in, other words, he has not passed on the liability. If it is not so done, the action for restitution or refunds, should fail.

11. In this connection, the decision of a three-member Bench of this Court in Mulamchand v. State of Madhya Pradesh , affords some guidance. The appellant in that case, purchased a right to pluck, collect and remove the forest produce from the proprietOrs. The right was acquired before the propriety rights vested in the State of Madhya Pradesh by Act No. 1 of 1951 - called the Abolition Act. Acting under the Act, in April, 1951 the Deputy Commissioner auctioned the forest produce of villages covered by the purchases of the appellant. Amongst others, the appellant had deposited a sum of Rs. 10,000 towards the right to collect lac from the forest. It turned out that the provisions of Article 299 of the Constitution were not complied with and the contract entered into by appellant therein with the State of Madhya Pradesh was void. The appellant claimed refund on the basis that there was no valid contract. The trial court as well as the appellant court held that the appellant having worked out the contract by collecting the lac from the jungles in pursuance of the agreement, was not entitled to refund of the amount of deposit. In the appeal filed by the appellant, this Court held that if the money is deposited and the goods are supplied or services rendered in terms of the contract, the provision of Section 70 of the Contract, Act may be applicable and, can be invoked by the aggrieved party to the void contract. This Court further held at pages 1222-23, thus:

> The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. In Fibrosa v. Fairbaim, (1943) AC 32 Lord Wright has stated the legal position as follows:
>
> ...any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.
>
> (7) In Nelson v. Larholt (1948) 1 KB 339 Lord Denning has observed as follows.

It is no longer appropriate to draw a distinction between law and equity, Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution of the justice of the case so requires.

(Emphasis supplied) This Court further stated the law thus:

> ...It is well established that a person who seeks restitution has a duty to account to the defendant for what he has received in the transaction from which his right to restitution arises. In other words, an accounting by the plaintiff is a condition of restitution from the defendant (See 'Restatement of the Law of Restitution', American Law Institute, 1937 Edn., p. 634).
>
> (Emphasis supplied) The observations extracted above indisputably point out that a person who seeks restitution, has a duty to disclose or account for what he has received in the transaction. An accounting is a condition precedent in an action for restitution. By way of analogy, it can be stated that in cases where restitution is claimed under Section 72 of the Contract Act, on the ground of payment due to mistake of law, the person claiming restitution, should plead and prove that "he has not passed on" the liability to another. That is the nature of "accounting" in cases falling under Section 72 of the Contract Act. In my opinion, the High Court was justified in law in holding that since the excise duty paid by the appellant was ultimately passed on to the buyers of the fabric, and that the appellant has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, was unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991).

12. Mr. F.S. Nariman, Senior Counsel for the appellants, contended that in an action for restitution under Section 72 of the Contract Act, the question as to whether the incidence of duty or tax has been passed on, is an irrelevant factor. There is no such requirement in the statute. The sheet-anchor of the appellant's case is founded on the decision of the Constitution Bench in Kanhaiya Lal's case (supra), which was followed by a Bench of 7 Judges in Aluminium Industries' case (1965) 16 STC 689. It was argued that the decision in Kanhaiya Lal's case was followed subsequently in Tilokchand Motichand and Ors. v. H.B. Munshi and Anr. ; D. Cawasji & Co., Etc. Etc. v. The State of Mysore and Anr. ; Dhanyalakshmi Rice Mills Etc. v. The Commissioner of Civil Supplies and Anr. Etc. The plea was that the law laid down in Kanhaiya Lal's case has stood the test of time for nearly four decades and there is no requirement either in Section 72 of the Indian Contract Act or in any of the above decisions, holding that in order to claim refund or restitution based on Section 72 of the Contract Act, the liability (duty) should not have been passed on. Our attention was also invited to the decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All ER 737, of the Canadian Court in Air Canada case (59 D.L.R. (4th series) 161) (in particular dissenting judgment of Wilson, J.), of the decision of the Australian Court in Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 69 A.L.J. 51, of the European Economic Committee in San Giorgio S.P.A. case (1985) 2 C.M.L.R. 658, and the decision of the United State Supreme Court in United States v. Jefferson Electric Manufacturing Co., 78 Lawyers' Edition 859, It was argued that the preponderance of judicial opinion in other jurisdictions also is in favour of the view, that "passing on" of the liability, is an irrelevant factors for consideration in an action for restitution, and at any rate, it cannot form the basis of a valid defence in an action for "restitution". Mr. Parasaran, Senior Counsel for the Union of India contended that the question of "passing on" of the liability never arose for consideration in Kanhaiya Lal's case nor was it decided. The said decision cannot be an authority for the proposition

that a person claiming refund of tax on the ground of mistake of law is not obliged to allege and prove that it has not been passed on; on the other hand, it is mandatory for a claimant in such cases to allege and prove that he suffered a loss or detriment. Then and then alone, that Court can grant the equitable relief of restitution. Counsel also contended that the principle in Kanhaiya Lal's case (supra) has not been uniformally followed by this Court subsequently. Counsel also distinguished the various foreign decisions that were brought to our notice and highlighted the fact that those decisions were rendered on their own facts. Counsel further contended that in cases of indirect levy of tax (ess or fee) which was passed on, this Court has negatived the claim for refund in a few cases. Our attention was invited to the following decisions:

> Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc. ; State of Madhya Pradesh v. Vyankatlal and Anr. , 566-568; Amar Nath Om Parkash and Ors. Etc. v. State of Punjab and Ors. Etc. ; Indian Aluminium Company Limited v. Thane Municipal Corporation [1992] Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores Etc. .

13. The main case relied on, Kanhaiya Lal's case (supra) requires a little detailed examination. The respondent, Kanhaiya Lal was a firm. For the assessment years 1948-49, 1949-50 and 1950-51, its forward transactions were brought to tax by the Assessing Authority - the Sales Tax Officer, as per Assessment orders dated 31.5.1949, 30.10.1950 and 22.8.1951. On 27.2.1952, the Allahabad High Court in Messrs Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur and Ors. (1952) A.L.J. 332 held that the provisions of the Uttar Pradesh Sales Tax Act, taxing forward contracts were ultra vires the U.P. Legislature. The said judgment was affirmed by this Court or 3.5.1954. The attempts of the assessee to obtain refund of tax basing its claim on Budh Prakash Jai Prakash ease before the statutory authorities were futile. Thereafter, the assessee-firm filed a writ petition in the High Court, praying to quash the assessment orders, and for direction for refund of tax illegally collected. By judgment dated 30.11.1956, a learned single Judge of the High Court, allowed the writ petition. In the appeal, the Revenue contended that since the tax was paid under mistake of law, it was not recoverable. Even so, relying on Section 72 of the Contract Act, the Division Bench affirmed the decision of the single Judge. The Revenue took up the matter in appeal before this Court. The pleas of the appellant-Revenue, that the assessee should have followed the procedure prescribed by the U.P. Sales Tax Act and, that the writ petition filed for refund of money would not lie, were not allowed to be urged by this Court. Mainly, two questions arose before this Court for consideration -

(i) Whether the term "Mistake" occuring in Section 72 of the Contract Act took within its fold "mistake of Law" as well as "mistake of fact"?

(ii) Whether the tax paid under mistake of law can be recovered under Section 72 of the Indian Contract Act?

This Court held that word "mistake" occuring in Section 72 of the Contract Act has been used without any qualification or limitation and, so, it takes within its fold "mistake of law" as well as "mistake of fact". On the second question, this Court held that once it is established that the payment, even though it be a tax, has been made by the party under a mistake of law, the party is

entitled to recover the same and a party who received the tax is bound to repay or return it. This Court held that there can be no distinction in a tax liability and any other liability on a plain reading of Section 72 and the plea that tax paid by mistake of law cannot be recovered under Section 72, will not be a proper interpretation of the relevant provisions, but to make a law, adding such words as "otherwise than by way of taxes" after the word "paid". The scope of Section 72 was considered only within a limited sphere. It should be noticed that no question was raised before this Court that in order to claim refund (restitution) of sales tax paid, - (an indirect levy) - under Section 72, the claimant should necessarily prove that he has sustained "a loss, or injury". In other words, the tax collected by him has not been passed on to a third party. Dealing with the plea that the position in law obtaining in England, America and Australia that money paid under mistake of law could not be recovered, and that similar considerations should weigh in interpreting Section 72, the Court held that the true meaning and intent of Section 72 should be interpreted on its own terms, divorced from all considerations, as to what was the state of previous law or the law in England or elsewhere. This Court made further observations to the following effect:

> If it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made in America vide the passage from Willoughby on the Constitution of the United States, Vol. 1, p. 12 op cit. To hold that tax paid by mistake of law cannot be recovered under Section 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid".
>
> Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If, once that circumstance is established the party is entitled to the relief claimed.
>
> No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other.
>
> The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are,

> however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him.
>
> Merely because the State of U.P. had not retained the monies paid by respondent but had spent them away in the ordinary course of the business of the State would not make any difference to the position and under the plain terms of Section 72 of the Indian Contract Act the respondent would be entitled to recover back the monies paid by it to the State of U.P. under mistake of Law.
>
> (Emphasis supplied)

14. It is apparent that in Kanhaiya Lal's case there was no plea by the Revenue that since the assessee has passed on the tax, the claim for refund is unsustainable. Such a question was not posed before this Court for consideration. One of the main aspects to be proved in a claim for restitution, that the person claiming restitution should have suffered a loss or injury in order to sustain an action, was not urged and was not considered. In such a situation the following observations of Lord Halsbury in Quinn v. Leathem (1901) A.C. 495 at p. 506, quoted with approval by a Constitution Bench of this Court in State of Orissa v. Sudhansu Sekhar Misra and again in Orient Paper and Industries Ltd. and Anr. v. State of Orissa and Ors. [1991] Supp. 1 SCC 81, at page 96, should govern the matter.

...there are two observations of a general character which I wish too make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

(Emphasis supplied) The above in Kanhaiya Lal's case, and the cases following the said case. The said decisions cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

It also appears that there is some inconsistency in the Kanhaiya Lal's case. The basis in an action for restitution under Section 72 of the Contract Act, rests upon the equitable doctrine of unjust enrichment. The Court observed on page 1364 that the recovery of the money paid under mistake of law or fact can be recovered "subject however to questions of estoppel, waiver, limitation or the like". Even so, at page 1366, the Court has observed "equitable considerations could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claims by him." The very basis of the claim, though statutorily incorporated in Section 72 of the Contract Act, is equitable in nature and if so, how can it be said that equitable considerations should not be applied in adjudicating the claim for restitution (refund)? If an assessee has passed on

the tax to the consumer or a third party and sustained no loss or injury, grant of refund to him will result in a windfall to him. Such a person will be unjustly enriched. This will result in the assessee or the claimant obtaining a benefit, which is neither legally nor equitably due to him. In other words, such a person is enabled to obtain an unjust benefit" at the cost of innumerable persons to whom the liability (tax) has been passed on and to whom really the refund or restitution is due. The above factors certainly disentitle such a person from claiming restitution. If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto.

15. Shri Nariman and Shri Sorabjee also contended that if the relief of refund is withheld or denied on the ground that the assessee has passed on the tax (liability) to the consumer or third party, It will result in a position where the State is enabled to retain and appropriate the unlawful collection to itself. The plea was that Article 265 of the Constitution of India contains a mandate to the effect that "no tax shall be levied or collected except by authority of law". It was argued that this is a basic feature of the Constitution and cannot be ignored. If no tax can be collected except by authority of law, the same logic would prevail for retention of amounts collected without the authority of law. Reference was made in this connection to the decision of the Madras High Court in Rayalaseema Constructions v. Dy. Commercial Tax Officer, 10 STC 345 (355-356) and affirmed by this Court in Dy. Commercial Tax Officer, Madras v. Rayalaseema Constructions 17 STC 505. The plea urged was that, if the assessee, is denied the refund, the State Government could retain the amount illegally collected, and it would amount to violation of the constitutional mandate enshrined in Article 265 of the Constitution. An equitable principle will not hold good against a constitutional mandate. On the other hand, Counsel for the Union of India, Sri K. Parasaran, brought to our notice the following portion of the Preamble and Article 39(b) and (c) of the Constitution to contend that Article 265 of the Constitution cannot be construed in a vacuo or isolation, but should be construed in the light of the basic principles contained in other parts of the Constitution -viz. - the Preamble and the Directive Principles of State Policy:

> Preamble WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizen:
>
> JUSTICE, social, economic and political;
>
> xxxx xxxx xxxx Article 39(b)-(c):
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(Emphasis supplied) Mr. Parasaran also urged that it should be borne in mind that excise duty is an indirect levy or tax which could be passed on. Innumerable persons bear the brunt. And it is passed on, ordinarily by prudent businessmen. The decisions in R,C. Jail v. Union of India [1962] Suppl. 3 SCR 436 and The Province of Madras v. Boddu Paidanna and Sons (1942) F.C.R. 90, were referred to. Reference also was made to Section 64A of Sale of Goods Act, 1930 which was substituted later by Act 33 of 1963 to show that the levy could be passed on and so recognised by statute, and in the above background, there is a presumption that excise duty has been passed on. The scope of Article 39(b) of the Constitution, as laid down by this Court in State of Karnataka and Anr. Etc, v. Shri Ranganatha Reddy and Anr. Etc. ; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. and Anr. ; State of Tamil Nadu Etc. Etc. v. L. Abu Kavur Bai and Ors. was highlighted. Reliance was placed on Amar Nath Om Prakash and Ors. Etc. v. State of Punjab and Ors. Etc. , at pp. 96, 97, 99, 100; Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc. and Walaiti Ram Mahabir Prasad v. State of Punjab and Ors. , at p. 124, to stress the point that the persons claiming refund who were only middle-men, should not be unjustly enriched and allowed to make a "fortune" as it were, at the expense of innumerable unidentifiable innocent consumers and that "public interest" requires that such persons claiming refund should not be unduly or unjustly benefited; and, public interest is better served, if the State is allowed to retain the collection of tax, which could be made/spent, for the benefit of the "public.

16. On an evaluation of the rival pleas urged in the matter, I am of the view that the plea of Counsel for Union of India should prevail.

Following the decision in the Province of Madras case (supra) and other cases, a Constitution Bench of this Court in R.C. Jall v. Union of India (supra) at page 451 stated the nature and character of excise duty, thus:

> Excise duty is primarily a duty on the production of manufactured of goods produced or manufactured within the country. It in an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer.
>
> (Emphasis supplied) Section 64A of the Sale of Goods Act after its amendment by Act 33 of 1963, in providing that in contract of sale amount of increased or decreased taxes, may be added or deducted by the seller or by the buyer, in case of increase or decrease or remitted, after the making of the contract for the sale or purchase of such goods, without stipulation as to the payment of tax where a tax was not chargeable at the time of making the contract, expressely states that the provisions shall apply to any duty of customs or excise and any tax on the sale or purchase of goods. The scope of Article 39(b) of the Constitution which has as its basis the concept of "distributive justice", as explained in three cases referred to in the previous paragraph; Shri Ranganatha Reddy [1978] 1 SCR 641; Sanjeev Coke v. Bharat and L. Abu go to show that the words "material resources" occuring in Article 39 Clause (b) will take in, natural or physical resources and also movable or immovable property and it would include all private and public sources of meeting material needs, and not merely

confined to public possessions. So also, the three cases, shiv Shanker Dal Mill's case , Amar Nath Om Prakash's case and Walaiti Ram Mahabir Prasad, , emphasise the principle that the persons who have passed on the burden of the levy - middlemen - should not be allowed to profiteer by illgotten gains and unjustly enriched. An analysis of the above decisions in detail will point out that if Article 265 of Constitution is literally interpreted and in isolation, and refund ordered, in cases where excise duty has been passed on, it will result in a mockery, totally ignoring the other salient features of the Constitution and the ground realities. As the Preamble states, the Constitution was enacted by the people, to secure to all the citizen, justice, political, social and economic. It is fairly settled by the decisions of this Court, that the directive principles contained in Part IV of the Constitution are fundamental in the governance of this country and all organs of the State including the judiciary are bound to enforce those directives. In interpreting the various provisions of the Constitution, the courts have to be realistic and should be alive to the needs of the times. The courts have a responsibility to ensure proper and meaningful interpretation of the directive principle and to adjust or harmonise the objectives enshrined in the Preamble - justice, political, social and economic and the directive principles contained in Part IV, with the individual rights. In the process, it is permissible to restrict, abridge, curtail and in extreme cases, abrogate other rights in the Constitution, if found necessary and expedient, in particular situations. In the light of the above, I hold that Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to the claim of restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto. The observation of a three-Member Bench of this Court in Orissa Cement Ltd. v. State of Orissa [1991] Supp. 1 SCC 430 (498 para 69), is apposite in this context.

We are inclined to accept the view urged on behalf of the State 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 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. It is a well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

17. It is open to the Court to deny the equitable remedy of refund (restitution) in such cases. The attempt of persons who have passed on the liability in claiming refund is only to strike at a bargain - to make a fortune at the expense of innumerable unidentifiable consumers. Such persons have suffered no loss. On the other hand, if the State is allowed to retain the amount, it will be available to the community at large and could be made use of for public purposes. On this basis as well, the denial of refund or restitution is valid. There is nothing abhorrent or against public policy if refund

or restitution is withheld in such a situation. It should also be stated that in cases of indirect levy of tax which was passed on, this Court has negatived the claim for refund in a few cases, mentioned in paragraph 12 (supra); - Shiv Shanker Dal Mills v. State of Haryana ; State of Madhya Pradesh v. Vyankatlal and Anr. ; Amar Nath Om Prakash and Ors. v. State of Punjab and Ors. ; Indian Aluminium Company Limited v. Thane Municipal Corporation [1992] 1 Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores etc. .

18. It now remains to consider the foreign decisions brought to our notice. The various decisions of foreign courts and their scope have been very exhaustively considered by Jeevan Reddy, J. in his judgment under the heading "Decisions of foreign courts on the subject". I am in broad agreement with my learned brother Jeevan Reddy, J., in the analysis of the various decisions aforesaid. It is unnecessary to cover that ground over again.

19. In this context, it will not be out of place to note that academicians have bestowed great thought and in various articles dealt with the matter in sufficient detail, particularly with reference to the foreign decisions brought to our notice. To mention a few, they are -

(1) When Money is paid in Pursuance of a void authority...." - A duty to replay? by Peter Birks: (Public Law (1992) page 580) (2) "Restitution of taxes, levies and other imposts: Defining the extent of the Woolwich Principle" - by J. Beatson: Law Quarterly Review Vol. 109 (1993) Page 401.

(3) "Restitution of Overpaid Tax, Discretion and Passing-on" - by J. Beatson. (Law Quarterly Review Vol. 111 (1995) page 375 Notes.

(4) "Unjust Enrichment" - by Steve Hedley (Cambridge Law Journal 1995 (578-599).

(5) "Unjust Enrichment Claims: A Comparative Overview" - by Brice Dickson (Cambridge Law Journal (1995) (100-126) (6) "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution" - by Graham Virgo; (British Tax Review (1993) (442-467) (7) "Payments of Money under Mistake of Law: A Comparative View" - by Gareth Jones [Cambridge Law Journal (1993) Comment (225)] (8) "Restitution, Misdirected Funds and Change of Position" - by Ewen McKendrick [Modern Law Review (1992) Vol. 55 (377-385)].

In some of the articles, the defences to a claim for restitution of overpaid taxes, has been dealt with the detail. One of them is the article by Graham Virgo's appearing in British Tax Review (1993) (pp. 442-467) titled "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution", pages 462 and 463 under the sub-heading "Passing on", the learned author has made the following comment:

> (vii) Passing on 484 Since restitution at common law is based upon the principle of reversing an unjust enrichment, it is important to determine whether the defendant was actually enriched at the plaintiff's expense. This raises a difficult problem where the Revenue was initially enriched at taxpayer's expense, by virtue of the receipt of overpaid tax, but the taxpayer did not ultimately suffer a loss because the burden of

> the payment was passed on to somebody else. This could arise if the taxpayer pays excessive VAT and passes the amount overpaid on to customers 495. As a matter of principle it could be argued that, in such a case, the taxpayer should not be allowed to recovery the amount overpaid from the Revenue, because recovery would mean that the taxpayer was unjustly enriched at the expense of those who ultimately bore the burden of the tax 506. A possible solution to this is to allow those who effectively paid the tax to recover from the tax payer, who in turn should recover from the Revenue, However, typically in cases of passing on there are many people who effectively bear the burden of the tax and to encourage actions by them would be impractical and unrealistic, Thus, in such cases the best approach is to allow the Revenue a defence of passing on and enable it to retain the tax and use it for the public benefit.

However, it remains uncertain to what extent a defence of passing on exists in English law 517. Such a defence is recognised by European Community law. In Administration delle Finanze dello Stato v. SpA San Giorgio it was held that Community law does not prevent Member States from "disallowing repayment of charges which have been unduly levied to do so would entail unjust enrichment of the recipients," for example where the unduly levied charges have been incorporated in the price of goods and passed on to purchasers, Although this decision is confined to charges levied contrary to the rules or Community law, the very fact that Community law accepts the validity of a defence of passing on and accepts that the rationale of it is to avoid the unjust enrichment of the initial taxpayer, is a good reason for the defence to be adopted-generally in English law. It would be odd if there were a divergence of approach between English and Community law on this matter.

However, it must be noted that Community law "does not prevent" Member States from adopting a defence of passing on. The San Giorgio case is not authority for the proposition that Member States must adopt such a defence. There has been some disquiet expressed as to the need for such a defence in theory and how it would work in practice. The defence was rejected in Mason v. New South Wales. The operation of the defence is fraught with difficulties because it is not easy to show that the charge was passed on in the price of goods. For the price of goods is affected by many factors, conditional upon the state of the market. Advocate General Mancini in the San Giorgio case said that the "passing on of charges is not generally relevant because of the innumerable variables which affect price formation in a free market and because of the consequent impossibility of definitively relating any part of the price exclusively to a certain cost." Thus, may be the price of goods was increased in an attempt to recoup the tax paid to the Revenue from the purchasers of goods, but this in turn may have had an impact on sales volume resulting in an overall loss. The burden of the enrichment cannot really be said to have been passed on when the initial taxpayer suffers a net loss.

It is submitted that in principle a defence of passing on should exist, with a burden of proving this being on the Revenue: in unlawfully demanded the taxes and so it should show that repayment would unjustly enrich the taxpayer. It is unlikely that such a defence would operate successfully in practice in many cases because of the difficulty of proving that the tax was actually passed on.

(Emphasis supplied) Similarly, in the Article by J. Beatson (1993) 109 L.Q.R. 401 (427-428), the learned author has stated regarding passing on, thus:

> "Passing on." The Law Commission raised the question of whether a payer who was "passed on" to others, for instance by price increases, the higher cost he has borne because of the overpayment should be precluded from recovering. This defence is permitted by European Community Law so long as it does not have the effect of making the right to recover impossible in practice or excessively difficult to exercise. However, it has been criticised, technically because, inter alia, price increases should mean that less will be sold, and also because of difficulties of proof. These difficulties were noted by Lord Goff, and arguments for a similar limit were not accepted by the High Court of Australia in Mason v. South Wales. However, the underlying rationale of a "passing on" defence might be achieved by providing, as in the statutes on recovery of Value Added Tax and car tax, that recovery should not be allowed if the payee can show that the payer would be unjustly enriched if he recovered the payment. This would be consistent with the basic equitable features that have influenced the development of the action for money had and received. It is also possible that such a limit would achieve the same policy ends as the "reasonable and just" limit in provisions such as Section 33 of the Taxes Management Act 1970 and, if so, it might provide a useful method of achieving a measure of rationalisation. (pp. 427-428)

20. Mention may also be made about the Law Commission's Report in England, Law Consultation Paper No. 120 "Restitution of Payments made under a mistake of law" - wherein, after discussing the entire case law of England and other jurisdiction, an observation is made thus:

> 3.85. In principle there would appear to be no reason why such a defence should not apply to cases where the authority can prove on the balance of probabilities that the payer would be unjustly enriched because the charge has been passed on. The views of consulters on the general issue of a "passing on" defence are invited.

In Kanhaiya Lal's case [1959] SCR 1350 at page 1367, this Court was not inclined to accept the defence in mitigation that the State has not retained the amount, but has spent them away in the ordinary course of governmental activities. This plea in defence based on the theory of "Change of Position" has been dealt with by Graham Virgo in his article in British Tax Review (1993) at pages 458-459. See also the views expressed in this behalf by a two-Member Bench of this Court in D. Cawasji & Co. v. State of Mysore .

21. I am of the view that the above academic opinion has got much force. However, it is subject to one aspect, stated hereunder. As held by me earlier, ordinarily, the presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the 'duty element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an indepth

analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge of the taxpayer, the burden of proving that the liability has not been passed on should lie on him. It is held accordingly.

22. The next important question that falls to be considered is, as to what extent the jurisdiction of the ordinary courts is ousted regarding claims for refund of tax illegally levied or collected?

According to the Revenue, the Act is a special enactment creating new rights and liabilities and has also made exhaustive provisions, to ventilate the grievances against all illegal and improper assessments by way of appeals, revisions etc. and also to obtain refunds in appropriate cases by following certain procedures and fulfilling some conditions. A hierarchy of tribunals is provided to afford relief to the assessees. Elaborate alternate remedies provided by the Act, taken along with the specific bar of the jurisdiction of courts provided in Rule 11 (as amended) and Section 11(B) of the Act, and in particular specifying the conditions and procedure for entertaining claims for refund, period of limitation within which the claim should be preferred, etc. will oust/bar the jurisdiction of ordinary courts in that regard. (Attention was also drawn to Sections 11C, 11D and also to Sections 12A to D of the Act, to stress the scheme of the Act). On the other hand, counsel for the assesses-claimants urged that the provisions in the Act dealing with refund of tax "unconstitutionally" or "illegally" or "unauthorisedly" collected are not exhaustive. Even so, in cases where the levy is unconstitutional or illegal or without jurisdiction, the jurisdiction of the Civil Courts is not barred to annul the levy and/or order refund.

23. As stated by me earlier in paragraph 5 of this judgment, the claims for refund can be classified broadly into 3 groups. They are -

(I) the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.

(II) the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure.

(III) mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law.

24. The relevant provisions of law that existed during different periods dealing with the claim for refund are different in content and scope. They are as follows:

(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the Central Excises & Salt Act; and

(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.

Rule 11 of the Central Excise Rules which was in force prior to 7.8.1977, has been quoted in paragraph 5 of this judgment. It contains no specific provision relating to ouster of jurisdiction of the courts.

25. Rule 11 of the Central Excise Rules as amended, Section 11A and Section 11B before Amendment Act 40 of 1991 and Section 11B, as amended by Act 40 of 1991, will be more important to consider the question of ouster of jurisdiction of courts. Sections 11C, 11D as also Sections 12A to D of the Act, will throw light on the scheme of the Act as amended. They are as follows (insofar as they are relevant in the instant cases):-

Rule 11 as amended Rule 11. Claim for refund of duty. -

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

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation.- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Whether as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

Explanation. - For the purposes of this rule, 'refund' includes rebate referred to in Rules 12 and 12A.

Section 11-A 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been

short-levied or short paid or erroneously, refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words 'six months', the words 'five years' were substituted.
>
> Explanation. -...
>
> (u) 'relevant date' means, -
>
> (a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid...
>
> (C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;

SECTION 11-B BEFORE AMENDMENT BY ACT 40/1991 11B. Claim for refund of duty. - (1) 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:

> Provided that the limitation of six months shall not apply where any duty has been paid under protest.
>
> (2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.
>
> (3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.
>
> (4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.
>
> (5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected

were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation. - For the purpose of this section....

(B) 'relevant date' means -

(1) in any other case, the date of payment of duty.

SECTIONS 11B, 11D AND 12A TO D, AS AMENDED BY ACT 40/1991 11B. Claim for refund of duty. - (1) Any person claiming refund of any duty or excise may make as application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish 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 had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the* foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) 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, no refund shall be made except as provided in Sub-section (2).

Explanation. - For the purposes of this section,...

(B) 'relevant date' means -

(f) in any other case, the date of payment of duty.

(Emphasis supplied) Section 11C deals with the power of Central Government to dispense with recovery of excise duty in certain specified cases, which is not necessary for our discussion. Section 11D and Sections 12A to D highlight the new scheme of the Act, relating to refund and they are as follows:

11D. Duties of excise collected from the buyer to be deposited with the Central Government.

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against duty of excise payable by the person on the finalisation of assessment and where any surplus is left after such adjustment, the amount of such

surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise.

12A Price of goods to indicate the amount of duty paid thereon Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

12B. Presumption that incidence of duty has been passed on to the buyer Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer welfare fund (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

12D. Utilisation of the Fund (1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

It is evident that Rule 11, before amendment, provided a time limit to apply for refund. Rule 11(4) as amended, Section 11B Clauses (4) and (5) before amendment and Section 11B Clause (3) after amendment, specifically oust the jurisdiction of the ordinary courts. Detailed provisions are also provided to ventilate the grievances and making such provisions exclusive. Other ancillary or incidental provisions are specified in Sections 11D and 12A to D - Section 11D provides that every person, who collects excise duty from the buyer, should deposit the same with the Central

Government. It will be adjusted against the duty of excise payable by the person concerned on finalisation of the assessment. Section 11D requires clarification. Excise duty is, ordinarily paid or payable at the time of clearance of the goods. The sale of the goods may be later. So, if excise duty due is already paid by the manufacturer, and later collected by him when the goods are sold, such collection, need not be paid to the Government. Only if the duty has not been paid already or if any excess is collected over the duty already paid, then only an occasion arises for payment of the duty collected or excess collected - and this is the purport of Section 11D. The said section (Section 11D) should be understood in the above practical and business sense. Section 12A provides that the price of the goods sold should indicate the amount of duty, which will form part of the price. Section 12B states that the person, who has paid the duty of excise on any goods under the Act, shall be deemed to have passed on the incidence of such duty to the buyer of such goods. It is a rebuttable presumption. Section 12C creates the "Consumer Welfare Fund". The amount of duty referred to in Sections 11B(2), 11C(2) and 11D(2) shall be credited in the said Fund. Section 12D provides that the Fund shall be utilised for the welfare of the consumers.

26. The question that falls to be considered is as to how far or to what extent the jurisdiction of the ordinary courts is barred, in view of the alternate remedies provided by the Act by way of appeals, revisions, claims for refund and the period of limitation provided therefor, etc. and specifically excluding the jurisdiction of the civil courts for claiming refund? In discussing this aspect, one has to bear in mind the content of Article 265 also. It will apply where the statute is unconstitutional or invalid and also where the collection is unauthorised/illegal, i.e., without "authority of law".

27. It is settled law that exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. There are a few decisions of Judicial Committee of the Privy Council and innumerable decisions of this Court which have dealt with the matter in detail. I propose to deal, only with the landmark decisions on the subject. In Secretary of State v. Mask & Co., , the Judicial Committee laid down the law thus:

> ...It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (Emphasis supplied) The scope of the above observation has been explained by a Constitution Bench of this Court, in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh . The minimal facts in this case will be relevant to understand the scope of the decision. The case arose under the Madras General Sales Tax Act, 1939. Section 18A of the Act provided that no suit or other proceeding shall except expressly provided in the Act, be instituted in any court to set aside or modify any assessment made under the Act. The Act also contained provisions by way of appeals, revisions and further revision to the High Court. The levy under the Act was only on "purchase" of 'ground-nuts', but the Sales Tax authorities brought to tax the "sales"

turnover and collected tax. The assessee contended that levy of tax on the sales turnover as distinguished from the purchase turnover is illegal, and filed a suit for recovery of the amount so collected. It should be noticed that the assessee himself voluntarily made a return and paid the tax. In such circumstances, the question arose, whether the suit so filed is maintainable in view of the adequate alternate remedies provided by the Act and the ouster of jurisdiction of the courts expressly contained in Section 18A of the Act? On the facts of the case, it was held that the suit was barred. In considering the question of exclusion of jurisdiction of the civil courts to entertain civil actions by virtue of specific provisions contained in the special statute, reference was made to the decision of the Judicial Committee in Secretary of State v. Mask & Co. (supra). After referring to the observations of the Judicial Committee quoted hereinabove, this Court in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh explained the said observations thus:

...It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under provisions of the relevant taxing statute, its validity can be challenged by a suit on the ground that it is incorrect on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong cannot be the subject-matter of the suit because S. 18-A clearly bars such a claim in the civil courts.

(Emphasis supplied) In this case, the relevant Act contained detailed and specific provisions by way of appeal, revision etc. to ventilate the grievances of the assessee. In addition thereto, there was specific provision ousting the jurisdiction of the courts. Even so, the court did not hold that the principles laid down in Mask & Co. case are inapplicable. The principles in Mask & Co. case were affirmed and explained.

28. The decision of the Privy Council in Mask & Co. case (supra), and other decisions of the Privy Council and of this Court, were surveyed in detail by a Constitution Bench of this Court in Dulabhai Etc. v. State of Madhya Pradesh and Anr. . In that case, the assessees filed a suit for refund of the tax

on the ground that it was illegally collected from them being against the constitutional prohibition contained in Article 301 of the Constitution of India and not saved in Article 304(a) of the Constitution. Section 17 of the relevant Act was pleaded in defence as a bar to the maintainability of the suit. Section 17 provided that no assessment made ' and no order passed under the Act or the Rules by any of the statutory authorities, shall be called in question in any case. The court held that notwithstanding, the alternate remedies by way of appeal, revision, rectification and reference to the High Court, the tax therein was levied without a complete charging section and this affected the jurisdiction of the tax authorities, and so, the suit was maintainable, and decreed the suit. After referring to the relevant decisions and in particular, Secretary of State v. Mask & Co., AIR (1940) P.C. 105; Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh , this Court held in paragraph 28 of the judgment, thus:

> The Constitution Bench, however went on to examine the rulings of the Judicial Committee in Mask and Co.'s and Realign Investment Co.'s cases, 67 Ind App 222 - . Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction...
>
> (Emphasis supplied) Referring to the facts Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh , it was further observed:
>
> The case of Firm of Illuri Subbayya be said to be decided on special facts with additional reference to the addition of Section 18-A excluding the jurisdiction of civil court and the special remedies provided in Sections 12-A to 12-D by which the matter could be taken to the highest civil court in the State.
>
> (Emphasis supplied) This Court also considered the facts and the actual decision of the Special Bench of of 7-Judges in Kamala Mills Ltd. v. State of Bombay in detail, with reference to Section 20 of the Bombay Sales Tax Act, 1946, and observed thus:
>
> The Special Bench refrained from either accepting the dictum of Mask Co. 's case, 67 Ind App 222 - or rejecting it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the civil courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with.
>
> It is evident from the above, that the principle laid down in Mask & Co. case, though explained, was not questioned, or departed from, either, in Illuri Subbayya Chetty's case or Kamala Mills case. In a subsequent decision - Ram Swamp v. Shikar Chand , a Constitution Bench of this Court again considered the scope of the decisions in Mask & Co.'s case (supra) and Kamala Mills's case (supra). Ram Swamp's case arose under the U.P. (Temporary) Control of Rent and Eviction Act. Section 3(4) of the Act provided that the order passed by the designated authority shall be final and Section

16 thereof further provided that the order passed by the State Government or the District Magistrate, shall not be called in question in any court. In other words, the jurisdiction of civil courts was excluded in relation to the matters covered by orders included within the provisions of Sections 3(4) and 16 of the said Act. The Constitution Bench approached the matter thus:

One of the points which is often treated as relevant in dealing with the question about the exclusion of civil Courts' jurisdiction, is whether the special statute which, it is urged, excludes such jurisdiction, has used clear and unambiguous words indicating that intention. Another test which is applied is: does the said statute provide for an adequate and satisfactory alternative remedy to a party that may be aggrieved by the relevant order under its material provisions? Applying these two tests, it does appear that the words used in S. 3(4) and S. 16 are clear. Section 16 in terms provides that the order made under this Act to which the said section applies shall not be called in question in any Court. This is an express provision excluding the civil Courts' jurisdiction. Section 3(4) does not expressly exclude the jurisdiction of the civil Courts, but, in the context, the inference that the civil Courts jurisdiction is intended to be excluded, appears to be inescapable. Therefore, we are satisfied that Mr. Goyal is right in contending that the jurisdiction of the civil Courts is excluded in relation to matters covered by the orders included within the provisions of S. 3(4) and S. 16.

(Emphasis supplied) Even so, this Court proceeded to state in paragraph 13 at page 896, to the following effect:

This conclusion, however, does not necessarily mean that the plea against the validity of the order passed by the District Magistrate, or the Commissioner, or the State Government, can never be raised in a civil Court. In our opinion, the bar created by the relevant provisions of the Act excluding the jurisdiction of the civil Courts cannot operate in cases where the plea raised before the civil Court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity.

(Emphasis supplied) This Court referred to the decisions of the Judicial Committee, in Secretary of State v. Jatindra Nath Choudhry AIR (1924) PC 175 and the decision in Mask & Co., and also quoted the observations in the latter case which have been quoted hereinbefore (para 27 - supra) and concluded thus:

In Kamala Mills Ltd. v. The State of Bombay, C.A. No. 481 of 1963, dated 23.4.1965 ; , while dealing with a similar point, this Court has considered the effect of the two decisions of the Privy Council, one in the case of Mask and Co., 67 Ind App 222. (supra), and the other in Raleigh Investment Co. v. Governor-General in Council, 74 Ind App 50 at pp. 62-63: AIR (1947) PC 78 at pp. 80-81. The Conclusion reached by this Court in M/s. Kamala Mill's case C.A. No. 481 of 1963 dated 23.4.1965: . (supra) also support the view which we are taking in the present appeal.

(Emphasis supplied) It is evident that in Ram Swamp's case, this Court expressed the view that the decision in Kamala Mills' case is in accord with Mask & Co.'s case, and the bar of jurisdiction of civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity - in other words, where the order or proceeding is attacked as one passed without jurisdiction. Again, the principle laid down in Mask & Co.'s case was only reiterated and observations were made that the decision in Kamala Mills' case was in accord with the decision in Mask & Co. 's case. It is important to notice that Gajendragadkar, C.J., spoke for the Bench in all the three decisions: Illuri Subbayya Chetty ; Kamala Mill and Ram Swamp .

In considering Mask & Co. and Kamala Mills the Constitution Bench in Ram Swamp's case held that if the proceeding assailed is totally invalid and a nullity or without jurisdiction, the jurisdiction of the civil courts is not barred. Again, the principle laid down in Mask & Co (supra) was only affirmed.

On an analysis of the various decisions, this Court laid down the law in paragraph 32 at page 89, thus (Dulabhai's case):

Neither of the two cases of Firm of Illuri Subbayya can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1) Whether the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision

or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

(Emphasis supplied) Dulabhai's case (supra) has been consistently followed by this Court later - see: Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Gum v. The State of Andhra Pradesh and Ors. and other cases.

29. Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai's case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application. Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills Ltd., Jalandhar [1988] Supp. SCC 683; Escorts Ltd. v. Union of India and Ors. [1994] Supp. 3 SCC 86. Rule 11 before and after amendment, or S. 11B, cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups or categories enumerated in paragraph 5 of this Judgment is as follows:

> Category (I) where the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act:-
>
> In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution, and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. [Dulabhai's case (supra) - para 32 -

Clauses (3) and (4)].

Category (II) where the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act. Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure:-

Under this category every error of fact or law committed by the statutory authority or Tribunal, irrespective of its gravity, or nature of infirmity will not be covered. It is confined to exceptional cases, "where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure", as stated in Mask & Co.'s (supra) and in Dulabhai's case (supra). The scope of the above dicta, should be understood in the background of/in accord with the observations of the earlier Constitution Bench of this Court in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh,, to the following effect:

...Non-compliance with the provisions of the statute, to which reference is made by the Privy Council must, we think, be noncompliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void....

[Dulabhai's case (supra) -- para 32 Clause (1)] (Emphasis supplied) Here also, the appropriate action should be laid within the period of limitation provided by the appropriate law and also can invoke Section 72 of the Contract Act, as the case may be.

Category (III) - Mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (i.e. without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee, either by the High Court or the Supreme Court and as soon as the assessee came to know of the judgment (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law:

In this category, assessees who initiated proceedings and impugned the assessments/claimed refund, for any reason, either by way of suit or petition under Article 226 of the Constitution, and the action was dismissed on merits, they cannot maintain an action over again. He who fights and runs away, cannot have another day. If the levy or imposition was held to be unconstitutional or illegal or not exigible

in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim cannot, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law. The claim will be unsustainable and barred by res judicata. Tilokchand Motichand and Ors. v. H.B. Munshi, Commissioner of Sales Tax, Bombay and Anr. . (This will be confined to the period for which action was laid and lost).

Subject to the above, if a levy or imposition of tax is held to be unconstitutional or illegal or not exigible in law i.e. without jurisdiction, it is open to the assessee to take advantage of the declaration of the law so made, and pray for appropriate relief inclusive of refund on the ground that tax was paid due to mistake of law, provided he initiated action within the period of limitation prescribed under the Limitation Act. Such assessee should prove the necessary ingredients to enable him to claim the benefit under Section 72 of the Contract Act read with Section 17 of the Limitation Act. Dulabhai's case (supra) - para 32 - Clauses (4) and (5).

30. It should be borne in mind, that in all the three categories of cases, the assessee should prove the fundamental factor that he has not "passed on" the tax to the consumer or third party and that he suffered a loss or injury. This aspect should not be lost sight of, in whatever manner, the proceeding is initiated - suit, Article 226, etc.

31. As observed earlier, proposition No. (1) or clause No. (1) enunciated in Dulabhai's case (supra) should be understood in the background of or in accord with the observations of the earlier Constitution Bench in Illuri Subbayya Chetty's case - as quoted in para 27 (supra) - (see para 29 of this judgment).

Opinions may differ as to when it can be said that in the "public law" domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (Referred to in Illuri Subbayya Chetty's case and approved in Dulabhai case). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact situation obtaining, in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or Tribunal, makes the decision rendered ultra-vires or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147 : (1969) 1 All ER 208 (H.L.), the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses", are construed restrictively, and such provisions whatever their stringent language be, have been held not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not

a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means, "the authority to decide", and it is determinable at the commencement, and not at the conclusion of the inquiry. The said approach has been given a go bye in Anisminic case, as we shall see from the discussion hereinafter (See De Smith, Woolf and Jowell - Judicial Review of Administrative Action (1995 edn.) P. 268; Halsbuny's Laws of England (4th edn.) p. 114 - para 67 - foot note (9). As Sir William Wade observes in his book, Administrative Law (7th edn.), 1994, at p. 299, "The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task". The decision in Anisminic case has been cited with approval in a number of cases by this Court: Citation of few such cases; Union of India v. Tarachand Gupta & Bros. , A.R. Antulay v. R.S. Nayak and Anr. , R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) and Anr. ; N. Parthasarathy Etc. Etc. v., Controller of Capital Issues and Anr. Etc. Etc. ; Associated Engineering Co. v. Government of Andhra Pradesh and Anr. ; Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors. . Delivering the judgment of a two-Member Bench in Shri M.L. Sethi v. Shri R.P. Kapur Methew, J. in paragraphs 10 and 11 of the judgment explained the legal position after Anisminic case to the following effect:

> The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denman in R. v. Bolton, [1841] 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd., (1969) 2 AC 147 Lord Reid said:
>
> Put there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.
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> In the same case, Lord Pearce Said:
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> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order

> that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity.
>
> 11. The dicta or the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. That comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a Statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or addressing themselves to a wrong question". The majority opinion in the case leaves a court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow....

In a subsequent Constitution Bench decision, Hari Prasad Mulshankar Trivedi v. V.B. Raju and Ors., delivering the judgment of the Bench, Mathew, J., in para 27 at page 2608 of the judgment, stated thus:

> ...Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic Case. (1967) 3 W.L.R. 382, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context (see Per Diplock, J. at p. 394 in the Anisminic Case). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. "At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic". (SA. De Smith, "Judicial Review of Administrative Action". 2nd Edn., p. 98.)" (1968 edition) (emphasis supplied) The observation of the learned author (S.A. De Smith) was continued in its third edition (1973) at page 98 and in its fourth edition (1980) at page 112 of the book. The

observation aforesaid was based on the then prevailing academic opinion only as is seen from the foot notes. It should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowell - Judicial Review of Administrative Action - 5th edition (1995) as is evident from page 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

32. After 1980, the decision in Anisminic case came up for further consideration before the House of Lords, Privy Council and other courts. The three leading decisions of the House of Lords wherein Anisminic principle, was followed and explained, are the following: In re Racal Communications Ltd. (1981) AC 374, O'Reilly and Ors. v. Mackman and Ors. (1983) 2 AC 237, Regina v. Hull University Visitor [1993] AC 682. It should be noted that In re Racal's case, the Anisminic principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) (1981) AC 374 (383, 384, 386, 391). In the meanwhile, the House of Lords in Council for Civil Service Union and Ors. v. Minister For the Civil Service (1985) 1 AC 374 enunciated three broad grounds for judicial review, as "legality", "procedural propriety" and "rationality" and this decision had its impact in the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the court of appeal, Privy Council, etc. and the later academic opinion in the matter the entire case law on the subject has been reviewed in leading text books. In the latest edition of De Smith on "Judicial review of Administrative Action" - edited by Lord Woolf and Jowell, Q.C. [(Professor of Public Law) (Fifth edition) - (1995)], Chapter 5, titled as "Jurisdiction, Vires, Law and Fact" (pp. 223-294), there is exhaustive analysis about the concept, "jurisdiction", and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in "Anisminic" case (1969) 2 AC 147, the development of the law in the post Anisminic period, the scope of the "finality" Clauses (exclusion of jurisdiction of courts) in the statutes, and have laid down a few propositions at pages 250-256 which could be advanced on the subject. The authors have concluded the discussion thus at page 256 ;

After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law, or where the error was evidential (concerning for example the burden of proof or admission of evidence). Perhaps the most precise indication of jurisdictional error is that advanced by Lord Diplock in Racal Communications, when he suggested that a tribunal is entitled to make an error when the matter "involves, as many do inter-related questions of law, fact and degree". Thus it was for the county court judge in Peariman to decide whether the installation of central heating in a dwelling amounted to a "structural alteration extension or addition". This was a "typical question of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, viz. the meaning of these words, a question which must entail considerations of degree, and the other for decision by a county court, viz. the application of words to the particular installation, a question which also entails considerations of degree.

It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful.

(Emphasis supplied)

33. The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithily stated in Halsbury Laws of England : 4th edition (Reissue), 1989, volume 1(1), P. 113 to the following effect:

> The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an inquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an inquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior Court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.
>
> A tribunal lacks jurisdiction if (I) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject matter, the value of that subject matter, or the non-existence of any other prerequisite of a valid adjudication. Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably.
>
> Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. (p. 114) There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question. (pp. 119-120) The presumption that error of law goes to jurisdiction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; but with the modem approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The courts

> will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament" (p.120) Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof (pp. 121-122) (Emphasis supplied)

34. H.W.R. Wade and C.F. Forsyth in their book - Administrative Law, Seventh Edition (1994) - discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over Fact and Law" in Chapter 9, pages 284 to 320. The decisions before Anisminic and those in the post Anisminic period have been discussed in detail. At pages 319-320, the authors give the Summary of Rules thus:

> Jurisdiction over fact and law: Summary At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. The overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:
>
> Errors of fact Old rule The court would quash only if the erroneous fact was jurisdictional.
>
> New rule The court will quash if an erroneous and decisive fact was
>
> (a) jurisdictional
>
> (b) found on the basis of no evidence; or
>
> (c) wrong, misunderstood or ignored.

Errors of law Old rule The court would quash only if the error was

(a) jurisdictional; or

(b) on the face of the record.

New rule The court will quash for any decisive error, because all errors of law are now jurisdictional.

(emphasis supplied)

35. The scope of the exclusionary clauses contained in the statutes has been considered in great detail with reference to the decisions of the superior courts in England and also the decisions of the Supreme Court of India by Justice G.P. Singh (former Chief Justice, M.P. High Court) in "Principles of Statutory Interpretation", 6th edition (1996) at page 475. The law is stated thus:

> A review of the relevant authorities on the point leads to the following conclusions:
>
> (1) An Exclusionary Clause using the formula 'an order of the tribunal under this Act shall not be called in question in any Court' is ineffective to prevent the calling in question of an order of the tribunal if the order is really not an order under the Act but a nullity.
>
> (2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of enquiry e.g., when (a) authority is assumed under an ultra vires statute; (b) the tribunal is not properly constituted, or is disqualified to act; (c) the subject-matter or the parties are such over which the tribunal has no authority to inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.
>
> (3) Cases of nullity may also arise during the course or at the conclusion of the inquiry, These cases are also cases of want of jurisdiction if the word 'jurisdiction' is understood in a wide sense. Some examples of these cases are (a) when the tribunal has wrongly determined a jurisdictional question of fact or law; (b) when it has failed to follow the fundamental principles of judicial procedure, e.g. has passed the order without giving an opportunity of hearing to the party affected; (c) when it has violated the fundamental provisions of the Act, e.g., when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters; (d) when it has acted in bad faith; and (e) when it grants a relief or makes an order which it has no authority to grant or make; "as also (f) when by misapplication of the law it has asked itself the wrong question.

With great respect to the learned author, I would adopt the above statement of law, as my own.

I would conclude this aspect by holding that the jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

36. Two decisions of this Court rendered after Section 11B of the Act was amended in 1991, deserve mention. They are - Union of India and Ors. v. Jain Spinners Limited and Anr. ; Union of India and Ors. v. ITC Ltd. [1993] Supp. (4) SCC 326. In Jain spinners case, the application for refund itself was filed before the concerned statutory Authority (Assistant Collector, Central Excise). While the said application was pending, Section 11B of the Act came into force. There was an earlier interim order passed by the High Court directing the deposit of the duty levied with a liberty to the Revenue to withdraw it, subject to the condition that the amount will be refunded if the assessee succeeded ultimately. The Assistant Collector applying the amendments effected in 1991, declined to order refund, holding that the assessee had passed on the incidence of duty to others. It was upheld by this Court notwithstanding the interim orders and other proceedings of the High Court. Basically, the application for refund was filed before the concerned statutory authority, who negatived the claim by giving effect to the provisions of the Amendment Act. There was no attack in the above case that the levy or collection as one unauthorised or unconstitutional or without jurisdiction or illegal. In Union of India v. ITC Ltd. the Jain Spinners case (supra) was followed. The main aspect that arose for consideration in the latter case was whether the assessee had passed on the incidence of duty to the consumers or other persons. In spite of the repeated orders of this Court, the assessee failed to establish that the burden of excess excise duty was borne by it and was not passed on to any other person. The assessee had filed five applications for refund. Three of them were allowed by the statutory authorities in the appeals. Only two refund applications were rejected which were assailed in the High Court. The High Court allowed the said applications, directing the Revenue to refund the amounts due as per the two refund applications. In Appeal, this Court stressed the fact that the assessee was not able to substantiate that the burden of excess excise duty was borne by it and was not passed on to any other person. Incidentally, this Court also referred to the amended provisions of the Act (11B, 12B etc.) and held that the amended provisions would apply when the matter regarding refund was still pending for adjudication in this Court. In this case also the levy or collection was not assailed as unconstitutional or illegal or without jurisdiction and, in consequence refund was called for. The above two cases did not deal with the maintainability of action in the ordinary courts where the levy or collection is assailed on the ground that it is unconstitutional, illegal or without jurisdiction.

37. The changes brought about by the Central Excise and Customs Laws (Amendment) Act, 1991 (w.e.f. 20.9.1991) regarding refund and the scope of Section 11B read with Section 12B was the subject of great controversy before us. The Amendment Act 1991 is also attacked as unconstitutional, illegal, invalid and unreasonable and as a "device" to deny refund legitimately due. The relevant statutory provisions have been extracted earlier in this judgment. Briefly stated the position is this. Clause (3) of Section 11B provides that notwithstanding any judgment, decree or order of the appellate tribunal or any court etc. no refund shall be made except as provided in Sub-section (2), In other words, the procedure to obtain refund is made exclusive as per Section 11B(3) of the Act. The application, therefore, shall be made under Section 11B(1) and dealt with by the concerned authority under Section 11B(2) of the Act. These provisions mandate amongst other things that the person claiming refund should substantiate that the incidence of duty has not been passed on by him to any other person. The application should also be filed within the time prescribed in the said sub-section. Section 11B(2) and Section 11B(3) go together. Under Section 11B(2), in certain specified cases, the duty paid will be refunded to the applicant. One such case is,

the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person and substantiates the same. In cases not falling within the proviso to Section 11B(2) of the Act the duty collected will be credited to the Consumer Welfare Fund and the said Fund will be utilised as per Section 12D of the Act.

38. As stated, Section 11B(2) and Section 11B(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11B(2) and (3) as amended in 1991 cannot apply to:

1. 'Refund' made or due as per orders passed by Court, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.

2. refunds ordered by the statutory authority concerned which have become final.

It is obvious that in such cases no application can or will be deemed to be pending on the date of the commencement of the Amendment Act. No application praying for refund is to be filed in such cases, either. No further probe, regarding the requisites for obtaining refund specified in the Amendment Act, 1991, is called for in such cases. The above aspects are fairly clear. Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances. It is not so herein. Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors. and Madan Mohan Pathak v. Union of India and Ors. Etc. . See also Comorin Match Industries (P) Ltd. v. State of Tamil Nadu, . Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply only to (1) refund applications made before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991 (Cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).

39. Excise duty is an indirect levy. It is intended or presumed to be passed on. This is so under the ordinary law. Section 12B of the Act only provides a statutory rebuttable presumption in that regard. If it turns out that the levy is not exigible, it is refundable to the person who had borne the liability. Ordinarily, in the case of indirect taxes, such persons will be innumerable and cannot be easily identified or located. If the duty, which is not exigible, is refunded to the person who had not borne the liability, it will result in an unjust benefit to him. So the Act has provided in Section 11B(2), that in such cases where the duty is refundable, it will be credited to the Consumer Welfare Fund (Section 12C). However, the proviso to Section 11B(2) provides that the duty of excise will be refunded in few specified cases, subject to certain conditions -- one of them is the manufacturer -- in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said that the provisions ushered in by Amendment Act, 1991 -- and the scheme formulated in Sections 11B and 12A to D -- are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein). Brother Jeevan Reddy, J. has dealt with this matter rather elaborately and there is no need to elaborate the matter any further. In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters. [See Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr. [1962] 3 SCR 786; Khyerbari Tea Company and Anr. v. State of Assam and Ors. AIR (1984) SC 925; R.K. Garg v. Union of India and Ors. AIR (1981) SC 2138; Gaurishanker and Ors. v. Union of India and Ors. and Union of India and Anr. Etc. Etc. v. A. Sanyasi Rao and Ors. Etc. Etc. , etc.]

40. Before closing I should specifically deal with two important aspects. In this judgment I have dealt with cases where duty is paid on items which are consumed as such. Due to paucity of details, the case of captive consumption has not been dealt with. It is made clear that whatever is stated in this judgment will not apply in the cases of goods which are captively consumed.

Chapter II-A of the Act was inserted by way of amendment in 1991. The establishment, working, administration and utilisation to the Consumer Welfare Fund is in its stage of infancy. The scheme or set-up envisaged by Sections 12C and 12D and its working will require an in-depth evaluation by the appropriate authorities in order to vouchsafe that the scheme is not rendered a mere ritual or illusory, but is meaningful and effective for the present, I do not want to deal with that aspect in detail.

41. For the sake of convenience, I shall summarise my conclusions as here-under: (in case of doubt, the body of the judgment should be looked into).

(A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991.) (B) The decision in Kanhaiya Lal's case and the cases following the same, cannot be understood as laying

down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect of the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in para 29 - Clause III shall also be borne in mind.

(C) Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.

(D) The presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the 'duty" element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an indepth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge to the taxpayer, the burden of proving that the liability has not been passed on should lie on him.

(E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc., as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai's case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application.

(F) The attack against the illegal or unauthorised levy as also the relief of refund may fall ordinarily within the three categories specified in paragraph 29 of the judgment. An action by way of suit or writ petition under Article 226 of the Constitution of India will lie in the cases, and subject to the conditions stated in paragraphs 29 and 30 of the judgment.

(G) The jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

(H) Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the

application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. If the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases.

(I) It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply, only to (1) refund applications made under the statute and filed before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the "commencement of the Amendment Act, 1991. (cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).

(J) The proviso to Section 11B(2), provides, that the duty of excise will be refunded in few specified cases, subject to certain conditions - one of them is the manufacturer - in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said, that the provisions ushered in by Amendment Act, 1991 - and the scheme formulated in Sections 11B and 12A to B -- (in the light of the clarifications made in the body of the judgment, and more particularly in paras 25 and 40 above) are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm. (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein).

42. The principles laid down in this judgment should be applied to the fact situation obtaining in individual cases and should be disposed of accordingly.

The matters may be placed before My Lord the Chief Justice for appropriate orders in this behalf.

Hansaria, J.

The conclusions arrived at by learned brother Paripoornan, J. and the reasons given in support thereof, have my respectful concurrence. I have nothing useful to add. The time at my disposal does not really permit me to do so, as the draft of this judgment reached my hands on the night of 15th instant; indeed, the first draft judgment of the case got me in the evening of 13th of this month.

Sen, J.

1. Leave granted in the Special Leave Petitions.

2. In C.A. No. 3255 of 1984 and a number of other cases which have been heard together, questions have been raised, firstly, as to whether a refund of Central Excise Duty wrongly realised from a tax-payer can be withheld on the ground of what is described as 'unjust enrichment', without any specific provision of law to that effect; secondly, whether the position was altered after the Central Excise Act, 1944 was amended by the Central Excises and Customs Law (Amendment) Act, 1991 which came into effect on September 20, 1991? By virtue of this amendment Section 11B along with a few other sections of the Central Excise Act, 1944 stood amended. I shall deal with both these questions separately. But before entering into that controversy, it is important to bear in mind the provisions of Article 265 of the Constitution and its amplitude. It has also to be seen what is the scope, meaning and purport and also the import of what is described as 'unjust enrichment'. A challenge has also been made to the validity of the amendments made to the Central Excise Act. That will also have to be examined.

ARTICLE 265

3. Article 265 of the Constitution lays down that "no tax shall be levied or collected except by authority of law." The mandate of the Constitution is lucid and clear and must be taken to mean what it says. 'No tax' takes in every type of tax. It has been contended on behalf of the Union of India that Article 265 merely lays down that no direct tax shall be levied or collected except by authority of law. The first question is that if that was the intention of the Constitution makers, then why did they not say so in so many words? 'Taxation' has been defined in Article 366(28) to include the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly. Therefore, the word 'tax' will include any tax general, local or special. That means every kind of tax direct or indirect will come within the ambit of Article 265.

4. It has also to be noted that Article 265 is included in Part XII of the Constitution which deals with Finance, Property, Contracts and Suits. Chapter I of Part XII deals with Finance. Under this heading, both direct and indirect taxes have been dealt within a number of Articles. Article 268 deals with stamp duties and duties of excise on medicinal and toilet preparations. Article 269 deals with duties in respect of succession to property other than agricultural land, estate duty in respect of property other than agricultural land, terminal taxes on goods or passengers, taxes on railway fares and freights, taxes other than stamp duties on transactions in stock-exchanges and futures markets and taxes on the sale or purchase of newspapers and on advertisements published therein. Article 270 deals with taxes on income other than agricultural income. Article 272 deals with Union duties of excise, other than duties of excise on medicinal and toilet preparations. Article 276 deals with taxes for the benefit of a State or a municipality, district board, local board or other local authority in respect of professions, trades, callings or employments. Article 277 deals with taxes, duties, cesses or fees which were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area. Article 287 deals with tax on the consumption or sale of electricity. All these Articles go to show that Part XII, Chapter I, deals with not only direct taxes like taxes on income or duties in respect of succession to property, but also deals with indirect taxes like stamp duty, duties of excise on medicinal and toilet preparations, other duties of excise, terminal taxes on goods, taxes on railway freights, taxes on transactions in stock- exchanges and futures markets and taxes on sale or

purchase of newspaper. In the context of all these Articles in Chapter I of Part XII dealing with direct and indirect taxes, it is difficult to hold that the mandate at the beginning of the Chapter that "no tax shall be levied or collected except by authority of law", was meant to be confined to direct taxes only and not to other types of taxes which were specifically enumerated in a number of other Articles in Chapter I of Part XII of the Constitution.

5. Moreover, this argument, if accepted, will have dangerous implications. It will mean that the Constitution has impliedly empowered the Government to levy and collect indirect taxes without any authority of law. Bearing in mind that the bulk of the taxes imposed by the Union and practically the entire amount of taxes collected by the States is by indirect levies, the constitutional protection against unlawful taxes will become meaningless and devoid of any substance.

6. Mr. Parasaran, appearing on behalf of Union of India has argued that Article 265 has to be read along with the Directive principles. The State has been enjoined to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. I do not see how this provision or any other provision of Article 39 can in any way whittle down the scope of Article 265 of the Constitution. If the provisions of Article 39 are to be construed as a licence given to the State to retain whatever has been collected however unlawfully, then why should any distinction be made between direct taxes and indirect taxes? If the argument is taken to its logical conclusion, it will mean that the State will be at liberty to retain whatever it has gathered unlawfully by direct as well as indirect taxation and use the same for the purpose of common good according to its perception. The victims of unlawful activities of the State will have no remedy against the State. This reasoning, if accepted, will have the effect of turning the State into a Leviathan in which the individuals have only such rights as may be permissively given by the State. The various constitutional guarantees given to protect the individuals from the oppression by State will become futile and without any meaning and substance. Neither Article 38 nor Article 39, in any way, empower the State to levy or retain taxes without any authority of law.

7. The importance and effectiveness of the Directive Principles of the State Policy have been laid down in Article 31C in the following words:

> 37C Saving of laws giving effect to certain directive principles. -Notwithstanding anything contained in Article 13, no law giving effect of the policy of the State towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

8. The disputes raised in this case do not relate to enforcement of the guarantees contained in Article 14 or Article 19 of the Constitution in any manner. The laws of Central Excise have been enforced since 1944 or even earlier. It is a tax on manufacture of goods. The object of the tax is to raise revenue for the Government. But this can only be done in accordance with law. No man can be subjected to an unlawful exaction made by the State by whatever process in disregard of the guarantee given by Article 265 of the Constitution.

9. In my judgment, apart from its boldness, there is no merit in this contention that guarantee contained in Article 265 of the Constitution must be restricted to direct taxes only. In my judgment, Article 265 must be implemented in letter and spirit as it stands and all the tax laws and all Government actions to realise and retain tax must be tested on the anvil of this guarantee. The courts should jealously guard against any attempt to whittle down or do away with any of the guarantees given under the Constitution to the citizens. In my judgment, Article 265 will have to be given full effect in cases of direct as well as indirect taxation. If any tax has been levied and collected without authority of law, then the State has committed a wrong and that wrong must be undone by the State by returning the tax unlawfully collected to the person from whom it was collected.

10. The Court has a duty to uphold the Constitution in letter and spirit. If the Court comes to the conclusion that a levy of tax is unlawful, the Court will direct the Government to return the tax. It is not for the Court to enquire how the tax-payer has managed his affairs after payment of the unlawful levy. It is but natural that the tax-payer will try to raise funds by raising price or cutting down costs or forgoing profits to get over the loss caused by the unlawful exaction of tax. There is usually considerable time gap from payment of any illegal levy and obtaining an order of refund. In most of the cases several years pass before refund of duty paid can be obtained. In such a situation, it is impossible for the taxpayer company not to do something to raise money somehow to carry on its business. Merely because a manufacturer has raised its price after paying the illegal levy cannot be a ground for denying him the constitutional guarantee contained in Article 265. The constitutional guarantee is unconditional and unequivocal and must be enforced regardless of what the manufacturer does after payment of tax. If the manufacturer has done something unlawful, steps must be taken against him. If this Court holds that constitutional guarantees ought to be enforced depending upon the conduct of the manufacturer after payment of the illegal levy, then the Court would be adding a rider to Article 265 which is not permissible. By this forced interpretation the Court will not be upholding the Constitution, but will be undermining it.

11. A point has been made that the manufacturer has passed on the burden of the illegal levy to his customers by raising his price of the goods. But that is no reason why the guarantee given by the Constitution should not be enforced. The manufacturer may have been compelled to raise the price because of the imposition of an illegal levy. But that is no reason to dilute the mandate contained in Article 265 of the Constitution. Article 265 forbids the State from making an unlawful levy or collecting taxes unlawfully. The bar is absolute. It protects the citizens from any unlawful exaction of tax. So long as Article 265 is there, the State cannot be permitted to levy any tax without authority of law and if any tax has been collected unlawfully that must be restored to the person from whom it was collected. If the tax has been collected from any person unlawfully, it is the taxpayer's money which is in unlawful possession of the State. The State has a constitutional obligation to give back

the money to the tax- payer. An act done in violation of constitutional mandate is void and no right flows out of that void act to the State. The State is in unlawful possession of the taxpayer's property. The State cannot retain it on any equitable ground nor can it give it to any other person out of any supposed equitable consideration. The constitutional mandate cannot be ignored on the pretext of any rule of equity or on the ground of what is perceived as substantive justice. Every word of the Constitution has to be treated as sacrosanct and respected and obeyed by the State and the Legislature and enforced by the Court.

12. The Court cannot, by torturing the language of Article 265 or by any other means, construe it so as to give it a meaning which it does not naturally bear. It was observed in the case of Commissioner of Inland Revenue v. Rossminster Ltd. (1980) AC 952 at 1018 that in construing a statutory provision, the rule of construction must be "however much a court may deprecate an Act, it must apply it. It cannot by torturing its language or any other means construe it so as to give a meaning which the Parliament did not clearly intend it to bear". The same rule of construction will apply for construing a constitutional provision. The Court may dislike Article 265 and its natural consequence. But because of that the Court cannot torture its language to bring out a meaning which the words do not naturally bear. Once it is established that a levy or collection of tax is void, no legal or equitable right is acquired by the State in the unlawfully collected money. The right to get refund accrues to the person who pays it the moment an illegal levy or collection is made. Once the levy or collection is declared illegal, the illegally collected amount has to be immediately paid back to the person from whom it was collected. The refund order is made to enforce the right of the tax-payer which accrued when the tax was illegally levied and collected from him. This is an absolute obligation under the Constitution, No statute can provide otherwise. If a collection of tax is found to be illegal being in contravention of the provisions of Central Excise Act, then it not only violates the Act but also the Constitution. If the Central Excise Act is amended or any separate act is passed to provide for denial of refund to the taxpayer, in any manner, then such amendment or Act is as offensive to the Constitution as the illegal levies themselves were. If the tax has been illegally exacted from a person, then he has been denied the protection given to him by the Constitution. The denial of the right to recover the unlawfully collected tax is denial of the protection given to citizen by Article 265.

13. A similar question was examined by the Judicial Committee of the Privy Council in an appeal from Australia in Commissioner for Motor Transport v. Antill Ranger & Co. Pvt. Ltd. (1966) 3 All. E.R. There, certain charges had been levied by the State of New South Wales under an Act in connection with inter-State transactions. These charges where held to be violative of Section 92 of the Commonwealth of Australian Constitution. Subject to imposition of uniform duties of customs, Section 92 guarantees freedom of trade, commerce and intercourse among the States by internal carriage or ocean navigation. The levy under the Principal Act having been declared unlawful, an Act called the state Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 was passed barring and extinguishing the right of recovery of any sums collected or recovered under the Principal Act. It was made clear that the provisions of the Barring Act would apply to proceedings pending at the commencement of the Act as well as proceedings brought after the commencement of the Act. The validity of the Barring Act was challenged. It was pointed out by the Judicial Committee that if the Act was valid, it would be a complete answer to the claim of the taxpayers. But the validity

of the relevant provisions of the Barring Act could be no greater or no less if they had been contained in the Principal Act itself. It was held that neither prospectively nor retrospectively can a State law make lawful that which the Constitution says is unlawful. If the statute laid down that the charges in respect of inter-State trade should be imposed and that, if they were illegally imposed and collected, they should nevertheless, be retained, such an enactment would be illegal. The statutory immunity accorded to illegal acts is as offensive to the Constitution as the illegal acts themselves.

14. The Judicial Committee posed the following question"....Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-state trade is invalid as an offence against Section 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted."

15. The Judicial Committee answered the question by saying that:

> It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasise or too often repeated that, in the words of the High Court, the immunity given by Section 92 to trade, commerce and intercourse cannot be transient or illusory. Yet, how fugitive would that protection be if effect where given to the argument of the appellants in this case.

16. The Judicial Committee clearly recognised Section 92 of the Australian Constitution as a measure of protection to the respondents who were the taxpayers. The judicial Committee emphasised, this protection could not be allowed to be transient or illusory. We should also not allow the protection to the tax- payers by Article 265 of our Constitution to be transient and illusory.

17. The Judicial Committee went on to give an illustration which is also useful for the purpose of this case. A trader desiring to engage in inter-State trade and confronted with the provisions of an unlawful Act may conform to its requirements and submit to the pecuniary exactions in order that he may be able to carry on his business. He can test the legality of the exactions in a court of law and if he was right and these sums were unlawfully exacted, he is entitled to the protection afforded by Section 92 of the Constitution. What is his situation if then he finds himself by a later provision of the same Act or by a subsequent Act once more subjected to the same exactions? The burden of his trade remains just what it was; the freedom of his trade has been in the same degree impaired. In letter and spirit, Section 92 is in the same measure defeated.

18. An argument was advanced before the Judicial Committee that the Barring Act did not impose any burden on trade but only barred the right of property viz., the right to sue for money...which accrued after the trading operations were over, the Judicial Committee rejected this argument by observing that "...an enactment whose only object is to validate an exaction which the section renders unlawful would in their Lordships' opinion be a mockery of the spirit of the Constitution".

19. In the case before us, a very similar situation has arisen. The levy and collection of excise duty has been found to be illegal. It has been levied and collected in violation of the Central Excise Act

and also the guarantee contained in the Constitution. The levy is void. It has denied the taxpayer the protection given by the Constitution. If illegally collected tax is not immediately restored to the taxpayer, the guarantee given by the Constitution will be a mockery. The constitutional guarantee is not hedged by any clause. A trader may trade with his goods as he likes. The terms and conditions under which he sells his goods is a matter between him and the purchaser. He may raise his price high enough to include costs and taxes. If he does so with the agreement of the buyer, he does not lose his right to get back what had been collected from him illegally or the protection of Article 265 of the Constitution. That will be putting a rider on the Constitution. The Court is not permitted to write the Constitution but is duty bound to enforce it.

20. The view of the Judicial Committee was that but for Section 92 of the Australian Constitution, the Barring Act might have been held to be valid. In the instant case also, the amended provisions of Section 11B of the Central Excise Act might have been held to be valid but for Article 265 of the Indian Constitution. The right to get refund arose the moment an illegal levy was imposed. As was pointed out in that case, the taxpayer had no option but to pay this levy; otherwise he could not have carried on his trade at all. The goods would not be cleared without payment of the illegal demand made by the excise authority. This does not debar him from pointing out that the collection of tax was illegal and claiming return of the illegal levy.

21. The American Constitution does not contain anything similar to Article 265 of our Constitution. The U.S. Supreme Court, therefore, had no difficulty in upholding the validity of Section 424 of Revenue Act of 1928 in the case of United States v. Jefferson Electric Manufacturing Company 78 L.Ed. 859. Section 424 provided:

> Section 424 Refund of automobile accessories tax.
>
> (a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924...unless either -
>
> (1) pursuant to a judgment of a court in an action duly begun prior to April 30, 1928 ; or (2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him:....

22. The Act came into force on 29th May, 1928. The section was challenged on the ground that it was violative of the Fifth Amendment of the American Constitution in that a taxpayer was being deprived of his property without due process of law and his private property was being taken away for public use without just compensation. It was held ;

The contention is made that sub-division (a) (2), when construed and applied as we hold it should be infringes the due process clause of the Fifth Amendment to the Constitution in that it strikes

down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent, because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before Section 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that Section 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law....

23. What the U.S. Supreme Court held in that case was that the new enactment did not infringe the due process of law and, therefore, could not be struck down. The U.S. Supreme Court did not have to consider the impugned section in the light of a provision similar to Article 265 of the Indian Constitution. But there were two important observations which have to be borne in mind:

> (1) If the tax was erroneous and illegal, a right accrued to the taxpayer when he paid the tax to have it refunded without showing as to whether he bore the burden of tax or shifted it to the purchaser.
>
> (2) Section 424 applied to rights accrued theretofore and still subsisting but not sued on prior to April 30, 1928.

24. A question similar to the one dealt with by the American Supreme Court also came up before the Supreme Court of Canada, in the case of Air Canada v. British Columbia (1989) 59 D.L.R. 4th 161. The principles laid down in Air Canada case cannot be understood unless one bears in mind the peculiar facts of the case which has been recorded in detail in the judgment of La Forest, J.

25. The dispute was confined to the taxes paid by Air Canada in the 23 month period between August 1, 1974 and July 1, 1976. The tax was levied under the Gasoline Tax Act, 1948. The Act as it stood on August 1, 1974 provided that every purchaser shall pay a tax equal to 10 cents per gallon on all gasoline purchased except gasoline purchased for use in an aircraft, which was taxed at a lower rate. Section 2 defined "Purchaser" as under:

> "Purchaser" means any person who within the Province purchases gasoline when sold for the first time after its manufacture in or importation into the Province.

26. An identical provision in a cognate statute was struck down by the Privy Council which led to retroactive amendment of the Gasoline Tax Act by inserting Section 25 which was as under:

> 25(1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976 purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.
>
> (2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15c a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but
>
> (a) where gasoline was purchased for use in an aircraft the tax shall be 8c a gallon, and
>
> (b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10c a gallon.
>
> (3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17c a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but
>
> (a) where gasoline was purchased for use in an aircraft the tax shall be 5c a gallon, and
>
> (b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12c a gallon.
>
> (4) x x x x x x (5) Where after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

27. These amendment were statutorily given retroactive character by Section 62(5) of the Finance Statutes Amendment Act, 1981. By this change of definition of purchaser what was an indirect tax earlier was converted into a direct tax. The tax was on gasoline purchased by a purchaser for his own use or consumption or for consumption of other persons at his expense or on behalf of or as an agent for the principal for use or consumption by the principal or by other persons at his expense. Although, it was provided by Sub-section (5) that the amount which was collected before the amendment of the Act between August 1, 1974 and July 1, 1976 as tax shall be conclusively deemed to have been confiscated by the Government without compensation, according to La Forest, J., the Section really does not mean what it says. A fund of money illegally collected was lying with the Province. Having imposed the tax retroactively, the Province merely was enabled to retain the

amount in its hands by adjusting it against the tax which has subsequently become payable by the amended provision. The tax retained and the tax payable were identical amounts. This in sum and substance, was the judgment of La Forest, J. The rest of the observations of La Forest, J. in Air Canada case appears to be obiter.

28. After referring to the amended Section, La Forest, J. said:

> That the tax is a direct tax I have no doubt. Since at least bank of Toronto v. Lambe (1887), 12 App. Cas. 575, the generally accepted test of what constitutes a direct tax has been that of John Stuart Mill: A direct tax is one which is demanded from the very person who it is intended or desired should pay it". That person is clearly identified in the definition in the 1976 Act as the ultimate consumer of the gasoline; there is no passing on of the tax to others, whatever may be the opportunities of recouping the amount of the tax by other means (a. very different thing).

29. Referring to the new Section 25 brought into existence by the 1981 Act, La Forest, J. identified the real issue of the case in the following words:

> None of the judges in the courts below casts any doubt on the legislative power of the province to impose a retroactive tax in the manner provided in Section 25(1) to (4). What they really disagreed about was the effect of Section 25(5) on those provisions. In common with these judges. I am unable to see any constitutional impediment to the province's enacting Section 25(1) to (4). On the reasoning regarding the 1976 Act, these provisions seem to be a proper exercise of its power to impose direct taxation in the province, the sole difference being that the 1981 provisions are given retroactive effect, a result that is not constitutionally barred. The real question, then, is whether when Section 25(1) to (4) are conjoined to Section 25(5), they become so coloured by the latter provision as to make all of Section 25 ultra vires.

30. That question was answered by La Forest, J. in the following words:

> That, of course, raises the issue whether Section 25(5) is itself ultra vires. There are, in my view, some serious difficulties in establishing its invalidity. It may be, if the provision stood alone, that it could be successfully maintained that it violates the principle, in the Amax decision. I need not consider that situation because it does not stand alone. It is the fifth of five subsections, the first four of which impose a valid direct tax, and it must obviously be read in that context. It must also be read in light of the well-known principle that it must be assumed that the legislature intended to stay within the confines of its constitutional competence. While, as Esson, J.A. notes, the expression "confiscated" is distasteful, one should not permit it to mislead us regarding the purpose of Section 25(5). The function of the courts is not to give the legislature lessons in tact. Their function, rather is to attempt to discover what the legislature, however, clumsily was attempting to achieve by the language it used, a task that should, as already noted, be informed by the presumption that the

legislature intended to stay within its constitutional powers.

> In the context in which it appears, Section 25(5) seems to be nothing more nor less than machinery for collecting the taxes properly imposed in the first four subsections of Section 25. It must be remembered that the amounts illegally collected under the ultra vires provision before 1974 would be equal to the taxes levied under Section 25(1) to (4). Administratively, the taxes levied under the invalid scheme were collected in the same manner and in the same amounts and from the same taxpayers as would have occurred if the scheme had originally been framed along the lines of Section 25(1) to (4). What the legislature attempted to do by Section 25(5), therefore, was to provide collection machinery whereby the moneys owing by the taxpayers under the latter provision could simply be taken out of the equal amounts it had collected from those taxpayers under the invalid tax. It was in that sense that the moneys were deemed to have been confiscated by the government.

31. Having reached this conclusion, La Forest, J. distinguished this case with the principles laid down in Amax case in the following manner:

> In that case, the Legislature sought, by giving itself immunity, to avoid repaying an unlawful tax. This was simply an indirect way of giving effect to the invalid statute....The situation is entirely different here. The legislature did directly what it was empowered to do impose a direct tax under Sub-sections (1) to (4). I see no reason why it could not then take that tax out of moneys it had improperly collected from the taxpayers under the ultra vires statutes, just as it could have set it off against any other obligation of the government to the taxpayers. The good fortune of the legislature, in the unusual facts of this case, in having collected amounts that matched precisely those owing by each taxpayer under Section 25(1) to (4) affords no reason to brand as unconstitutional a tax that it can validly impose and collect.

32. This is the ratio of the decision of La Forest, J. An unconstitutional levy brought about by an indirect tax was cured retroactively by a direct levy. What was collected wrongfully under an indirect levy was retained by adjusting the unlawful collection against what turned out to be a valid collection under the new law. Section 25(5) was clumsily worded in that it had used the word "confiscated". Properly understood, according to La Forest, J., it did not really confiscate the amount already paid but adjusted that amount against the subsequent lawful demands made under the retroactively amended provisions.

33. Thereafter, La Forest, J. went on to discuss the points raised on "mistake of law". La Forest, J. came to the conclusion after review of the case law that "in my view, the distinction between mistake of fact and mistake of law should play no part in the law of restitution. " But he was of the view that recovery of taxes imposed by a legislation subsequently declared ultra vires could not be allowed "even if the airlines could show that they bore the burden of the tax...."

34. The view on ultra vires taxes as expressed by La Forest, J. is an extreme proposition which may be acceptable in accordance with the Constitution laws of Canada, but it cannot be held valid under our system.

Wilson, J. who dissented in part held:

> It is, in my view, impossible to divorce Section 25(1) to (4) from Section 25(5) of the Gasoline Tax Act, R.S.B.C. 1979, c.152. The only possible basis for the confiscation under Section 25(5) is the imposition of the retroactive tax under Section 25(1) to (4). Certainly the payments made under the ultra vires legislation could not support such a confiscation since the moneys were not as a constitutional matter properly exigible under that legislation....
>
> Averting to "Mistake of Law" Wilson, J. observed:
>
> ...Whatever the nature of the mistake, the key question, my colleague suggests, should be whether the respondent has been unjustly enriched at the appellants' expense or whether there is some specific reason which makes restitution inappropriate in the circumstances. My colleague concludes that there was unjust enrichment in this case but he finds two reasons why restitution is inappropriate. The first is that the appellants in all likelihood passed on the burden of the ultra vires tax. to their customers; the unjust enrichment of the respondent was therefore not shown to be at the expense of the appellants. The second is that the general rule of recovery should, as a matter of policy, be reversed where the person unjustly enriched is a governmental body....
>
> Wilson, J. went on to observe:
>
> It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

35. Adverting to the argument that any refund to the taxpayer who has passed on the burden of tax to the ultimate consumer will result in an unmerited "windfall" to him, Wilson, J. observed:

> My colleague advances another reason why the appellants should be denied recovery in this case, he says, in effect, that the appellants would be receiving a "windfall" if they received their money back because in all likelihood they have already recouped the payments made on account of the ultra vires tax from their customers. In terms of my colleague's analysis, the appellants are unable to show that the unjust enrichment of the province was at their expense. In my view there is no requirement that they be able to do so. Where the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained. As Dickson, J. stated in Amax, supra, at p.10:
>
> To allow moneys collected under compulsion, pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.
>
> ...
>
> Indeed, even on my colleague's unjust enrichment analysis Dickson, J. found in Nepean, supra, that there were no equitable reasons of principle or policy to preclude recovery from Ontario Hydro.

36. I shall deal with Sections 11B, 11D and 12A to 12D of Central Excise Act as amended by the Act 40, 1991 later in this judgment in greater detail. But it may be noted that now these provisions have made it practically impossible for a taxpayer to get back what had been collected unlawfully from him, whatever the wording of the statute may be. La Forest, J. interpreted Sub-section (5) of Section 25 of the Gasoline Tax Act and construed that although the word "confiscation" was used, the provision was not confiscatory but was really a provision for setting off of the new claims arising out of the retroactive statute against the moneys which were lying in the hands of the Province even though unlawfully collected. In the present case, although the term "confiscation" has not been used in Sections 11B, 11D and 12A to 12D these provisions, in effect, have confiscated without any compensation all illegally gathered taxes which came within their ambit.

37. Air Canada case came up for further consideration in the case of Allied Air Conditioning Inc. v. British Columbia 76 B.C.L.R. 2(d) 218. Here the question was whether a taxpayer could recover the moneys which were collected as tax, but were not properly payable. The plaintiff had paid Social Service Tax to the Province of British Columbia totalling to $ 500,000. In the judgment of Oliver, J, it was stated that the required elements at the heart of the law of restitution was (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff and (3) an absence of any juristic reason for the enrichment.

38. Oliver, J. stated that the distinction between recovery of money paid under mistake of fact and money paid under mistake of law had now been swept away by the decision in Air Canada Case. On the day on which the judgment in he case of Air Canada was pronounced, a second judgment was delivered in the case of Air Canada v. British Columbia ("C.P. Air"); 1989 36 B.C.L.R. (2d) 185. There the dispute related to social Service Tax, wrongly paid on (a) aircraft parts and equipment and (b)

alcoholic beverages sold to passengers on the flight. The Supreme Court held that C.P.A. could recover the Social Service Tax paid on purchasers of equipment and parts, but the tax paid on alcoholic beverages sold to passengers was imposed on the passengers who consumed the liquor and therefore, the C.P.A. was not entitled to recover the same. Oliver, J. observed that "it can be agreed that both taxes were passed on to customers by Air Canada in the price of airline tickets." La Forest, J. in the C.P.A. case held that Social Service Tax paid by the airlines was not properly payable on either aircraft parts or on alcoholic beverages. Having found that the tax was inapplicable, La Forest, J. concluded "there seems no reason to refuse Air Canada the recovery it seeks. There is nothing to indicate it ever abandoned this claim." The claim for recovery of the tax paid on alcoholic beverages was rejected on the ground that "the tax was imposed on the passengers, not Air Canada. Air Canada was simply an agent to collect it under the Act, and, in fact, obtained a fee for doing so. I am unable to see how it could identify the passengers who consumed the liquor, so its repayment to Air Canada would simply amount to windfall to the airline."

39. The contention of the plaintiffs in Allied Air Conditioning Inc. Case before Oliver, J. was that the observations of La Forest, J. that "a passing-on defence is available to the taxing authority whenever the taxpayer can be shown to have passed on the tax burden, regardless of whether it was passed on "specifically and directly" or generally in the price charged to customers" was obiter. The true reasoning of the Supreme Court with respect to the passing-on defence can be gleaned from its decision in C.P. Air in which it allowed a passing-on defence where the tax was "directly and specifically" passed on to customers but not where the tax was merely included generally in the price of airline tickets.

40. In the end, after noting that the comment of La Forest, J. at page 179 that "this alone is sufficient to deny the airlines' claim, Oliver, J. stated that rest of the decision of the La Forest, J. was obiter. Oliver, J., however, disposed of the case before him by observing:

> In the present case the invoices given by the plaintiffs to their customers for lump sum contracts did not set out any amounts charged for materials, labour or taxes; simply the lump sum itself was shown. The evidence discloses that many factors, including the competitive environment and the plaintiff's profit margin goals, influence the amount of the lump sum.
>
> In my opinion, it cannot be said in such a case that the tax is passed directly and specifically to customers so that they become the true taxpayers. While it is difficult to make specific comparisons, the situation in the present case more closely resembles the tax paid on aircraft parts and equipment in C.P. Air than the tax paid on alcoholic drinks in that case.
>
> I find that in all the circumstances no passing- on defence is available and that the plaintiffs are entitled to restitution of the amounts they are claiming as wrongly paid taxes, subject to any applicable limitation period.

41. In the case of Woolwich building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All E.R. 737 at 763. Lord Goff cited with approval the dissenting view expressed by the Wilson, J. in Air Canada Case (supra) after quoting from the judgment and noting the fact that:

> She also rejected the proposed defence of 'passing on' (at 160-170). Accordingly in her opinion the taxpayer should be entitled to succeed.
>
> I cannot deny that I find the reasoning of Wilson, J. most attractive. Moreover, I agree with her that, if there is to be a right to recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue. Furthermore, like Wilson, J, I very respectfully doubt the advisability of imposing special limits on recovery in the case of 'unconstitutional or ultra vires levies'.

42. In the concluding part of the judgment, Lord Goff recognised the difficulties involved in the doctrine of 'passing on'. Lord Goff pointed out that the question need not be finally decided in that case. It was observed ;

It will be a matter for consideration whether the fact that the plaintiff has passed on the tax or levy so that the burden has fallen on another should provide a defence to his claim. Although this is contemplated by the Court of justice of the European Communities in the San Giorgio case, it is evident from Air Canada v. British Columbia that the point is not without its difficulties; and the availability of such a defence may depend on the nature of the tax or other levy....

43. In the case of Commissioner of State Revenue v. Royal Insurance Australia Ltd. 182 C.L.R. 51, the question before the Australian High Court was whether a taxpayer is entitled to recover overpayment of stamp duty. It was held that there was no obligation to refund the overpayment because Sub-section (1) of Section 111 of the Stamps Act conferred discretionary power on the Commissioner to refund the money but did not create any duty to do so. Therefore, the finding that there was an overpayment did not give rise to any enforceable obligation to make refund. One of the points that came up for consideration was disruption of public finance as a consequence of restitution. Mason, C.J. did not uphold this contention. He observed that:

> That proposition was accepted by La Forest, J. in Air Canada v. British Columbia but it was repudiated by Wilson, J. in her dissenting judgment for reasons which, to my mind, are compelling....

44. Mason, C.J. went on to observe that the argument that the plaintiff will receive a windfall or will unjustly enrich if recovery from public authority is permitted, cannot be accepted straightaway. He further observed:

> ...In the context of the law of restitution, this economic view encounters major difficulties. The first is that to deny recovery when the plaintiff shifts the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffers loss or damage without a remedy. That consequence suggests that, if the economic argument is to be converted into a legal proposition, the proposition must be that the plaintiff's recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And, finally, it has long been thought that, despite Lord Mansfield's statement in Moses v. Macferlan, the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without justification.

45. After a review of the large number of cases cited, Mason, C.J. concluded:

> The United States and European decisions demonstrate that any acceptance of the defence of passing on is fraught with both practical and theoretical difficulties. Indeed, the difficulties are so great that, in my view, the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons.

46. Brennan, J. who agreed with Mason, C.J. that the appeal should be dismissed, held that:

> The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter.

47. In the concurrent judgment of Dawson, J., there are certain observations to which I shall refer later on in this judgment.

48. All these cases go to show the complexity of the problem of doctrine of "passing on". The U.S. view appears to be that but for the law passed in 1924, illegally collected tax had to be refunded even if it was passed on to the consumers. The majority view of the Canadian Supreme Court was to the contrary. However, the dissenting judgment of Wilson, J. was found preferable by Mason, C.J. in Australia as well as by Lord Goff who spoke for the House of Lords in England. But the English decision as well as the Australian decisions were founded on common law and Bill of Rights.

49. In none of these countries any constitutional provision akin to Article 265 fell for consideration. The debate whether a taxpayer is entitled to get refund when the levy is found illegal is concluded by Article 265 of the Constitution in our country. The protection afforded to the taxpayer is total and complete. It cannot be taken away under any circumstances or by any legislative action. The Constitution being sacrosanct and overriding, in my view, any tax collected unlawfully, must be

returned to the taxpayer. Whether the taxpayer has passed on the burden of the tax to the consumers or not is a matter of no consequence.

50. The constitutional embargo is on both the levy and collection of tax without authority of law. It has been repeatedly asserted by the Courts that every taxing law has three parts. First is charge, the second is computation which results in a demand of tax and the third is recovery of the tax so computed. The Constitution has enjoined that there must be a valid levy. The word 'levy' has also been understood in a broad sense in various cases to include not only the imposition of the charge but also the whole process upto raising of the demand. The Constitution guarantees that not only the levy should be lawful but also collection of tax must also be done with the authority of law. The State is not permitted to exact any tax from a citizen without the authority of law and without following the procedure laid down by law. This guarantee has to be strictly enforced not only in the matter of levy but also in the matter of collection. It was pointed out by this Court in the case of Municipal Council, Khurai and Anr. v. Kamal Kumar and Anr. that Article 265 of the Constitution clearly implies that the procedure to impose a liability upon the taxpayer has to be strictly complied with. Where it is not complied with, the liability to pay a tax cannot be said to be according to law. In that case, a validly passed municipal law was sought to be enforced, but the objections of the ratepayer were not dealt with by the Municipal Council as a whole but by a sub-committee. The Court held that this was erroneous. The phrase 'levy and collection' indicates that all the steps in making a man liable to pay a tax and exaction of tax from him must be in accordance with law. There must be a valid statute which will be properly followed. All steps must be taken according to statutory provisions. Recovery of tax must also be according to law. No one can be subjected to levy or tax or deprived of his money by the State without authority of law.

51. Article 39 of the Constitution has directed the State to formulate its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These provisions do not in any way curtail the scope and effect of Article 265. Section 39 does not enjoin that unlawfully collected properties should be used by the State for the common good. Nor does it say that the operation of the economic system should be so moulded as to prevent concentration of wealth, by unlawful means. Article 39 cannot be a basis for retaining whatever has been gathered unlawfully by the Government for common good. Simply stated the Directive Principles of State Policy do not license the Government to rob Peter to pay Paul.

52. It has been repeatedly asserted by the Supreme Court of the United States that it is the duty of the Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. (See Boyd v. United States 116 US 616 (1886). Actually, that should be the main function of the Court. Otherwise, independence of the judiciary will become meaningless.

Independent tribunals of justice...will be naturally led to resist every encroachment upon- rights expressly stipulated for in the Constitution by the declaration of rights.

Madison, I Annals of Cong. 439 (1789).

53. Repeatedly, in various contexts, it has been emphasised that constitutional rights of citizens should not be watered down however desirable the end result of a particular case may be. The Constitution is to last for ever. If for one particular case, out of its perceived notion of expediency, the Court cuts down the scope and effect of a constitutional provision, the Court will be failing in its bounden duty to uphold the Constitution. The Court should not be guided by any policy of expedition but only by the dictates of what has been laid by the Constitution and what the American Courts refer to as "Imperative of Judicial Integrity." It is the imperative of judicial integrity that Article 265 is upheld as it is. If it is allowed to be destroyed in this case, there is no reason why other Articles of the Constitution should not slowly and steadily be whittled away to take away all the other guarantees given to the citizens by the Constitution. This case, then, would be a dangerous precedent for demolition of the Constitution, article by article.

54. Apart from that, the Government cannot be allowed to say that it has broken the law but it will retain the fruits thereof. As was observed by Mr. Justice Brandeis in Olmstead v. United States 277. US 438 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example....If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

55. In the case of Mapp v. Ohio 367 US 643 (1961), Mr. Justice Claks delivering the opinion of the Court in a case where the State tried to use in evidence he materials gathered as a result of unlawful search, on the ground that it was very desirable to do so in the facts of that case observed:

> Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in true administration of justice.

56. In may view, the scope and effect of Article 265 cannot be whittled down in any manner in order to enable the Government to retain unlawfully gathered tax on the pretext that a refund will unduly enrich the taxpayers. Whatever the consequence may be, the provisions of the Constitution must be upheld as they stand.

57. In my judgment, Article 265 does not permit the State to levy or collect any tax without the authority of law. This is a protection afforded to the citizens by the Constitution from State oppression in financial matters. This protection given to the citizens must be jealously guarded by the Courts. If any tax has been gathered unlawfully by the State, It cannot be retained by the State. If any law has been passed for retention of the illegal levy, it must be struck down in the same manner as the Judicial Committee struck down the Barring Act in the case of Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd., (supra).

WHO IS THE TAX-PAYER UNDER THE CENTRAL EXCISE ACT?

58. The taxable event for payment of central excise is manufacture of excisable goods. The Central Excise Act has a long history and the courts have never been in doubt that the excise duty under the various Excise Acts was payable by the manufacturer and if there was any excess payment, the refund of the excess amount of tax must be made to the manufacturer who had actually paid the duty. In this connection, it has to be borne in mind that the Central Excise and Salt Act. 1944 is a consolidating Act. In the statement of objects and reasons it is stated:

> The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto, the introduction of a new central duty of excise has required the enactment of a self-contained law and the preparation of a separate set of statutory rules. There are now no less than 10 separate excise Acts (the excise on kerosene being covered by a part of the Indian Finance Act, 1922) and 11 sets of statutory rules; and there are also 5 Acts relating to salt, the duty on which is by a wide margin the oldest of our taxes on indigenous commodities. The taxes being closely akin to one another, the methods of collection follow the name general pattern and many of the provisions of the various Acts are identical or closely similar; and this is the case also with many of the statutory rules. The an glomeration of statute and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organised administration.
>
> ...
>
> 3. The intention of the Bill is to reproduce provisions already existing in the Acts which it is proposed to appeal but in the process certain small amendments have been made, either in modernising the language or for dovetailing the provisions and otherwise adapting them to present circumstances. These amendments are the minimum consistent with each blending and adaptation.

59. Section 39 of the Act, when it was passed in 1944, stood as under:

> 39. The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

The Third Schedule contained as many as 17 Acts which were entirely repealed. The Acts were inter alia, The Motor Spirit (Duties) Act, 1970. The Silver (Excise Duty) Act. 1930. The Sugar (Excise Duty) Act, 1934, the Matches (Excise Duty) Act, 1934. The Iron and Steel Duties Act, 1934. The Tyres (Excise Duty) Act, 1941, The Tobacco (Excise Duty) Act, 1943 and the Vegetable Product (Excise Duty) Act, 1943 and Mechanical Lighters (Excise Duty) Order, 1934.

60. In all these Acts the Central Government were empowered to make rule for assessment and collection of duty, issue of notice requiring payment, the manner in which the duties shall be payable and the recovery of duty not paid. The rules also provided for appeals in case the tax-payer was aggrieved by any order.

61. Elaborate provisions were made for payment of excise duty on various products, the manner in which the duty was to be paid, imposition of penalty in case of evasion of duty and also the remedies to a tax-payer including refund of any excess amount of duty paid. If an assessee succeeded in appeal, the appellate authority was competent to give suitable direction to grant relief to the assessee. For example, under the Sugar (Excise Duty) Order, 1934 duty was imposed on certain varieties of sugar. Provisions was made for filing of monthly returns (Rule 5). The Collector was empowered to make assessment and also summary assessment (Rule 6). Provisions for refunds and remissions of duty were made (Rule 9). Any dispute could be determined by a suitably empowered officer (Rule 11) and appeal also lay to such authority as the Local Government might direct (Rule 12). Any order of the Collector or such authority could be revised by the Local Government or such higher authority as the Local Government might direct. A time limit for filing of appeals was provided in Rule 13. Rule 16 entitled the Collector to recover duty which had been short levied through inadvertence, error or misconstruction of the law by the Collector, or through misstatement as to quantify on the part of the owner of a factory, or even when erroneously refunds had been made. Rule 17 provided, "No duty which has been paid and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be returned unless such claim is made within three months from the date of such payment". Likewise, in the Mechanical Lighters (Excise Duty) Order, 1934 a duty of excise was imposed on manufacture of mechanical lighters. Such manufacturer was required to take a licence from the Collector (Rule 4). The manufacture could only take place in terms of the licence. Every holder of licence had to keep a correct daily account (Rule 7). Within five days after the close of such month, every holder of a licence had to submit to the Collector a monthly return showing the number of mechanical lighters removed from the manufactory during that month (Rule 8). On receipt of the return, the Collector would make an assessment. The Collector was empowered to make a summary assessment (Rule 9). Provisions for refunds and remissions were contained in Chapter IV. Chapter V dealt with miscellaneous provisions including provision for preferring an appeal, firstly to the Local Government or to such higher authority as the Local Government might direct. Appeal could also be made to the Central Board of Revenue and any order could be revised by the Governor General in Council (Rule 22). Rule 23 imposed a time limit of three months for preferring an appeal. Rule 26 dealt with short levy through inadvertence, error or misconstruction on the part of the Collector, or through mis-statement as to the quantity on the part of the owner of the manufactory. Recovery could also be made when erroneous refunds had been made. Such claims of refund had to be, made within three months from the date of such payment. Some provisions were made in the other Orders or statutes by directly providing for payment of tax, appeals and refunds or by incorporating provisions of other Acts like Sea Customs Act. What is important to remember is that it was never in doubt that it was the manufacturer who was liable to pay tax and also entitled to get refund of any tax paid to the State through "inadvertence, error or misconstruction."

62. This scheme was continued in the consolidating Act of 1944. As was stated in the object clause of the Act the Act sought to consolidate the existing legislations and did not seek to bring about any fundamental changes in the legislation. In fact even under the Central Excise and Salt Act, 1944 after the levy of duty if the tax-payer felt aggrieved he could go up on appeal and claim that the levy was excessive or unlawful and if he succeeded, he got refund of the excess amount paid. This is how the Act was understood and interpreted.

63. Now it is being argued that if excess amount of duty has been realised the tax-payer should not get back the excess payment because it is morally wrong. The burden of tax has been passed on to the consumers who are the real tax-payers.

64. This argument cannot be upheld for three reasons:

> (1) When a statute of this nature, which is a consolidating Act, is passed, the Court should not presume that the Legislature was unaware of the scheme of the earlier statutes and how the law was understood and administered. The Legislature avowedly did not bring about any fundamental change in the structure of these existing laws in passing the consolidation Act. Tax was to be paid on manufacture of the excisable goods. There were provisions for assessment and computation of tax. Provisions were also made for appeals, recovery of tax in cases of short levy and refund of tax in cases of excess realisation. The duty of the Court is not to legislate but to find out the intention of the Legislature. The legislative intent was to consolidate and continue the laws that were existing in one comprehensive statute and even when the new statute was in force the Legislature did not think fit to stop refund of a wrong levy of tax to the manufacturer and thereby confer a right to the consumers to get refund before the amendment made in 1991.

65. Before that the Central Excise Act did not recognise any right of the consumer of excisable goods to get a refund of duty.

(2) Refund of tax whether under Income Tax Act, Wealth Tax Act, gift Tax Act, Estate Duty Act, Sales Tax Act, Customs Act or the Central Excise Act has to be given under the statutory provisions contained in the Act. Refund in a taxing statute is to be made not on the ground of compensation for loss or damage sustained by a tax-payer but on the principle of restoration to the tax-payer of what had been collected from him without justification of law. This was highlighted by Mason, C.J. in the Australian Case (supra). It is not without significance that in all the tax laws, the word 'refund' has been preferred to 'restitution' or 'compensation'. The dictionary meaning of 'refund' is "to give or pay back money etc.", Webster Comprehensive Dictionary, International Edition 1984. When a taxing statute provides for refund, it is not to be understood as a section providing for compensation for loss or damage. Refund of tax means returning to the assessee what had been taken or received from him unlawfully.

(3) Under the Central Excise Act, there is only one tax which is levied by Section 3 and the tax-payer is the person who pays the charge levied by Section 3. The taxable event under the charging section

is manufacture. This is the duty which a manufacturer has to pay before he can remove the manufactured goods from his factory. What the buyer of the goods pays to the manufacturer is the price of the goods. No duty is levied by the Central Excise Act upon the buyer. What the buyer pays to the manufacturer is not under any charge imposed by any statute. What he pays is the price of the goods. The price is a matter of contract between the buyer and the seller. Whatever the buyer pays and the seller gets is the price of the goods, even though the tax element is included in the price. I shall refer to the decided cases later in the judgment.

66. Section 3, which is the charging Section, reads:

> 3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.
>
> (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India as and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985.

PROVIDED that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975).

Explanation 1 : Where in respect of any such like goods, any duty of customs leviable under the said Section 12 is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable under the said Section 12 at the highest of those rates.

Explanation 2 : In this proviso, -

(i) "free trade zone" means the Kandla Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;

(ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.

(1A) The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government.

(2) The Central Government may, by notification in the official gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty ad valorem and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed -

(a) for different classes or descriptions of the same excisable goods; or

(b) for excisable goods of the same class or description --

(i) produced or manufactured by different classes of producers or manufacturers; or

(ii) sold to different classes of buyers:

> PROVIDED that in fixing different tariff values in respect of excisable goods falling under Sub-clause (i) or Sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods.

67. Actually there has been a very little change in the charging section since 1944, except that since 1985 excise duty has to be paid at the rates set forth in the "Schedule to the Central Excise Tariff Act, 1985". Before this amendment with effect from 28.2.1986, the levy was at the rates set forth in the First Schedule of the Central Excise Act. Since 1944 the taxable event continues to be production and manufacture or excisable goods. The moment any excisable goods are produced or manufactured, levy of excise duty is attracted. The time and manner of payment of duty have been fixed by Rule 9 of the Central Excise Rules:

> RULE 9. time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:
>
> Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under Rule 27 or Rule 47 or in a warehouse appointed or registered under Rule 140 or may be exported under bond as

provided in Rule 13:

Provided further that such goods may be removed without payment or on part payment of duty leviable thereon if the Central Government, by notification in the Official Gazette, allow the goods to be so removed under Rule 49:

68. Rule 9A inter alia lays down that the rate of duty and tariff valuation shall be the rate and valuation in force in the case of goods removed from a factory or a warehouse on the date of the actual removal of such goods from such factory or warehouse. Even if any excisable goods are lost after manufacture, the duty will have to be paid. Clause (iii) of sub Rule (4) of Rule 9A provides:

Rule 9A(4). The rate and valuation, if any, applicable to cases of losses of goods shall -

(i)...

(ii)...

(iii) where the loss occurs in storage, whether in a factory or in a warehouse, be the rate and valuation, if any, in force on the date on which such loss is discovered by the proper officer or made known to him.

69. These provisions have undergone minor alterations from time to time but there is not the slightest doubt that the levy of excise duty is on manufacture of goods. The taxable event is the manufacture. The duty will have to be paid regardless of the destination of the goods. Even if the goods are lost before clearance, duty will have to be paid, whether the manufacturer after removal of the goods, is able to sell the goods or not is a matter of no consequence. Once the taxable event has happened the duty has to be paid. There is no escape from it. This is a strict liability foisted on manufacture by Section 3. But nothing in excess of this strict liability can be collected by the Excise Officers, If something is levied or collected which is beyond the charging section, then that has to be paid back to the tax-payer. Whatever tax has been levied or collected in violation of law has to be restored to the person from whom such illegal levy has been extracted. Otherwise the guarantee under Article 265 becomes meaningless.

70. The argument that the real tax-payer is the person who buys the goods from the manufacturer or the ultimate consumer because duty is included in the price, forms a component of the price and is thereby passed on to the consumer, does not bear scrutiny. Excise duty is payable because of the charge levied by Section 3. Whether the manufacturer is able to sell his goods or not, excise duty will have to be paid. If a man is able to pass on the burden or not is something with which the Excise Act is not concerned. If as a result of high excise tariff the price becomes too high and the goods become unsaleable, the manufacturer may go out of business but will not be absolved from payment of duty. Hardships suffered by the manufactures may be redressed by the Government for which power has been retained in the Central Excise Act (Section 5A). But a manufacturer cannot decline to pay excise duty on the ground of inability to sell his products and failure to pass on the burden of the

duty.

71. If the Central Excise Officer discovers that the duty of excise has not been levied or paid or has been short levied or short paid, he has a right to recover the duty from the manufacturer (Section 11A). The short levy may have been due to an oversight or mistake committed by the Excise Officer. It may be that the goods manufactured have already been sold off and it will not be possible for the manufacturer to recover the amount of duty from his customers. That is a post-duty situation with which the Excise Act is not concerned. The Central Excise Act is only concerned about collection of the duty levied by Section 3 on the manufacture of goods. In the scheme of the Act, the consumer who purchases the goods from the manufacturer and pays cum-duty price does not pay any tax either directly or through the manufacturer. If a manufacturing company goes into liquidation after selling off all its products, the Excise Officer can in no way realise any short levy or under levy from the, consumer. A tax is a compulsory levy imposed by the statute which is something quite different from purchase-price. If a person having paid the tax increases the price of the goods, what the purchaser pays the tax-payer is not the tax but the price of the goods. The price usually comprises of costs, taxes and profits. But there is only one tax and one tax-payer who pays the tax. If there is short levy or under levy of excise duty due to any reason, the excise authority has no right to chase the consumers for the arrears of tax. In no sense of the term the consumer can be treated as the tax-payer under the Central Excise Act. Moreover, if the consumer is a businessman, the cum-duty price will be deductible from his income under the Income Tax Act.

72. The charge of duty under the Central Excise act is imposed by Section 3. It has to be computed in the manner laid down in the rules and paid also in the way rule provides. The charge of tax is to be recovered from every person "who produces, cures or manufactures any excisable goods" (Rule 7). It may also be recovered from person who stores such goods in a warehouse. It further provides that the duty shall be payable "at such time and place and to such person as may be designated". Rule 7 really supplements the charging section and specifies the person who has to pay excise duty and to whom, where and within which time the duty is to be paid. Rule 9, which has been set out earlier in the judgment, places a bar on removal of goods from the place of manufacture "until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Collector may require". Under the scheme of the Excise Act and the rules, these are the only provisions by which excise duty is made payable. The charge is declared in Section 3. The liability to pay duty is cast on any person who produces, cures or manufactures any excisable goods or stores such goods in a warehouse (Rule 7). Time and manner of payment of duty is laid down by Rule 9. Date for determination of duty and tariff valuation is provided by Rule 9A and Rule 9B provides for provisional assessment to duty. It is provided that when the duty leviable on the goods is assessed finally, the duty provisionally assessed has to be adjusted against the duty finally assessed and if the duty provisionally assessed falls short of, or is in excess of, the duty finally assessed, the assessee has to pay the deficiency or be entitled to refund, as the case may be. Provisions were also made for recovery of duties not levied or not paid, or short-levied or not paid in full or erroneously refunded (Rule 10). Rule 10A provided residuary powers for recovery of duties for which any specific provision had not been made in the Act or the Rules. Rule 10B dealt with claim for refund of duties.

73. Rules 10A and 10B were as under:

10A. Residuary Powers for Recovery of Sums Due to Government. - (1) Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the Central Government under the Act or these rules, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Asst. Collector of Central Excise may, in any particular case, allow.

10B. Claim for refund of duty. - Any person claiming refund of any duty paid by him may, make an application, for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation. - Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by applicant should be refunded to him, he may make an order accordingly.

(3) Where, as a result of any order, passed in appeal or revision, under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained.

Explanation : For the purposes of these rule 'refund' includes rebate referred to in Rules 12 and 12A.

74. Rules 10A and 10B were in force till 1980. These two rules were substantially adopted in Section 11A and 11B of the Central Excises and Salt Act, 1944 by the Customs Central Excises and Salt Act and Central Boards of Revenue (Amendment) Act, 1978. The two sections came into force on

17.11.1980. It is well-settled that these two rules (Rules 10A and 10B) are complementary. Rule 10A invests the Government with the power to recover duty where any duty had not been levied or paid or had been short-levied or erroneously refunded or any duty assessed had not been paid in full. In such a case, the proper officer within six months could serve a notice on a person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice.

75. Likewise, Rule 10B enabled a person to claim "refund of any duty paid by him". This could be done by an application for refund of such duty to the Assistant Collector of Central Excise before expiry of six months from the date of payment of duty. Where any duty was paid provisionally under Rue 9B, the period of six months was to be computed from the date on which the duty was adjusted after final determination of the value. If as a result of any appellate or revisional order refund of duty is due to any person, the proper officer had to refund the amount to such person even without any application.

76. There is nothing in the Act which enables or enjoins the manufacturer to pass on the duty of excise to the purchaser nor is any duty cast on the purchaser to pay the excise duty. It is the manufacturer who has to pay the duty imposed by Section 3 by virtue of the provisions of Rule 7 and in the manner laid down in Rules 9A and 9B. He is the person against whom proceedings for recovery could be taken in case of non-levy or short-levy or erroneous refund of duty. Only a person who was under a legal obligation to pay duty under Section 3 read with Rule 7 and has actually paid duty in the manner laid down in Rule 9 (or any other rule), can claim refund of duty.

'Duty' has been defined by Rule 2(v) to mean "the duty payable under Section 3 of the Act". All these provisions go to show that there is only one duty payable under the Central Excise Act. It has to be paid by the manufacturer or producer of the excisable goods. In fact stringent provisions have been made to ensure that there is no evasion of duty by the manufacturer. Under Rule 43 the manufacturer is required to give notice before commencement of production. He has also to give a notice before stopping or resuming production of such goods. He has also to give particulars of the raw-materials used for production and if there is any change in the nature of the raw-material that has also to be conveyed to the Collector of Excise. Under Rule 49 duty has to be paid by a manufacturer only when the goods are removed from the factory premises or an approved place of storage. But a manufacturer has to pay on demand the duty leviable on any goods which cannot be accounted for or which are not shown to have been lost or destroyed by natural causes or by an unavoidable accident during handling or storage of such goods.

77. The procedure of clearance is contained in Rule 52. The manufacturer has to make an application in triplicate to proper officer in proper form at least twelve hours before the removal of the goods. The officer has to assess amount of duty on the goods on production of evidence that the sum has been paid into the treasury or the approved Bank as has been provided in the Rules. This rule has also importance for our purpose. Duty of Central Excise is to be paid into the treasury or the Bank specified in Rule 52. Any payment made by any person by way of price has not been treated as payment of duty by the Central Excise Act. Rule 53 enjoins every manufacturer to make stock account of his goods. Monthly return has to be filed showing the quantity of goods manufactured, the quantity removed on payment of duty, the quantity removed for export without payment of duty

and such other particulars as may be prescribed. Materials used for manufacturing of the goods have also to be accounted for under the provisions of Rule 55. It is not really necessary to examine the scope of procedure for the duty-paid materials or under MODVAT scheme. All these elaborate rules and procedures have been made for payment and collection of duty by and from the manufacturer.

78. The Central Excise Act has not made the manufacturer an agent of the State for collection of tax from the consumers. If an illegal levy has been made on the manufacturer and any tax has been collected unlawfully from him by the State, the State cannot refuse to return the unlawfully collected amount. The amount which has been unlawfully collected is the property of the tax- payer. If the law has been broken by the State and an unlawful levy has been made the State is not at liberty to distribute the amount so collected on any supposed equitable principle to somebody other than the actual tax-payer without a specific provision of law to that effect. If this is allowed, the legal wrong done to the tax-payers will remain unredressed. In the case of Baidyanath Ayurved Bhawan (P) Ltd. v. Excise Commissioner, U.P. and Ors. , a Bench of Three Judges of this Court reiterated that the Court should not concern itself with the policy behind the provisions of the statute or even with its impact. The observations of Rowlatt, J. in Cape Brandy Syndicate v. Commissioner of Inland Revenue (1921) 1 K.B. 64, was cited in the judgment that "in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

79. In the case of R.C Parsi v. Union of India after quoting with approval the observations of Lord Simonds in The Judicial Committee, in governor General in Council v. Province of Madras AIR (1945) PC 98 at p. 101, Subba Rao, J. observed as under:

> ...the said tax can be levied at a convenient stage so long as the character of the impost, that is it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on fair construction of the provisions of a particular Act.

80. In Bharat Kala Bhandar (Private) Ltd. v. Municipal Committee, Dhamangaon 59 ITR 73, the subject matter of dispute was a municipal levy. The appellant claimed repayment of an excess amount of tax recovered by the Municipality. Although the facts and the subject mater of the decision was municipal levy which is quite different from the facts of this case, there is an important observation made by a Constitution Bench of Five Judges:

> The Constitution is the fundamental law of the land and it is wholly unnecessary to provide in any law made by the legislature that anything done in disregard of the Constitution is prohibited. Such a prohibition is to be read in every enactment.

81. Here we are dealing with a taxing legislation. Like all other taxing statutes the Central Excise Act has a charging section, provisions for computation and quantification of the charge and also collection of the charge (Sections 11 and 11A) and also for refund of duty (Section 11B). The Court cannot ignore these provisions and hold without any specific charge levied to that effect in the Act that the ultimate consumer is the real tax- payer. The refund must be made of excess realisation of the duty of excise to the manufacturer. The Government has not imposed nor realised any duty from the ultimate consumer.

82. The structure of the Excise Act has to be borne in mind. Duty is levied on manufacture and collected from the manufacturer according to the rules. The well-known distinction between levy and assessment and between levy and collection will have to be borne in mind in this Connection. In the case of Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. , it was held by this Court that:

> The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd., this Court made a distinction between "levy" and "collection" as used in the Act and the rules before us. It said there with reference to Rule 10:
>
> We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says: There shall be levied and collected in such a manner as may be prescribed the duty of excise....It is to be noted that Sub-section (i), uses both the expressions - 'levied and collected' and that clearly shows that the expression 'levy' has not been used in the Act or the Rules as meaning actual collection.

83. I fail to see how a person who has been subjected to levy of excise duty and from whom the duty has been collected cannot get the refund of the duty but only a person who has neither been charged any duty nor paid any duty under the Act can claim refund of the duty. This will be clearly against

Article 265 of the Constitution.

REFUND

84. Sections 11A and 11B before its amendment in 1991 stood as under:

> 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer," the words "Collector of Central Excise, " and for the words "six months", the words "five years" were substituted.
>
> Explanation, - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.
>
> (2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.
>
> (3) For the purposes of this section,
>
> (i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
>
> (ii) "relevant date" means:
>
> (a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short levied or short-paid -

(A) Where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder:

(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.

11B. Claim for refund of duty. - (1) 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:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

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

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation : For the purpose of this section:

(a) "refund" includes rebate of duty of excise on excisable rebate of duty India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means. -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid:

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) In a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability of the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in a case where duty of excise is paid provisionally under this Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(f) In any other case, the date of payment of duty.

85. Section 11B before its amendment in 1991 provided by Sub-section (1) "Any person claiming refund of any of 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". By Sub-section (2), the Assistant Collector was required to examine the application and if he was satisfied that "the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may

make an order accordingly". Sub-section (3) dealt with the consequence of an order passed in appeal or revision under the Act. It provided that if as a result of any appellate or revisional order, any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount. Sub-section (4) provided that no claim for refund for any duty of excise shall be entertained except as provided by or under this Act. Sub-section (5) laid down that the provisions of this Section will also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty.

86. In order to claim refund, a person has to establish that he has paid the duty. The duty is what is paid pursuant to the charge levied by Section 3 and quantified in the manner laid down in the rules. Rule 3(v) of the Central Excise Rules also says that "duty" means the duty payable under Section 3 of the Act. The time and manner of payment of duty will have to be in accordance with the provisions of Rules 9 and 9A (4). There is no other duty charged under the Central excise Act and there is no other way a duty can be paid under the Central Excise Act. It is the person who has paid the duty of central excise under the charge imposed by the Act and within the time and in the manner laid down by the Act, who can claim the refund of duty under Section 11B. "Any person claiming refund of any duty of excise" must be the person who has paid the aforesaid duty in the aforesaid manner. A consumer or buyer cannot say that he has paid any duty of excise. The duty is only on the manufacturer and not on the consumer. Under Sub-section (2), the Excise Officer has to be satisfied that whole or any part of the duty of excise should be refunded to the person who has paid the duty.

87. This is the law in respect of payment of duty as obtaining refund of duty paid in excess. The buyer or the consumer does not pay any "duty" and, therefore, he is precluded from making any application for refund under Section 11B. A person who has not paid any duty in law cannot claim a refund on the ground that he has borne the burden of duty.

88. The Excise officer is a creature of the statute. His powers and functions are circumscribed by the statute. He can realise tax strictly in accordance with the statute. He cannot realise tax beyond the charge imposed by Section 3 out of any extra-statutory considerations. If more tax than permissible under the charge imposed by Section 3 has been collected, it must be returned to the taxpayer. There is nothing in the Act which enables the Excise Officer to embark upon an inquiry to find out whether after payment of the duty, the manufacturer has sold his goods and if so, has included this amount in his price. It is not a ground on which the Excise officer can refuse to refund the excess amount of duty paid by the manufacturer in the mode and manner laid down by the Act. A taxation statute has to be construed strictly. The Excise Officer cannot insert a proviso to the Section and say that even if the levy is illegal and the manufacturer is otherwise entitled to refund of duty under Section 11B, he will not be given this refund if he has included the duty element in the price of the goods manufactured by him.

89. The Excise Officer has no discretionary power to refuse to pay refund even when he was satisfied that excess payment of duty contrary to law has been collected or paid. Though Sub-section (2) of Section 11B or earlier Rule 11A used the language that the Central Excise Officer "may make an order of refund". The word 'may', in this context, has to be construed as 'must'. The section does not give

the Central Excise Officer any discretion once he was satisfied that excess payment had been made. He cannot withhold payment on some extraneous reasons. This point was dealt with at length in the Australian case of Commissioner of State Revenue v. Royal Insurance (1995) 69 Australian Law Journal 51 by Dawson, J. There, Section 111(1) of the Stamps Act, provided:

> Where the comptroller finds in any case that duty has been over-paid, whether before or after the commencement of the Stamps Act, 1978 he may refund to the company, person or firm of persons which or who paid the duty the amount of duty found to be overpaid.

90. This section was later on amended to provide that the Comptroller "must refund the amount of the overpaid duty" upon an application made within three years of overpayment. There was no dispute that a huge amount of Stamp duty had been overpaid by Royal in respect of premiums for workers compensation insurance. The overpayments had been passed on. The comptroller made a decision not to refund the overpaid duty. Royal initiated an action for the recovery of the amount. It was unsuccessful before the Trial Judge who reached the conclusion that the use of the word 'may' in Section 111(1) gave the Comptroller a discretion whether or not to refund the overpaid tax. The Full Court on appeal came to a contrary conclusion. It held that after being satisfied that over payment had been made, it was not open to the comptroller to refuse to refund the duty. One of the points argued was the Act was amended later to use the word 'shall' in place of 'may'. Dawson, J. observed that this was of no consequence. On behalf of the Comptroller it was argued that a number of considerations might justify her withholding of refund of overpaid stamp duty and submitted that the possibility of these situations arising explains why the Legislature had used the word 'may' Chief among these considerations was the impossibility of ensuring that where the duty had been passed on to some other person, any refund should be similarly passed on. It was argued that unlikelihood of Royal's passing on of any refund would result in a windfall to it because the burden of the duty had in fact been borne by its customers.

91. Dawson, J. repelled this contention by saying ;

But that it is a situation for which the legislature might have provided had it wished to do so and its failure to do so does not indicate an intention to give to the Comptroller a discretion to retain payments of stamp duty which were not made pursuant to any legal obligation.

...

The absence of any qualification of this kind in Section 111(1) suggests to my mind an obligation to refund the overpaid duty rather than a discretion to withhold repayment in situations which the legislature might have specified but did not.

It must be borne in mind that the occasion for the exercise of the authority conferred by Section 111(1) is the finding of an overpayment of stamp duty; that is to say, a finding that the comptroller received moneys to which she had no entitlement. The sub-section must be read either as requiring her to refund the overpayment or as conferring a discretion upon her to keep the moneys

notwithstanding that she had no entitlement to receive them. The principle that a statute will not be read as authorising expropriation without compensation unless an intention to do so is clearly expressed has been described as a firmly established rule of law'.

92. Dawson, J. also expressed the view that the Comptroller did not have a discretion which had to be exercised in accordance with law of restitution. He pointed out that the occasion for the exercise of the authority was identified. The only question which arose was whether the authority must be exercised when the necessary finding of overpayment had been made or whether its exercise was discretionary. Dawson, J. observed that "if the common law, rather than the sub-section, were to govern the Comptroller's obligation to make a refund, then no doubt a refund would now be required."

93. In fact, this principle is very important to understand the problem raised in this Court. The Central Excise Act provided for every situation for levy, collection and refund of tax. If an overpayment has been made for whatever reason, the amount has to be refunded. The Excise Officer, who deals with an application for refund, has to find out whether an overpayment has been made under the Act. He may, for any reason to be found in the Act, decline to give refund. He cannot travel beyond the Act to find other considerations for withholding the refund. As Dawson, J. pointed out if that was the intention of the Legislature, the Legislature would have expressly provided for it. Dawson, J. observed:

> However, as I have said, I do not regard Section 111(1) as conferring a discretion. Once the Comptroller found that duty had been overpaid, she was under an obligation to refund it.

94. Since Dawson, J. concluded that Section 111(1) did not confer any discretion to the Comptroller to withhold payment of an unlawful levy, he did not express any final opinion on the question of unjust enrichment and passing on of the overpayment of stamp duty to the insurer in that case. However, Dawson, J. observed:

> The better view would seem to be that it is the unjust enrichment of the payee rather than loss suffered by the payer which should govern entitlement to restitution, but, having regard to the view which I take, it is unnecessary to determine that question in these proceedings.

95. I am also of the view that the Excise Act before its amendment in 1991, in particular Rule 10B and later Section 11B, did not confer any power on the Excise Officer to withhold refund on any ground of "unjust enrichment", after being satisfied that overpayment of tax has been made.

96. Moreover, refund is to be claimed within six months from the date of payment of tax which means within six months from removal of the goods from the factory. A company may take a very long time to dispose of its goods after clearance. But a claim for refund has to be made within the short time permitted by the Act. These provisions are indicative of the fact that refund claim has to be made regardless of the sale of the goods.

97. That passing on of the incidence of tax was not relevant consideration is also borne out by Sub-section (3) of Section 11B as well as Sub-rule (3) of Rule 10B, e.g., if there is dispute as to classification of the goods and the assessee takes resort to filing of an appeal which ends in favour of the assessee, refund will have to be made of the excess amount of tax realised to the assessee without his having to make any claim in that regard. In such a situation, the Assistant Collector of Central Excise is not empowered, before refunding the money, to make an enquiry as to whether the duty has been passed on to the consumers.

98. The concept of "passing on the duty " cannot be fitted in the provisions of the Excise Duty Act before its amendment in 1991. As has been repeatedly asserted in a number of cases that in a taxing statute, there is nothing to be added and there is nothing to be taken out and the words must be interpreted as they stand. There is no equity about taxation. To introduce the concept of "unjust enrichment" in the Act even before its amendment in 1991 is not permissible by any canon of construction. Our attention has not been drawn to any provision of the Act which is concerned about the consumer of the product after they pass out of the factory gate. The rule and the Section dealing with the refund do not contain any provision that the Excise officer will be entitled to withhold refund if it is found that the duty has been passed on to the consumers. As I have stated earlier powers and functions of the Excise Officer are circumscribed by the Act. He cannot take into consideration anything which is not specifically contained in the Act.

99. The contention of Mr. Parasaran on behalf of the Union of India has been that the incidence of tax is on the ultimate consumer. As I have pointed out earlier, the Central Excise Act is not at all concerned with the ultimate consumer. Even if it is not possible for a manufacturer to sell the goods, the duty will have to be paid. If it is found after sale of the goods that there is any short levy or underlevy, the duty will still have to be paid by the manufacturer. If there is a penalty imposable because of short levy or under levy or any interest is payable, it is the manufacturer who has to bear it. If the goods are lost after production, the manufacturer will have to pay duty on the lost goods.

100. The sum up, under the Central Excise Act, 1944, there is only one duty and that has been imposed on manufacture. This duty has to be paid before clearance. This duty has to be paid in the manner and mode laid down by the Act. The Act does not impose any other duty. The Act is not concerned with what happens after the goods have been cleared. If the duty has been erroneously imposed, the refund of the duty must be made to the person on whom it is imposed. Refund of tax must not be confused with restitution or compensation. In my judgment, there is only one taxpayer and it is the person who pays the tax at the time of clearance of goods. There is no other tax imposed by the Central Excise Act. How the burden of tax is borne or its economic impact on the manufacturer are not matters within the purview of the Central Excise Act. No notice of these considerations can be taken in deciding the application for refund by the Excise Officer. Article 265 of the Constitution enjoins that no duty shall be levied ! and collected except in accordance with law. If it is found that a manufacturer has been asked to pay more than what he is liable to pay under the Central Excise Act, he is immediately entitled to get the refund of the wrongfully collected duty. This constitutional guarantee cannot be sidetracked in any manner.

PRICE

101. Every manufacturer tries to maximise his profits. When he sells goods, he fixes a price at which he can make the maximum profits. Higher prices do not necessarily fetch higher profits. The manufacture has to sell his products and if the prices are to high, the products will not sell. He has to fix a price keeping in view the costs incurred by him (this will include costs of production as well as selling costs and also the overheads) and also the taxes he has to pay. He will also have to take into consideration the market forces, the effective demand for his products and also the nature and price of the competing products in the market. He will only fix such a price which "the traffic can bear'. It is wrong to presume that if taxes are raised, the manufacturer has merely to pass on the burden to the consumers by raising the price.

102. It should always be borne in mind that a manufacturer has to generate sufficient income to pay for the prices of inputs, wages to the employees, rents, fuel charges, overheads and many other charges, including direct and indirect taxes.

103. Every type of tax, except only those which are levied on the profits like Income Tax and Surtax on company's profits, will have to be included in the price. The price must be high enough to fetch sufficient income to the manufacturer to pay for all these things and stay in business. If the manufacturer is a company, as the appellant herein is, out of the profits, specific and general reserves will have to be created. Provisions have to be made for known liabilities like provident fund and gratuity for workers, etc. Debenture holders and preferential share- holders will have to be paid. Dividends will also have to be paid to the share-holders who have invested their money in the company. All these things will have to be paid out of the profits made by a company after paying all the expenses including excise and other duties. A manufacturer has also to take into account that all the goods produced by him may not be sold in the year of production itself. That means a large amount of circulating capital will remain blocked. This will also lead to higher interest charges. In fact, there is hardly a company which does not have to carry inventories of tax-paid finished good year after year. Goods distributed for sale to various outlets may not be sold for months or even years. Such goods may ultimately have to be sold at large discounts or even at a loss. Many products after some time cannot be sold at all for various reasons. In the case of BSC Footwear Limited v. Ridgway (1972) A.C. 544, the House of Lords dealt with a case of a well-known shoe manufacturing company. It was found that the unsold stock of shoes of the company at the end of the trading year was generally about a third of the quantity actually sold in that year. Substantial part of the stock-in-hand at the end of the year would be sold either at reduced prices in January sales and thereafter at even lower prices in later sales. The question in that case was how to value the unsold stock at the end of the trading year. That question does not arise in this case, but it is illustrative of the difficulty of selling goods produced by a manufacturer. Can it be said in such cases when a substantial portion of the goods are being sold at an undervalue and thus causing large erosion of profits, that the incidence of duty has been merrily passed on to the consumers'? The goods could not be sold except by reducing the price drastically. It is difficult to say that in such a case incidence of tax is being borne by the consumers and the loss by the producer. BSC Footwear's Case illustrates the predicament of an average manufacturer, A substantial quantity of tax-paid products cannot be disposed of as a matter of course and the manufacturer has to get rid of the unsold products by organising first sale at a discount thereafter at even lower prices.

104. This is a problem with every manufacturer and to assume that the excise duty can be passed on to the consumer without any corresponding loss to the manufacturer is to ignore reality.

105. In the case of British Paints India Limited v. Commissioner of Income Tax, West Bengal , the problem was once again of valuation of unsold stock of a paint manufacturer. It was recognised that paints had a very short "shelf life". In other words, unsold cans of paints lying on the shelves of the various outlets of the manufacturer could not retain its quality and utility for indefinite length of time and became unfit for market. In that case, the question was whether the Company was entitled to depart from the usual practice of valuing the unsold stock at the end of the year on cost or market price, whichever was lower, basis. The Court said Yes. The Court held that the Company was entitled to value its unsold stock of the goods "in process" on the basis of the cost of raw materials and finished products on the basis of its costs. It was recognised that the company might have to sell a portion of its products ultimately at a vastly reduced price.

106. I have not understood the concept of passing on of tax liability. If this argument is taken to its logical conclusion, then it means that the manufacturing company does not incur any expenditure at all. The taxes as well as the costs of production are recovered through price. Will that mean that a company does not have any cost of production? The wages of labourers, their provident fund, gratuity, bonus, the costs of raw-material, the fuel charges, the overheads; all these things have to be paid out of the money generated by the company. This can only be done through price obtained by the sale of goods. A suit for short sale by a manufacturing company or recovery of money for over charging can be defeated by saying that all these things have been passed on to the consumer. An electricity supply company or a coal supplier can also take the plea, faced with an allegation of excessive charge, that in any event the charges have been passed on to the consumers. As I have emphasised earlier that it is not possible to split up the price of a commodity and find out how much is attributable to labour, how much to cost of production and how much to the overheads.

107. That the buyer pays nothing but the price, has been made clear by Section 2(10) and also Section 4 of the Sale of Goods Act. Section 64A permits the seller to add an amount equal to any new tax imposed or any tax increased if such imposition or increment has taken place after the contract was entered into and if a different intention does not appear from the terms of the contract.

108. Incidentally, it should be noted that Lord Goddard, J. took into consideration Section 27 of Finance (No. 2) Act, 1940 which appears to be similar to Section 64A of our Sale of Goods Act, 1930. Section 64A provides:

> 64A. In contracts of sale, amount of increased or decreased taxes to be added or deduced. - Unless different intention appears from the terms of the contract in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time,-

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

109. The English Law in this regard is the same.

110. Lord goddard's judgment goes to show that even if the duty element was separately shown in the invoice what the buyer pays is the price of the product and nothing else. The seller similarly gets only the price. Lord Goddard, J. also noted the fact in that case that the burden of the tax had been passed on. This according to Lord Goddard J., did not make any difference.

111. In the case of Paprika v. Board of Trade (1944) 1 KB 327, a person was called upon to pay penalty which was three times the price at which the articles were expected to be sold. The Divisional Court rejected the argument that the tax element in the price should be excluded because it was no price at all. It was an amount which would ultimately go to the Government. The Court recognised the fact that the price could be affected by the tax element but "it does not cease to be the price which buyer has to pay even if the price is expressed to be as X plus purchase tax."

112. This case was cited with approval by Lord Goddard, J. (as His Lordship then was) in the case of Love v. Norman Wright (Builders) Ltd. (1944) 1 All England Law Reports 618, the question before the Court of Appeal was whether the seller of goods under a contract made after the purchase tax had been imposed by law could call upon the purchaser to pay the tax exigible in respect of the sale in addition to the agreed price at which the goods were to be supplied. Goddard, J., pointed out that a seller quoted a price X plus purchase tax, the buyer must pay the tax as part of the purchase price. Conversely, if a seller agreed to supply goods for a certain sum, then he could not call on the buyer to pay anything extra for tax additionally, unless he was authorised by any statute to do so.

113. In George Oakes (Private) Ltd. v. State of Madras and Ors. this Court was called upon to consider whether a dealer can pass on his tax liability as such to his customer. In that decision while rejecting the contention that the tax liability as such can be transferred to the buyers, this Court referred to the observations of Lawrence. J. in Paprika Ltd. and Anr. v. Board of Trade (supra) and

Goddard, L.J., in Love v. Norman Wright (Builders) Ltd. (supra).

114. In the former case, Lawrence, J. observed:

> Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands it does not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax.

115. In love's Case, Goddard, LJ. observed:

> Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax but on a sale there is only one consideration, though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

116. In that decision, reference was also made to the decision of this Court in Tata Iron and Steel Co. Ltd. v. State of Bihar [1958] SCR 1355. Therein Das, C.J. who delivered the majority judgment of the court said:

> The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. See Love v. Norman Wright (Builders), Ltd.
>
> From all these observations, it is clear that when the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by the buyer and the distinction between the two amounts - tax and price - loses all significance.

117. These decisions were re-affirmed by this Court in the case of Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Sales Tax, Indore (1971) 28 STC 331.

118. In the case of Delhi Cloth and General Mils Co. Ltd. v. The Commissioner of Sales Tax, Indore , Hegde, J., speaking for the Court, once again emphasised:

> Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers the same can only be considered as valuable consideration for the goods sold.

119. I have been at great pains to emphasise that if the seller passes on his tax liability to the buyer, the amount equivalent to the tax received by the Seller is part of the entire sale consideration. It is not collection of tax, because levy and collection of tax is regulated by law and not by contract. Whatever may have been collected by a seller from his customer on account of tax, the same can only be considered as valuable consideration for the 'price' of the goods sold.

120. What the buyer pays is the price of the goods and not the components of the price. Production costs, selling costs, overheads, taxes, everything goes into fixation of the price. Moreover, the market conditions will have to be taken into account. If the price is too high for the market to bear, the goods will not sell, In order to absorb the excise duty the manufacturer may have to cut various types of costs. It may have to reduce its profit, pay lesser dividends to shareholders, he may not readily agree to any increment in pay or payment of bonus or other benefits to the workers. It has not been explained how it can be readily assumed that all that the seller has to do to absorb higher duty is to include it in its price and pass it on to the consumers?

121. If preamble to the Constitution and social justice is borne in mind, then it may as well be argued, as Karl Marx did, that every article of manufacture is congealed labour. If the labour is given just reward for the work done by him, no surplus value will be left. It is this surplus value extracted from the labour through the pricing mechanism that becomes the manufacturer's profit. To prevent "unjust enrichment", the entire surplus should go back to the labour.

122. But, here we are not concerned with social and economic theories, but only with the prosaic realm of law as it stands. Harold Laski in his well-known book "Introduction to Politics" pointed out the difference between role of law and role of politics by saying that the lawyers will have to take the law as it stands. It is not for them to ask why those laws should be our laws? What ends do these laws serve? Why should these ends be our ends? Whereas a student of politics may ask all these questions. Laski said, "We have to add, so to say, a teleology to law."

123. In this case also we are not entitled to add any teleology to law. We have to take the Central Excise Act as it stands. We may or may not like the law. But for that reason we cannot discard it or its language to bring out an abnormal meaning. If the meaning of 'price' as given in the Sale of

Goods Act is borne in mind and its implications as explained in judgments referred to hereinabove are kept in view, then it can never be said that the seller has charged anything but the price of the goods from his buyer. He cannot by a contract call upon the buyer to pay any tax which is the prerogative of a taxing statute. Even if he quotes the price as x (Costs) + Y (Taxes) + Z (Profit), what the buyer will pay is the price of the goods and nothing else, neither the costs nor the taxes are passed on to the buyer.

UNJUST ENRICHMENT

124. The facile assumption that when excise duty is imposed or raised,, it can be passed on to the consumer by merely raising the price with no corresponding loss or detriment to the manufacturer has not been made on the basis of any market study. In fact, before the new amendments were effected no in-depth study was at all done by the legislature. The basic premise of this line of reasoning is fallacious. The Finance Minister in his budget speech for the year 1994-95 (206 ITR Page 19) stated:

> Over the years, our indirect tax structure has grown into a complex maze of high and multiple rates, with numerous exemptions, and different rates being applicable for the same product for different uses and users. This has resulted in unnecessary complexity leading to administrative abuse, mounting litigation and uncertain economic impact. All this has effectively eroded the tax base and buoyancy of the system and created serious economic distortions....

125. To illustrate the enormity of excise burden which has to be borne by the manufacturers, it may be mentioned that in the Central excise Tariff Act, 1985, duty on oils used for skin-care was 105 per cent and duty on residual oil which was not specifically mentioned under the heading 3305.90 was 105 per cent. The duty on paints and varnishes under the heading 32.09 was as high as 60 per cent. Under the heading 33.07 pre-shave, shaving or after-shave preparations had to bear duty of 105 per cent. The example of high excise duty can be multiplied. It cannot be blindly assumed that levy of excise duty does not cause any financial hardship or loss to the manufacturers because they can merrily pass it on to the consumers. In fact, in very many cases, the Central Government had to issue exemption notifications on the representation made by industries exemption goods wholly or partially from excise duty having regard to the plight to which the industries had been reduced under the impact of taxation. The economic reality that rise in duty causes financial hardship to the manufacturer and that the manufacturer cannot get rid of that hardship by simply passing on the duty has been recognised by the Central Government itself by giving relief to the manufacturers by various exemption notifications. Even in cases where exemption notifications could not be issued retrospectively, an Act was passed to help the manufacturers.

126. The Central Duties of Excise (Retrospective Exemption) Act. 1986 was passed on 8th September, 1986 to give retrospective effect to certain notifications to enable the excise authorities to refund duties of excise which had already been collected in certain cases. It was stated by Section 2 of the Act that the Act shall be deemed to have and to have always had, effect on and from the 1st day of March, 1986. It went on to provide:

(2) The duties of excise which have been collected, but which would not have been so collected if the said notification had been in force at all material times, shall be refunded:

(3) The duties of excise which have become payable, but which would not have been so payable if the said notification had been in force at all material times, shall not be required to be paid.

(4) Any person claiming refund of any duty of excise under Sub-section (2) may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the. commencement of this Act.

127. It had the effect of refunding the duties of excise which had already been collected and declaring the duties of excise which had become payable (but would not have been payable if the notifications had been in force) shall not be required to be paid. This Act was passed in recognition of the fact that high excise duty causes hardship to the manufacturers. They must be given relief even with retrospective effect.

128. This Act is important for the purpose of this case because it goes to show the legislative intent. The Legislature never intended before 1991 that refund of excise duty will not be given to the manufacturers but to the buyers of the goods. The Central Excise Act is totally silent on this aspect of the matter and we shall not add a rider to the Central Excise Act to deny any refund due to the manufacturer.

129. It has also to be borne in mind that the rates of duty in India is much higher than in U.S.A., Australia or Canada. Its economic impact is much greater. In fact in the case of United States v. Jefferson Electric Manufacturing Company, (supra), the dispute related to levy of excise duty at the rate of 5 per cent. In Air Canada' Case, the disputed duty was 5 cents per gallon. It is needless to speculate how the Courts would have reacted if they had to face the high tax regime that exists in India.

130. Mason, C.J. in the case of Commissioner of State Revenue v. Royal Insurance Australia Ltd., (supra), noted how the theory that the burden imposed by higher excise duty can be passed on to the consumers without any economic loss to the manufacturer has been rejected in various Courts in the United States, Canada and also Australia. Mason, C.J. observed that this economic theory had major difficulties. The first was that to deny recovery when the plaintiff shifted the burden of the imposition of the tax or charge to third parties will often leave a plaintiff who suffered loss or damage without a remedy. Another reason given by Mason, C.J. was that an inquiry into and a determination of the loss or damage sustained by a plaintiff who had passed on a tax or charge was a very complex undertaking.

131. Mason, C.J. also pointed out that the basis of restitutionary relief was not compensation for loss or damage sustained but restoration of the plaintiff of what has been taken or received from the plaintiff without justification. Mason, CJ in his judgment illustrated the proposition with a number

of cases to show that the doctrine of "Passing on" was fraught with many difficulties. An American case was cited where the Supreme Court of U.S. had rejected the doctrine of "passing on" under anti-trust laws where plaintiff had passed on overpayments to their customers {Hanover Shoe Inc. v. United Shoe Machinery Corporation (1968) 392 US 481. Commenting on this, Mason, CJ. observed that though the context is different, the reasons given for the rejection were relevant for the present case. They include the difficulty of determining the economic impact upon the plaintiff's business of passing on the overpayment, the practical problems which availability of the defence would generate involving "massive evidence and complicated theories". Further the defence would probably apply all the way down the . chain of distribution to the ultimate consumer who would have little interest to sue. The U.S. Supreme Court also noted that economic theories rely upon the assumptions which do not operate in the real world, thereby making the proof of passing on extremely difficult. This view was also expressed in the opinion of Advocate General in Administration delle Finanze dello Stato v. San Giorgio SPA (1985) 2 CMLR 658.

132. Mason, C J. Concluded that:

> The United States and European decisions demonstrate that any acceptance of the defence of passing on is fraught with both practical and theoretical difficulties. Indeed, the difficulties are so great that, in my view, the defence should not succeed unless it is established that the defendant's enrichment is not at the expense of the plaintiff but at the expense of some other person or persons.

133. In view of all these, I see no basis to deny the refund to a manufacturer on the facile assumption that burden of duty has been passed on to the consumers without any loss or detriment to the manufacturer. The absurdity of this doctrine of "passing on" can well be demonstrated by the following examples.

134. Supposing, a manufacturer of pulp sells his product to a rayon manufacturer which uses the pulp to manufacture rayon it can be said that the burden of duty has been passed on to the rayon manufacturer. The rayon manufacturer, in his turn, includes the cum-duty price in his costs and includes it in his price when he sells his yarn to a cloth manufacturer. The cloth manufacturer in his turn will include the duty-paid price of rayon in his costs and will sell his products to a garment manufacturer at duty-paid price. The garment maker will sell the garments to the actual users. Can the last consumer establish that he has borne the incidence of an illegal excise duty imposed on pulp and claim refund of the unlawful duty on pulp. Can he at all be made aware of such an unlawful levy on pulp? Or will it be that the rayon manufacturer will get the refund as a consumer of pulp even though he has included the duty paid price in his costs of raw material for production of rayon and has thereby passed on the burden to his customers. These illustrations can be multiplied ad infinitum. If a scrap dealer buys duty paid scrap and sells to a car-parts manufacturer who in his turn treats such price as his cost and includes it in his price (duty included) and sells the parts to a car manufacturer, who in his turn sells cars to the actual users, who will get back any illegal levy of excise duty on scraps?

135. This problem has other dimensions. Excise Act cannot be viewed in isolation. If there is an illegal levy of paper and a lawyer buys paper at cum-duty price, he gets deduction of the entire sum in computation of income under the Income Tax. Can he claim refund of excise duty as being the ultimate consumer? As I said earlier, these are not isolated examples. But things that are happening in everyday life. Duty paid price charged by a manufacturer is his income for Income Tax purposes, turn over for sales tax and turn over tax. It has a variety of other fiscal dimensions. How can it ever be assumed that an illegal levy of tax will be a source of joy for the taxpayer? He will happily pass on the burden and merrily enjoy the refund.

136. The argument by reference to the Directive principles that unlawfully collected tax must be retained by the government for the common good of the people and also to involve the weaker sections of the people may have a populist appeal, but is without any basis having regard to the provisions of the Central Excise Act as well as Excise Tariff Act.

137. The Central Excise Act levies a tax on manufacture of goods. Very often goods are manufactured by small scale industries or individuals for the benefit of large industries. If a small scale paper pulp manufacturer who struggles to exist, cannot get back an illegal levy of excise duty because the consumer, a large scale viscose fibre manufacturer, has ultimately borne the burden of the duty and the illegally collected duty is paid back to that large company, the weaker section far from being benefitted, will be thoroughly robbed. In fact, if we look at the Central Excise Tariff Act, it will be seen that the vast majority of the products are not for household use or for common man. The list of excisable commodities starts with Animal Products, which may include products of the kind unfit or unsuitable for human consumption; Guts, bladders or stomachs of animals or animal blood; or animal fat, other than pig fat (Chapter 2). Obviously these have industrial uses, but a common man will not buy them. Likewise, lac, Gums, Resins (Chapter 13), Bituminous and Asphalt, chemical compound (Chapter 27), Chemical Compounds - Organic and Inorganic (Chapter 28), Explosives, Pyrotechnic Products; Pyrophoric Alloys and other Combustible Preparations (Chapter 36) will only be used by large industries. A large number of chemical products are taxed under the heading Miscellaneous Chemical Products, like Graphite, Activated Carbon, Rubber Accelerators, compound plasticisers, organic composite solvents (Chapter 38), charged fire extinguishing grenade are not used by the common man.

138. In fact, the Schedule to the Central Excise Tariff Act has as many as 96 chapters and appears to contain more entries relating to goods which are used by trade and industry than common man in every day life like Base Metals, Iron and steel. Aluminium Metal (Chapter 72), Nuclear Reactors, Boilers, machineries, mechanical appliances; parts thereof, electric motors and generators, rotary converters, transformers, static converters, electro-magnets, etc. (Chapter 85). The Schedule also include Railway or tramway Locomotives, Rolling-Stock and parts thereof; Railway or Tramway Track Fixtures and Fittings and parts thereof; Mechanical Traffic Signalling Equipment of all kinds (Chapter 86). This Entry is followed by Vehicles other than Railway or tramway etc. (Chapter 87). This Entry includes motor cars, motor vehicles, tanks and other armoured fighting vehicles and also parts and accessories of the motor cars and motor vehicles principally designed for transport of persons, motor vehicles for the transport of goods. Even here it should be noted that, having regard to the price of the motor cars and motor vehicles, it is not the weaker section of the population who

uses these vehicles. In the name of benefitting the weaker section, unlawfully and illegally levied duty of excise on parts and accessories and various inputs manufactured by small manufacturers for use of the large manufacturers will not be returned to them but handed over to the large manufacturer or rich consumers who has the resource and ability to claim it.

139. There are of course household goods or goods of everyday necessity like edible oil, toothpaste, tooth brush, soap, some textile articles and possibly some items falling under paper and paper board are used by common man in everyday life. But taking an overall view of the tariff items in the Schedule to the Central Excise Tariff Act, it can hardly be said that excise duty by and large is on goods to be used by the common man. Moreover, there are many industries reserved for small scale sector. This has been done to protect small scale industries from competition from the big manufacturers. If for example, a manufacturer of wrist watch strap (reserved for small sector) is unable to get back any illegally imposed duty of excise because the watch straps have been sold to large watch manufacturing company and that large company is given the refund, the weaker section will not benefit in any way.

140. Even for the consumer goods, it is not in the realm of belief that an ordinary buyer will be able to chase the Excise Officer and claim refund of duty illegally imposed on the manufacturer. For example, a person buying tooth brush from the local grocery shop, will not retain the cash memo for years and years and even if he does so, he will not know that there is a dispute about the levy of excise duty pending. Furthermore, a man who purchases tooth brush in Madras will not be able to claim refund of duty from the proper Excise Officer who has jurisdiction over the company at Bombay. We shall bear all these considerations in mind before trying to interpret the law in a way which will benefit the weaker sections of the people and give them a sense of participation in the development of the country.

141. Moreover, only the manufacturer has to separately show the duty element in his invoice. The wholesaler, the distributor or the retailer has no such obligation. Ordinary customers buy their goods at the retail outlet, where even if a cash-memo if given, the duty element will not be shown separately. How will the common man know that he has paid any duty and if so of what amount?

142. In my view, the entire argument based on "unjust enrichment" is founded on a false premise. It will be wrong to assume that the duty element can be included in the price and that no prejudice will be caused to the manufacturer by the levy or enhancement of the duty. To take this position is to ignore the economic realities.

143. There may also be situation when a manufacturer will not be able to certify that he has not passed on the duty even though he has borne it. Supposing a manufacturer is charging Rs. 100 per unit of good. The price of Rs. 100 is calculated on the basis of Rs. 80 as costs, Rs. 10 as profits and Rs. 10 as excise duty. The excise duty element is enhanced unlawfully by Rs. 5. In such a case, the manufacturer may either raise the price of the goods by Rs. 5 or he may decide to reduce his profit to Rs. 5 and sell the goods at the same price. In the second case when the manufacturer reduces the profit element to Rs. 5 "and sells the goods at Rs. 100, can it be said that he has passed on the burden of excise duty to his customers. The price is inclusive of the duty element. In a sense, the

burden of duty borne by the manufacturer has been passed on. But then again, the manufacturer has suffered diminution of profit. Can it be said in such a case that if the manufacturer manages to get an order of refund of duty, it will be unethical for him to get the amount because this will be "unlawful enrichment"? The manufacturer in a case like this will not be in a position to certify that the burden of duty has not been included in the price of the goods but the fact remains that in order to maintain the price of goods at the optimum level the manufacturer had to suffer loss of profit. The Central government has been empowered to exempt, generally or absolutely by notification, excisable goods from the whole or any part of the duty imposed thereon. Judicial notice must be taken that in very many cases, having regard to the hardship suffered by the industry and representations made by the industry, duties have been reduced or exempted by issuing appropriate notifications or even by legislation.

SCOPE OF SECTION 11B, 11D, 12A, 12B, 12C AND 12D OF THE CENTRAL EXCISE ACT, 1944

144. Sections 11B and 11D in Chapter II and Sections 12A, 12B, 12C and 12D in Chapter II-A are now to be considered:

> 11B. Claim for refund of duty.
>
> (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish 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 had not been passed on by him to any other person:
>
> PROVIDED that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act;
>
> PROVIDED FURTHER that the limitation of six months shall not apply where any duty has been paid under protest.
>
> (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
>
> PROVIDED that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section

shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credits of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

PROVIDED FURTHER that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) 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, no refund shall be made except as provided in Sub-section (2).

(4) Every Notification under Clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should ceases to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central

Government at any time by notification in the Official Gazette.

Explanation : For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable material used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves india, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purpose aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 5A, the date of issue of such order;

(f) in any other case, the date of payment of duty.

...

11D. Duties of excise collected from the buyer to be deposited with the Central Government.

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by Assistant Commissioner of Central Excise.

...

12A. Price of goods to indicate the amount of duty paid thereon.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

12B. Presumption that incidence of duty has been passed on to the buyer.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer welfare fund.

(1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

12D, Utilisation of the fund.

(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

145. Section 11B(1) contemplates that for claiming refund of any duty of excise a person has to apply with documentary evidence to establish, (1) the amount of duty of excise was collected from him or paid by him and (2) the incidence of such duty has not been passed on by him to any other person. Sub-section (2) of Section 11B provides that if the Excise officer is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly. The refundable amount, however, will be credited to a Fund. The proviso lays down certain circumstances under which the duty may be paid to applicant. Clause (d) of the proviso says that the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person, will be refunded to him. These provisions are not in consonance with the charging provisions of the Excise Act and the Rules. The well-known principle of fiscal legislation is that the charge lies where it falls. It cannot be shifted by a contract. Acts relating to Income Tax, Wealth Tax, Sales Tax as well as Excise Duty have charging sections. A man may contract with somebody to pay his Income Tax, a seller may contract with somebody else to pay his Sales Tax and a manufacturer may contract with a third party to pay the duty of excise. These contracts are not enforceable by or against the Revenue. The Central Excise Act imposes a tax on manufacture. This tax has to be paid before the goods are cleared in the manner laid down by the Act and the Rules. There is no other duty of excise payable under the Act. I have referred to various decisions wherein it has been pointed out that the contract between the manufacturer and a buyer is of no consequence in the matter of payment and collection of excise duty. The question of passing on can only arise after the duty has been fully paid. The duty of excise is never borne by the buyer as stated in Clause (e) of the proviso. The buyer may pay a sum equivalent to the duty of excise pursuant to a contract with the manufacturer, but that is a matter of contract.

146. The duty impose on and collected from manufacturer, if it is found to be in excess of the charge imposed by Section 3, has to be returned to manufacturer and nobody else, otherwise charging provision, rules for computation of charge and imposition and collection of duty will become meaningless. If any amount has been realised by the Excise Officer in excess of the charge imposed by the charging section, then such collection is beyond the competence of the Act and also violates Article 265 of the Constitution. It was pointed out in the case of Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. , that Article 265 of the Constitution makes a distinction between levy and collection. Levy may include both imposition of a tax as well as assessment. 'Collection' will be recovery of tax. If it is found that a tax-payer has been levied more

than the permissible limit imposed by the charging section read with Excise Tariff Act and the Rules, the levy is bad. The Collection pursuant to this levy is equally bad. Such levy and collection are dehors the provisions of the Excise Act. There is no way that the Central Excise Authority can retain the amount or use the amount. In any way it has to refund the amount to the person from whom it has been unlawfully collected by the Excise Officer. The Central Excise Act, as Hegde, J. pointed out in the case of Delhi Cloth and General Mills (supra), duty is imposed by a statute whereas the cum-duty price is paid by the j purchaser under a contract with the manufacturer. No portion of the cum-duty price in law can be treated as the duty of excise. Nothing which is not imposed by Section 3 and collected under the provisions of the Excise Act and Rules, can be called "duty of excise". In my view this is the basic principle of any tax law. If by any device any amount which is not leviable in law has been levied and collected from a tax- payer, then retention of such amount will be unlawful.

147. Any provision appearing or trying to bar recovery of illegally collected tax is violative of Article 265 of the Constitution and must be struck down as the Barring Act was struck down by the Privy Council in the case of Commissioner for Motor Transport v. Antill Ranger & Co. Pty. Ltd. (supra). If the realisation of tax in excess of the chance imposed by the Excise Act read with Excise Tariff Act and Rules, then such levy of tax is not authorised by law. The Collection of such excess unlawful levy is also invalid. As the judicial Committee pointed out if the levy is invalid as an offence against Section 92, it is equally an offence to deny the right to recover it after it has been unlawfully exacted. Therefore, in my view, once it is established that more than what is payable under the statute has been collected from the tax-payer, the tax-payer automatically gets a right to get back the Whole amount. If the right is sought to be effectively taken away by imposing conditions, then the law imposing these conditions must be declared to be bad and ultra vires the Constitution.

148. There is another aspect of this matter. Excise Officer cannot tax more than what is permitted by the statute. If the levy is in excess of the statute, then its retention by the State is unauthorised by law. What is being retained is not in enforcement of the charging section but something else. Such illegally collected tax is not the property of the State and is not within the disposing power of the State. If the money has to be utilised by the State, the State has to find out some legitimacy for having possession of the money. In the Canadian case of Air Canada v. British Columbia (supra) retroactive amendment of the Gasoline Tax Act was passed with a new definition of 'purchaser' to make a levy valid and retain the illegally collected amount by setting off against the claim raised by the amended Act. That is the only way in which La Forest, J. could justify, what was otherwise a confiscatory provision. In this case, there has been no attempt to give legitimacy to the holding of the amount or utilisation of the amount by the Government. The entire amount was collected unlawfully. The original sin has not been cured as in Canada by a retroactive charge.

149. I shall now examine the other provisions of the newly added sections. Sub-section (1) of Section 11B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-section (3) merely lays down that no refund shall be made except as provided in Sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases

where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, Sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the Legislature cannot take away the force and effect of that judgment, decree or order, . except by amending the law retrospectively on the basis of which the judgment was pronounced.

150. I have indicated earlier in the judgment and shall not repeat that it is practically impossible for an ultimate consumer to make an application for refund under Section 11B. He has to know that there is a dispute about levy of excess duty which is going on between the manufacturer and the excise authority. He has to know the outcome of that dispute. He has also to find out what is the amount of duty he has borne. This is a difficult process because the ultimate consumer may have a cash-memo from his retail-seller. Retail-seller usually does not give the break up of duty in the price he charges. The new law requires a manufacturer at the time of clearance of the goods to prominently indicate in the invoice and other documents the amount of such duty which will from part of the price. There is no such requirement for the dealers down the line. It is incomprehensible how a person who buys a cake of soap will know the duty content in the price and whether the excise duty levied was valid or not and how will he find out which is the proper officer, to whom to make an application in the prescribed form for refund of duty and what sort of evidence will he be having in his possession to authenticate his claim? It is rightly contended by Mr. Nariman that all these provisions are only an eye-wash to retain the illegally exacted excess levy by the Government which as a matter of fact what is actually being done.

151. Now I shall deal with Section 11D. Excise duty is levied by the charging Section 3. It has to be paid according to the Excise Tariff Act, 1985 and the rules. Before clearance of the goods, the assessee is required by Rule 173B to file what is known as price/classification List in which full particulars of the goods manufactured and intended to be removed from his factory has to be given. The Chapter heading and sub-heading number under which the goods are to be assessed under Tariff Act has also to be indicated. The assessee has also to state the rate of duty leviable on each such goods. On the basis of the declaration made by the assessee, the Excise Officer has to make his calculation of duty. For the purpose of proper valuation of the goods assessable ad valorem, pro-forma price list for commodities has to be filed. The value of the goods have to be calculated by making deductions from the wholesale price in accordance with Section 4(4) of the Excise Act. There may be dispute as to the valuation or rate of duty for which an adjudication proceedings may have to be taken. But without the approval, of the Excise Officer, no goods can be removed from the factory. The assessee has also to maintain an Account Current. This is laid down by Section 173G:

> RULE 173G. Procedure to be followed by the assessee. - (1) Every assessee shall keep an account-current with the Commissioner separately for each excisable goods..., in such forms and manner as the Commissioner may require, of the duties payable on the excisable goods and in particular such account...shall be maintained in triplicate by using indelible pencil and double-sided carbon, and the assessee shall periodically make credit in such account-current, by cash payment into the treasury so as to keep the balance, in such account- current, sufficient to cover the duty due on the goods

intended to be removed at any time; and every such assessee shall pay the duty determined by him for each consignment by debit to such account-current before removal of the goods:

152. This rule requires advance payment of tax. Money has to be deposited in the treasury well in advance before removal of the goods.

153. Section 11D is a curious piece of legislation. Even after the full amount of duty has been paid and goods have been cleared, the manufacturer is being called upon to deposit with the Central Government any amount collected from the buyer representing duty of excise. In other words, having paid the full amount of duty of excise, the manufacturer is being called upon deposit the duty element in the price of his goods to be deposited to the credit of the Central Government. The only justification for this appears to be that the entire amount will be held till finalisation of the assessment. But the Section provides that if there is any surplus left after such adjustment, the surplus shall not come back to the seller but will be credited to the Fund or paid to the person who has borne the incidence of the duty in accordance with the provisions of Section 11B which means the ultimate consumer.

154. An attempt has been made to salvage this Section by construing that this Section will apply only if duty has not been paid on the goods or if any excess collection has been made over and above the duty already paid. It is very difficult to agree to such a construction. There cannot be a blanket statutory direction to pay everything collected from a buyer on account of excise duty to be paid over to the Excise Officer. If it is in the nature of advance tax, there has to be some attempt to fix a percentage which needs to be handed over. Otherwise, it will be unreasonable restriction on trade. The sale price is a part of the circulating capital. Goods are converted into money and money is again utilised to manufacture goods. If a substantial portion of this money is taken away without having regard to the actual or probable necessity for the collection, it will be unreasonable restraint on the right of a person to carry on business. Moreover, the amount may be kept till finalisation of assessment. The assessment may not be finalised till the dispute has been decided finally by CEGAT or even by this Court. Will the money be blocked up till then? Supposing the assessee succeeds, why will he not get back the money with interest?

155. This provision has to be contrasted with the advanced tax collected under the Income Tax Act. Such collection is authorised by the charging Section of the Act Section 4(2) because otherwise, the collection would have gone beyond the scope of the charge. The rate on which the tax is to be collected and the basis is clearly stated, High Court rates of interest is payable both by the assessee and the Government in appropriate cases. But if an amount is taken in advance, then the residue after adjustment of tax must go back to the taxpayer.

156. That is not the scheme here. So, this cannot be treated something in the nature of advance collection of tax where duty has not at all been paid on the goods.

157. The second point that this has been done to safeguard against any excess collection from the consumer is equally unreasonable. The excise duty is a duty on the manufacture of the goods. Once

full amount of duty has been collected, the excise authority cannot control any contract between the purchaser and the seller. The Excise Act imposes a charge on manufacturer. There is no charge of duty levied by the Excise Act on excess collection by the manufacturer from the buyer. Any question of execess collection by the manufacturer from the buyer is entirely out of the purview of the charging section. If the assessee has collected on account of excise duty from the purchaser more than what he has paid, perhaps, a purchaser can bring an action against the seller. In the event of a contractual dispute between the purchaser and the seller, the relevant statutes will be the Contract Act, the Sale of Goods Act and similar other statutes. But the Central Excise Officer cannot under any circumstances, lay his hands on anything more than what is actually levied by the Act. He cannot collect something which is not payable under the charging section even for the purpose of directing it to the Fund or to the actual consumer. The entire Section 11D is ultra vires the charge levied by the Excise Act itself.

158. Moreover, the entire sale price (duty included), will form part of the sales turn over of the assessee on which sales tax will have to be paid under the State Acts. Turn over tax will have to be paid by big assessees. The purchaser may also have to pay purchase tax on the purchase price. In such cases, how will the State Revenue authorities determine the quantum of turn over of sales or purchase for levy of sales tax or purchase tax? The sales proceeds will be income of the assessee for the purpose of levy of income tax.

159. Unlike the Income Tax, Act, the assessee has not been given any option to show that he is not liable to pay the amount which is being taken away from his proceeds. He has no opportunity of getting a hearing on this issue. The Income Tax Act enables the assessee, in such circumstances, to dispute the estimation of advance tax made by the Income Tax Officer and file his own estimate (or course at his own peril). Here he has no option but to pay without any hearing.

160. I repeat that a manufacturer cannot be called upon to pay anything except the duty imposed by the charging provisions. Even if the final assessment has not been made, goods may be allowed to be cleared by paying the admitted amount of duty and furnishing the security for the disputed amount. The security may be keeping sufficient money in the Account Current with the Excise Department or even by furnishing a bond or a bank guarantee. This is provided by the Rules.

161. There is no legal or rational basis for a blanket provision to deposit whatever is included on account of excise duty in the price of the goods sold.

162. The position gets curio user after the deposit. After adjustment of the tax against the deposit, the surplus amount is not returned to the manufacturer. It has to be credited to the Fund or paid to the person who has borne the incidence of tax i.e., the ultimate consumer. In other words, the manufacturer will be robbed of a portion of his sale price for no rhyme or reason. This may also have the effect of nullifying the sale contract entered into by the manufacturer with the buyer. The buyer had agreed to pay an agreed price which may include the duty element. The seller agreed to sell the goods to the buyer at that price. Section 64A of the Sale of Goods Act protects the interests of both. How can a portion of that price be taken away and credited to a Fund or paid to the ultimate consumer? What will happen to the contract? The only effect of Section 11D is to rob the

manufacturer of a portion of his legitimate dues. These provisions are not in aid of the charge on manufacture levied by the Central Excise Act, but are in excess of the charge and are confiscatory in nature and have to be struck down.

163. It appears to me that by these newly amended provisions, the Legislature has merely created a device or a cloak to confiscate the property of the tax-payer. In such a situation, a Bench of Five Judges of this Court in Raja Jagannath Baksh Singh v. State of Uttar Pradesh , said that the law has to be struck down as passed in colourable exercise of the power of taxation. It was observed by Gajendragadkar, J., speaking for the Bench:

> ... the conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy, because the reasonableness of the extent of the levy is always a matter within the competence of the Legislature. Such a conclusion can be reached where in passing the Act, the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts, that is separate and independent ground for striking down the Act.

164. So far as Sections 12A and 12B are concerned, only thing that, has to be pointed out is that these two sections do not change the character of the price of the goods. Both these elements were taken into consideration by Lord Goddard, J. in the case of Love v. Norman Wright (Builders) Ltd. (supra). It was stated that even if the burden of duty was passed on and the price was expressed as Pound X plus duty, even then what the buyer paid was price of the goods and not the duty and the seller obtained the price and nothing else. This principle was reaffirmed time and again, as we have noted earlier in the judgment, in a number of cases by this Court.

165. Apart from what has been stated hereinabove, I find that the entire group of these sections is dehors the charging section of the Central Excise Act. The Central Excise Act imposes a duty on manufacture of goods. Various provisions have been made for computation and collection of that duty. Anything collected in excess of that charge is unlawful. If any provision is made for retention of duties collected without any authority of law, then such provision will be beyond the scope of the charge. It will amount to collecting and retaining something which is not at all duty payable under Section 3.

166. The Legislature has now authorised the Excise Department to retain the illegal levy. In my judgment, these provisions are ultra vires the charge levied by Section 3 and cannot be sustained in any way. In the language of Lord Mac Millan in Avrshire Employers Mutual Insurance Association Ltd. v. Commissioners of Inland Revenue 27 Tax Cases 331, 337, the legislature has missed fire.

167. The scope of charge in a taxing Act is of the highest importance. Nothing can be realised under a taxing Act beyond that. The new provisions of the Excise Act are not in aid of the charge imposed by Section 3. These sections are designed to enable the Excise Department to retain what was collected over and above the charge. The amounts collected in excess of what is actually payable

under the charging section is not excise duty at all. Nothing can be collected under a taxing Act which is not authorised by the charging section read with the machinery provisions.

168. The new provisions not only effectively bar recovery of unlawful levies by the tax-payer but have also taken away from him a portion of the price at which he has contracted to sell the goods to the purchasers. How can a portion of the sale price be taken away and retained by the Excise Officer or returned to the buyer in derogation of a contract of sale passes comprehension.

169. I have already noted earlier in the judgment the impossibility of finding out on whom the incidence of charge falls and also the various unworkable problems created by these ill-conceived amendments. In my view, the amended provisions must be struck down as violative of Article 265 and the guarantee contained in Article 19(1)(g) of the Constitution of India.

170. I am further of the view, the Legislature has merely adopted a device and a cloak to confiscate the property of the tax-payer by not only withholding repayment of unlawfully gathered tax but also taking away a portion of the sale price collected from the buyer without any lawful demand or excuse. Every person has a right to contract and bargain for the price. Section 11D places unreasonable fetter to the freedom to carry on trade and commerce and violates the guarantee given by Article 19(1)(g) of the Constitution.

171. Various other points were raised in these cases. I am not dealing with them separately, but I express my respectful concurrence with the views of my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the view expressed by him and the reasoning thereof on points E, F and G of the concluding part of his judgment.

172. In conclusion, I hold that the Government is permitted to levy and retain only that much of excise duty which can be lawfully levied and collected under the Central Excise Act read with the Central Excise Tariff Act, 1985 and the Central Excise Rules and various notifications issued from time to time. Anything collected beyond this is unlawful and cannot be retained by the Government under any pretext. The illegal levy and collection of duty violate not only the Central Excise Act and the Rules but also offends Article 265 of the Constitution of India.

173. I am of the view that the provisions of Section 11B is a device for denying the claim for refund of duty to a tax-payer and must be struck down as violative of Article 265 of the Constitution. It in effect tries to perpetuate an illegal levy without altering the basis of the law under which the levy was made in any way. It is also a colourable piece of legislation and must be struck down.

174. Section 11D imposes unreasonable restriction on the right to carry trade and violates Article 19(1)(g). Excise authority cannot deny the manufacturer the freedom to commerce and trade and take away a portion of the contract price even without raising any demand or giving any hearing. The Excise Officer cannot under any circumstance give the balance to the ultimate consumer or credit the amount to the Fund. Section 11D is arbitrary and is a colourable piece of legislation and is hereby struck down.

175. Section 12C and 12D are parts of a device to withhold refunds of unlawfully gathered tax. These provisions are also violative of Article 265 of the Constitution.

176. I express my respectful agreement with the views expressed by my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the views expressed by him and the reasoning on points 'E', 'F and 'G' of the concluding part of his judgment. I also agree with my learned brother Paripoornan, J.'s holding on points 'H' and T subject to my views that in view of Article 265 of the Constitution, the Excise Department is not entitled to withhold refund of any unlawfully collected duty of excise under any circumstances. Any provision to that effect will be ultra vires Article 265 of the Constitution. Such illegally collected duties must be returned to the person from whom it has been collected.

177. In my judgment, the appeal should be allowed and the writ petitions should succeed.

178. There will be no order as to costs.

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1. It is a matter of regret that inspite of this clear enunciation as far back as 1975, Parliament took no steps, until 1991, to make a law providing that where the payer passes on the burden of the tax to another, he cannot recover the same from the State.Sri F.S. Nariman naturally stressed this inaction and made it a basis for contending that any decision over-turning Kanhaiyalal must only have prospective effect.

2. Situation would be the same where he fights upto High Court and failing therein, he keeps quiet.

3 This discussion, we may reiterate, it also relevant on the nature of the constitutional right to refund or restitution as it is called - flowing from Article 265 referred to in Paras 71 to 73.

4. 48 This defence differs from that of change of position because with the latter the issue relates to the conduct of the payee. With the defence of passing on the issue relates to the conduct of the pay.

5. 49 This specifically dealt with by F.A. 1989, Section 24(5) discussed infra, which denies the repayment of VAT if it would unjustly enrich the recipient of the payment.

6. 50 In Moses v. Macferlan (1760) 2 Burr. 1005 at p. 1020 Lord Mansfield said that the payee "may defend himself by everything which shews that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or to any part of it." This principle suggest that a defence of passing on should exist, for simple reasons of justice.

7. 51 51. In Woolwich, supra, Lord Goff deferred the issue of the existence of a passing on defence, suggesting (at p. 178) that the availability to such a defence may depend on the nature of the tax. It is submitted that the only real relevance of the nature of the tax relates to the case of determining

whether the burden of the tax really was passed on.