Commissioner Of Sales Tax, U.P vs Auriaya Chamber Of Commerce, Allahabad on 10 April, 1986

Equivalent citations: 1986 AIR 1556, 1986 SCR (2) 430, AIR 1986 SUPREME COURT 1556, 1986 TAX. L. R. 2396, 1986 20 TAX LAW REV 297, 1986 SCC (TAX) 449, 1986 ALL TAX J 515, 1986 UPTC 917, (1987) 167 ITR 458, 1986 (19) VKN 345, 1986 (18) STL 1, 1986 8 ECR 1, 1986 STI 53, (1986) 2 SCJ 314, (1986) 25 ELT 867, (1986) 62 STC 327, 1986 (3) SCC 50, (1986) 3 SUPREME 290, (1986) 2 CURCC 706

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji, K.N. Singh

PETITIONER:
COMMISSIONER OF SALES TAX, U.P.

Vs.

RESPONDENT:
AURIAYA CHAMBER OF COMMERCE, ALLAHABAD.

DATE OF JUDGMENT10/04/1986

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
SINGH, K.N. (J)

CITATION:
1986 AIR 1556 1986 SCR (2) 430
1986 SCC (3) 50 1986 SCALE (1)1068
CITATOR INFO :
RF 1990 SC 313 (23)
R 1992 SC 96 (14)

ACT:
Uttar Pradesh Sales Tax Act, 1948, s. 2(h), 7-F and 29 Sales Tax - Refund of - Tax paid under provision of law subsequently held unconstitutional - Liability of State to refund tax - Limitation period for claiming such refund.
Indian Contract Act 1872, s. 72 - Money paid under mistake of law - Liability to return/refund.

HEADNOTE:

The proviso to s. 29 of the U.P. Sales Tax Act 1948 provides that no claim to the refund of any tax or other amount paid under the Act shall be allowed unless it was made within 24 months from the date on which the order for assessment was passed or within 12 months of the final order passed in appeal, revision or reference in respect of the order of assessment whichever Period is later.

The respondent-assessee had been taxed on the basis of sale of forward contracts for the assessment year 1949-50 and for subsequent years. After coming to know of the decision of the Supreme Court in Sales Tar officer, Pilibhit v. M/s. Budh Prakash Jai Prakash, [1955] 1 S.C.R. 243 that the provision for taxation of sales tax on forward contract was ultra vires, the respondent-assessee filed a Revision in 1955 for quashing the assessment order for the relevant year 1955 i.e. within a year of the assessment order. me revision was dismissed in September 1958 on the ground that it had been filed after a long delay and was barred by limitation. m e assessee there after made a formal application before the Sales Tax Officer for refund of the amounts which were deposited in accordance with various assessment orders under mistake. The Sales Tax Officer dismissed that application as barred by period of limitation prescribed under Article 96 of the First Schedule of the Indian Limitation Act 1908. The assessee then filed a revision to the court of Additional Judge (Revision) Sales Tax, U.P. against the order of the Sales Tax Officer. Relying

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upon the decision of the Allahabad High Court in Sales Tax Commissioner, U.P. v. Sada Sukh Veopar Mandal, 1959 S.T.C. 57, the Additional Judge (Revision) held that there was no period of limitation and ordered refund of sales tax of Rs.3535.3 for 1948-49, Rs.9,205.12 for 1949-50, Rs.3,653.8 for 1950-51 and Rs.5,014.3.3 for 1951-52. me High Court also upheld the order of the Additional Judge (Revision) in a reference at the instance of the revenue. It held: (a) that the period of limitation under Article 96 of the Limitation Act could not be taken into consideration by the Sales Tax Authorities in refusing to allow refund; and (b) that the Additional Judge (Revisions) Sales Tax, U.P. was legally justified in entertaining the revision application after the lapse of several years from the date of the assessment order and that the sums deposited by respondent-company towards sales tax for the year 1949-50 and onwards were refundable to the company.

Dismissing the appeal of the appellant-revenue, this Court,

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HELD: 1.(i) Article 265 of the Constitution enjoins that no tax shall be levied or collected except by authority of law. Therefore, when moneys are paid to the State which the State has no legal right to receive, it is ordinarily

the duty of the State subject to any special provisions of any particular statute or special facts and circumstances of the case, to refund the tax of the amount paid. [437 D-H]

1.(ii) Where indubitably there is in the dealer legal title to get the money refunded and where the dealer is not guilty of any latches and where there is no specific prohibition against refund, one should not get entangled in the cobweb of procedures but do substantial justice. [445 F-G]

Suresh Chandra Bose v. State of West Bengal, 38 S.T.C. 99 and State of West Bengal and Ors. v. Suresh Chandra Bose, 45 S.T.C. 118, approved.

2.(i) The rights and the obligations of the parties must be found within the four corners of the Act and the Supreme Court in an appeal under an Act must act under the four corners of law, but in interpreting the relevant procedural provisions, fairness and justice should be the approach and

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even in a fiscal statute, equity should prevail wherever language permits. [438 H; 493 A]

2.(ii) Section 7-F of the Act is significant in the sense that it proceeds on the basis that refund had to be made in certain cases. The section enjoins that notwithstanding anything contained in the Act, no tax, fee, interest or penalty under the Act shall be recovered and no refund shall be allowed if the amount involved for any assessment year was less than five rupees. It recognises liability and the obligation of refund if the amount is more than rupees five. Sub-section (5) of section 9 stipulates that if the amount of tax assessed, fee levied or penalty imposed was reduced by the appellate authority under sub-section (3), he shall order the excess amount of tax, fee or penalty, if realised to be refunded. Section 29 stipulates that the assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under the Act. Sub-section (3) of section 29 provides certain embargo against refund in certain cases. Therefore, it is apparent that the obligation to refund in cases of excess realisation or excess payment by the Taxing Authority of the dues from the seller as well as from the assessee is recognised in the scheme of the Act. [439 G-H; 440 A-B; E-F]

3.(i) Section 72 of the Indian Contract Act, 1872 recognises that a person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it. Money paid under a mistake of law comes within 'mistake' in section 72 of the Indian Contract Act, and there is no question of estoppel when the mistake of law is common to both the assessee and the taxing authority. [440 G; 443 D]

3.(ii) If law of limitation is applicable then section 5 of the Limitation Act is also applicable and it is

apparent that the application originally was made within time before two years as contained in the proviso. Article 96 of the First Schedule of the Limitation Act, 1908 prescribes a period of limitation of three years from the date when the mistake becomes known for filing a suit. If that principle is also kept in mind, the assessee had made the application in 1955, and it was not beyond time, since the judgment came to be known in May. 1954. [445 D-F]
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In the instant case, the mistake indubitably was there. There was no dispute that the tax was not due and had been collected wrongly. There is no dispute that the assessee is entitled to the same. There is no dispute that the assesee made application within a year of the knowledge of the mistake. There is no dispute therefore that had a suit been filed under Article 96 of the Limitation Act, 1908 or an application made under section 29 of the Act, the claim would have been allowed but the revision was dismissed on the ground that it was belated. The revision of The assessment order was wrong but the consequential relief of refund could have been granted. The order of the Additional Judge (Revision) was correct and the assessee was entitled to refund. [443 G-H; 444 A-B]

Gannon Dunkerley and Co.'s case, 9 S.T.C. 353 and The State of Kerala v. Aluminium Industries Ltd., 16 S.T.C. 689, relied upon.

Sales Tax Commissioner, U.P. v. Sada Sukh Veopar Mandal, 1959 S.T.C. 57; Raja Jagdamba Pratap Narain Singh v. Central Board of Direct Taxes and Ors.., 100 I.T.R. 698; Hindustan Sugar Mills Etc. v. State of Rajasthan & ors., [1979] 1 S.C.R.276 at 297; Commissioner, Sales Tax, Lucknow v. Auraiya Chambers of Commerce, 30 S.T.C. 41; The State of Madhya Pradesh (Now Maharashtra) v. Haji Hasan Dada, 17 S.T.C. 343; Commissioner of Income Tax, West Punjab v. Tribune Trust, Lahore, 16 I.T.R. 214; K.S. Venkatara and Co. (P) Ltd. v. The State of Madras, 17 S.T.C. 418; Gannon Dunkerley & Co. v. The State of Madras, 5 S.T.C. 216; Raleigh Investment Co. Ltd. v. Governor-General in Council, 74 I.A. 50 = 15 I.T.R. 332; The Sales Tax Officer, Banaras & ors. v. Kanhaiya Lal and Lal Saraf & ors., 9 S.T.C. 747 and Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, Dhamangaon, 59 I.T.R. 73, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 874- 876 of 1974.

From the Judgment and Order dated 19.1.1973 of the Allahabad High Court in Sales Tax Reference No. 763, 764 and 765 of 1970.

R.A. Gupta for the Appellant.

A.K. Verma and D.N. Mishra for the Respondent. The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. These appeals by special leave arise from the decision of the High Court of Allahabad. Under Section 11(3) of the U.P. Sales Tax Act, 1948 as amended from time to time the following questions were referred to the High Court for opinion at the instance of the Commissioner of Sales Tax and statement of the case was submitted.

> "1. Whether, the observations (subject, however, to the question of estoppel, waiver, limitation or the like) made by their Lordships of the Hon'ble Supreme Court in the case of Sales Tax Officer, Banaras v. Kanhaiya Lal Mukundlal Saraf, (1958 STC p. 747), imply that the provisions of the Indian Limitation Act are applicable to cases under the U.P. Sales Tax Act and whether these observations are inconsistent with the view taken by the Hon'ble High Court in the case of Sales Tax Commissioner, U.P. v. Sadasukh Veopar Mandal, (1959 STC p. 57) ?
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> 2. Whether, in these cases in which refund was claimed on the principle of section 72 of the Indian Contract Act the period of limitation under Article 96 of the Limitation Act could be taken into consideration by the Sales Tax authorities in refusing to allow refund?
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> 3. Whether under the circumstances of this case as stated above, the Addl. Judge (Revisions) Sales Tax was legally justified in holding that the sums deposited by the Company towards sales tax for the year 1949-50, was refundable to the company?
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> 4. Whether, the Addl. Judge (Revisions) Sales Tax was legally justified in entertaining the revision application in question of the aforesaid Company - after the lapse of several years from the date of the assessment order particularly when the appeal and the revision application of the Company in respect of the assessment year were dismissed?
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> The questions relate to the assessment year 1949-50 and for subsequent years. In view of the decision of the Allahabad High Court in Commissioner of Sales Tax, U.P. Lucknow v. Aurlsya Chamber of Commerce which was in respect of the assessment year 1948-49 reported in 30 STC page 41, the High Court was of the opinion that question No. 1 aforesaid need not be answered, question No.2 aforesaid should be answered in the negative, question No.3 aforesaid in the affirmative and question No.4 aforesaid in the affirmative.
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> The main question involved is the question of refund of sales tax paid in respect of forward contract.
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> In The Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash, [1955] 1 S.C.R. 243 = 5 S.T.C. 193 this Court held on 3rd May, 1954 that section 2(h) of the Uttar

Pradesh Sales Tax Act, XV of 1948, enlarging the definition of "sale" so as to include forward contracts must, to that extent, be declared ultra vires. A bench of five learned judges of this Court held that there was a well-defined and well-established distinction between a sale and an agreement to sell. m e words 'Taxes on the sale of goods' in entry No. 48, List II, Schedule VII of the Government of India Act, 1935, conferred power on the Provincial Legislature to impose a tax only when there had been a completed sale and not when there was only an agreement to sell. For the same reason explanation III to section 2(h) of the said Act which provided that forward contract 'shall be deemed to have been completed on the date originally agreed upon for delivery' and section 3B of the Act also must be held to be ultra vires.

As a consequence, the assessee in this case filed a revision in 1955 for quashing the order for this year. It may be mentioned that the assessee had been taxed on the basis of sale of such forward contracts. The revision was dismissed in September, 1958 on the ground that it had been filed after a long delay and was barred by limitation.

The assessee subsequently filed an application before the Sales-tax Officer for refund of the amount which was deposited in accordance with the assessment order for the year and the subsequent years under mistake. This claim of refund was again made on 24th May, 1959. The Sales-tax Officer dismissed that application as barred by period of limitation prescribed under Article 96 of the First Schedule of the Indian Limitation Act, 1908. m e assessee thereafter filed revision to the Court of Additional Judge (Revision) Sales Tax U.P. against the order of the Sales-tax Officer rejecting the claim for refund.

The Court of Additional Judge (Revision) Sales Tax U.P. directed refund of sales-tax of Rs.3,535.3 for 1948-49, Rs.9,205.12 for 1949-50, Rs.3,653.8 for 1950-51 and Rs. 5,014.3.3 for 1951-52. It may be mentioned that prior to 1st April, 1959, there was no section dealing with any period of limitation for refund. Section 29 was added by U.P. Sales Tax (Amendment) Act VII of 1959 and came into force with effect from 1st April, 1959. The first proviso to section 29 is as follows :-

"Provided that no claim to the refund of any tax or other amount paid under this Act shall be allowed unless it was made within 24 months from the date on which the order for assessment was passed or within 12 months of the final order passed in appeal, revision or reference in respect of the order of assessment whichever period is later."

It appears that the claim for refund in the instant case was made after 1st April, 1959. At the time when the taxes were paid and the assessment was made, there was no limitation. m e Additional Judge (Revision) Sales Tax U.P. held that there was no period of limitation and ordered refund as mentioned hereinbefore. The said Additional Judge placed reliance upon the decision of the Allahabad High Court in Sales Tax Commissioner U.P. v. Sada Sukh Veopar 1959 S.T.C. 57 The said officer at the instance of the revenue referred the four questions indicated above for the opinion of

the High Court under section 11(3) of the Act.

The main question therefore is : are these diverse amounts refundable to the assessee?

It is undisputed that the tax was collected from the assessee and the assessee paid the tax on the belief that tax was due and payable. It was subsequently found that the provision for taxation of sales-tax on forward contract was ultra vires. Therefore the levy and collection of sales tax on forward contracts was ultra vires. In other words, the State had no right to that money. The assessee was not liable to pay that money. This position in law came to the knowledge of the parties only on this Court's decision being rendered on 3rd May, 1954. The assessee filed a revision as appears from the statement of case for quashing the assessment for the relevant year in 1955 i.e. within a year which was dismissed in 1958 on the ground that it had been filed after a long delay and was barred by limitation. The assessee thereafter made a formal application for refund on 24th May, 1959. That was dismissed on the ground of claim being barred by limitation on the principles of article 96 of First Schedule of Indian Limitation Act, 1908.

Article 265 of the Constitution enjoins that on tax shall be levied or collected except by authority of law. Tax in this case indubitably has been collected and levied without the authority of law. It is therefore refundable to the assessee. The question is : is there any machinery for refund of that tax to the assessee and if so, is there any limitation for refund of the tax collected without the authority of law? If State collects because of its powers moneys not due to it, can it be directed to refund? If so, then is there any period of limitation?

Though not in this context but in a different context, the question whether tax collected by the State without authority of law can be directed to be refunded without any period of limitation was considered in a writ application by the Calcutta High Court in Suresh Chandra Bose v. The State of West Bengal, 38 S.T.C. 99. This decision of the single judge of the Calcutta High Court was approved by the Division Bench of that High Court in State of West Bengal & Ors. v. Suresh Chandra Bose, 45 S.T.C. 118. me court under Article 226 of the Constitution directed refund in that case. The court emphasised that when moneys are paid to the State which the State has no legal right to receive, it is ordinarily the duty of the State subject to any special provisions of any particular statute or special facts and circumstances of the case, to refund the tax of the amount paid.

This Court in Raja Jagdambika Pratap Narain Singh v. Central Board of Direct Taxes & ors., 100 I.T.R. 698 had to consider from the point of view of the Income-tax Act this aspect. This court was dealing with the question of limitation in granting relief in the background of Article 226 of the Constitution of India. But this Court observed that any legal system, especially one evolving in a developing country, might Permit judges to play a creative role and innovate to ensure justice without doing violence to the norms set by legislation. But to invoke judicial activism to set at nought legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

Here in the instance case we have to find out within the four corners of the provisions of U.P. Sales Tax Act, 1948 whether there is any prohibition prohibiting the assessee from getting the refund as

claimed for. If the original claim of 1955 is accepted as sum claimed for refund, then it cannot be Disputed that there was denial of a rightful claim.

We might in this case bear in mind certain observations, though we are conscious that the same were rendered in a different context, of this Court in Hindustran Sugar Mills Etc. v. State of Rajasthan & Ors., [1979] 1 S.C.R. 276 at 297 Where directing payment of certain sales tax collected from the assessee, this Court observed that though there was no legal liability on the Central Government but as we are living in a democratic society governed by the rule of law and every Government which claims to be inspired by ethical and moral values must do what is fair and just to the citizen, regardless of legal technicalities, this Court hoped and trusted that the Central Government would not seek to defeat the legitimate claim of the assessee for reimbursement of sales tax in that case on the amount of freight by adopting a legalistic attitude but would do what fairness and justice demanded.

It is true that this is an appeal from a reference under section 11(3) of the U.P. Sales Tax Act, 1948. The rights and the obligations of the parties must be found within the four corners of the Act and this Court in an appeal under an Act must act under the four corners of law but in interpreting the Relevant procedural provisions, fairness and justice should be the approach and even in fiscal statutes equity should prevail A wherever language permits. With this background, let us examine the actual provisions of the Act.

As mentioned in the order of the High Court, the order under appeal was passed by the High Court relying on the order of the Special Bench of that High Court for the assessment year 1948-49 in Commissioner, Sales Tax, Lucknow v. Auriaya Chamber of Commerce, 30 S.T.C. 41. On a difference of opinion between the two learned judges, the matter was disposed of by the opinion of third learned judge. m e year involved was the assessment year 1948-49. Four identical questions were referred to the High Court. Pathak, J. (as his Lordship then was of the Allahabad High Court) expressed the view that the first question had been framed in the abstract without relevance to the facts of the present case and therefore need not be answered. With this view the other learned judge, Gulati J. agreed. We are also of the same opinion. The facts before the High Court were identical with the facts of the present case.

In order to appreciate the contentions raised in this case, it is necessary to bear in mind the relevant provisions of the U.P. Sales Tax Act, 1948 (hereinafter called the 'Act'). Section 3 of the Act enjoins that subject to the provisions of the Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or under section 3-A or section 3-D on his turnover of sales or purchases or both as may be which shall be determined in such manner as may be prescribed. It is not necessary for the present purpose to deal in detail with the said provisions.

Various sections of the Act deal with the various stages of taxation. It is not necessary to deal with these in detail.

Section 7-F deals with recovery or refund of petty amounts to be ignored. The section is significant in the sense that it proceeds on the basis that refund had to be made in G certain cases. The section

enjoins that notwithstanding anything contained in the Act, no tax, fee, interest or penalty under the Act shall be recovered and no refund shall be allowed if the amount involved for any assessment year was less than five rupees. It recognises liability and the obligation of refund if the amount is more than rupees five. Section 8 deals with payment and recovery of tax. Section 8- A deals with registration of dealers and realisation of tax by dealers. The other sections are not very material except that section 9 deals with appeal and sub-section (5) of section 9 stipulates that if the amount of tax assessed, fee levied or penalty imposed was reduced by the appellate authority under sub-section (3), he shall order the excess amount of tax, fee or penalty, if realised, to be refunded. Section 10 is not material for our present purpose. Section 11 deals with revision by the High Court in special cases, and section 11(8) enjoins that the High Court shall, after hearing the parties to the revision, decide the questions of law involved therein, and where as a result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the Tribunal for fresh determination of the amount and the Tribunal shall thereupon pass such orders as are necessary to dispose of the case inconfirmity with the said decision.

Section 5 of the Limitation Act has been made applicable. The other material section for our present purpose is section 29 which was added in the Act on 1st April, 1959 provided for refund. Section 29 stipulates that the assessing authority shall, in the manner prescribed, refund to dealer any amount of tax, fees or other dues paid in excess of the amount due from him under the Act. Then there is provision for payment of interest if there is delay in refund with which we are not concerned. Sub-section (3) of section 29 provides certain embargo against refund in certain cases. In the instant case, we are not concerned with the same. Therefore, it is apparent that the obligation to refund in case of excess realisation or excess payment by the taxing authority of the dues from the seller as well as from the assessee is recognised in the scheme of the Act.

Section 72 of the Indian Contract Act, 1872 recognises that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. In this case it is not disputed that mistake of law is also a mistake covered by the provisions of section 72 of the Indian Contract Act. If the law declared by this court in Budh Prakash Jai Prakash's case (supra) is correct, as it must be, then the payment of tax by the dealer, the respondent herein, was under a mistake of law and realisation by the revenue authorities was also under a mistake. Therefore such sum should be refunded. This is recognised in the provisions of the Act as we have noted before. The principle of section 72 of the Indian Contract Act has been recognised.

This was the view expressed by Pathak, J. on this aspect. We are in respectful agreement. But the learned judge was unable to find in the provisions of the Act any authority for directing the refund without a suit. The question therefore arises whether in a case where assessment order determining the liability was void, but the same was not set aside, can the sales tax authorities grant refund of the tax assessed thereunder? The learned judge posed this question and answered it by saying that if the assessment could be said to have been under the Act, no such power could be exercised by the sales tax authorities. The learned Judge relied on the observations of this Court in The State of Madhya Pradesh (now Maharashtra) v. Haji Hasan Dada, 17 S.T.C. 343. There this Court was dealing with section 13 of the C.P. and Berar Sales Tax Act, 1947 (prior to its amendment by Act 20 of 1953) and the Court said that the refund might be granted only of the amount which was not lawfully due, and

whether a certain amount was lawfully due or not must be determined by the officer in making the order of assessment or re-assessment. Until the order of assessment was set aside by appropriate proceedings under the Act full effect must be given to the order even if it be later found that the order was erroneous in law. It was held by a bench of three learned judges that an application for refund of sales tax paid under an order of assessment made by the Assistant Commissioner of Sales Tax could not be entertained by that officer on the plea that the order was made on an erroneous view of the law unless the order was set aside in appropriate proceedings. There the assessee had paid that amount of tax assessed on him by the Assistant Commissioner of Sales Tax on his turnover from his business in yarn for the period 13th November, 1947, to 1st November, 1948, and then applied to that officer under section 13 for an order refunding an amount on the plea that in the turnover were included dyeing charges which were not taxable. It was held that the application was not maintainable under section 13 (as originally passed). There this Court after referring to the Judicial Committee's decision in Commissioner of Income- tax, West Punjab v. Tribune Trust, Lahore, 16 I.T.R. 214 held that such an order by the taxing authority was not possible but it has to be borne in mind that in this case the imposition of the tax was really without authority of law as contemplated under Article 265 of the Constitution. Therefore from the beginning the realisation was illegal and a right of refund was embedded in the fact of payment.

In K.S. Venkataraman and Co. (P) Ltd. v. The State of Madras, 17 S.T.C. 418 this Court had occasion to deal with the problem similar to this. The appellant company there was carrying on the business of building contractors and was assessed to sales tax under the Madras General Sales Tax Act, 1939, during the years 1948-49 to 1952-53 on the basis that the contracts executed by them were works contracts. On 5th April, 1954, the Madras High Court held in Gannon Dunkerley & Co. v. The State of Madras, 5 S.T.C. 216 that the relevant provisions of the Act empowering the State of Madras to assess indivisible building contracts to sales tax were ultra vires the powers of the State Legislature. The appellant issued a notice to the State of Madras under

> section 80 of the Code of Civil Procedure claiming refund of the amounts collected from them, and, as the demand was not complied with, filed a suit in the City Civil Court on 23rd March, 1955, for recovery of the amount of taxes illegally levied and collected from them. The relevant provisions of the Act empowering the Sales Tax Authorities to impose sales tax on indivisible building contracts were unconstitutional and void and the Sales Tax Authorities had not jurisdiction to assess the appellant in respect of the transactions and the appellant having paid the amounts under a mistake of law was entitled to a refund of the same. Following the decision of the Privy Council in Raleigh Investment Co. Ltd. v. Governor-General in Council, 74 I.A. 50 = 15 I.T.R. 332 the City Civil Court held inter alia that the suit was not maintainable under section 18-A of the Act, and the Madras High Court upheld that decision. On appeal this Court by a majority held that on the facts, that the assessments were made on the appellant in respect of indivisible works contracts, and that this Court in Gannon Dunkerley and Co.'s case 9 S.T.C. 353 had held that the provisions of the Act in so far as they enabled the imposition of tax on the turnover of indivisible building contract were ultra vires the powers of the State Legislature, and, therefore, void, the Sales Tax Authorities had acted outside the Act

and not under it in making the assessment on the appellant on the basis of the relevant part of the charging section which was declared ultra vires by this Court and therefore it was held that section 18-A of the Act was not a bar to the maintainability of the suit. Shah and Ramaswami, JJ., however, took a different view. But if the realisation of the tax and the collection of tax on forward contract was an act beyond the authority and ultra vires then money retained by the taxing authority should be refunded to the citizen concerned. There is no express prohibition against that refund.

In The State of Kerala v. Aluminium Industries Ltd., 16 S.T.C. 689 this Court reiterated that money paid under a mistake of law comes within 'mistake' in section 72 of the Indian Contract Act, and there was no question of estoppel when the mistake of law was common to both the assessee and the taxing authority. Where the assessee did not raise the question that the relevant sales were outside the taxing State and were therefore exempt under Article 286(1)(a) of the Constitution (as it then was), the Sales Tax Officer had no occasion to consider it, and sales tax was levied by mistake of law, it was ordinarily the duty of the State, subject to any provision of law relating to sales tax, to refund the tax. If the refund was not made, remedy through court was open, subject to the same restriction and also to the bar of limitation under Article 96 of the Limitation Act, 1908. But this Court reiterated that it is the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if the mistake was proved and the claim was made within the period of limitation. In the instant case before us as we have noted mistake indubitably was there. There was no dispute that the tax was not due and had been collected wrongly. There is no dispute that the assessee is entitled to the same. There is no dispute that the assessee made an application within a year of the knowledge of the mistake. There is no dispute therefore that had a suit been filed under Article 96 of the Limitation Act, 1908 or an application made under section 29 of the Act, the claim would have been allowed but the revision was dismissed on the ground that it was belated. The revision of the assesment order was wrong but the consequential relief of refund could have been granted. In that view of the matter we should construe the provisions in such manner as there is no contra indication which will ensure justice to the party and not denied to it and hold that the order of the Additional Judge (Revision) was correct and the assessee was entitled to refund.

In The Sales Tax Officer, Banaras, & Ors. v. Kanhaiya Lal Mukund Lal Saraf & Ors., 9 S.T.C. 747 the contention was raised on behalf of the Sales Tax Authorities to urge that the procedure laid down in U.P. Sales Tax Act by way of appeal and revision against the assessment order in question ought to have been followed by a dealer and not having done so, the dealer was debarred in Civil Court from obtaining refund of tax paid by it. This Court overruled that contention by reason of the categorical statement made by the Advocate-General before the High Court. This Court clearly laid down that when an amount has been recovered as tax by an authority in exercise of the constitutionally permissible amount, a suit of such amount would lie

notwithstanding the provisions in the statute barring a suit in respect of the order made. This decision was rendered in Bharat Kala Bhandar (Private) Ltd. v. Municipal Committee, Dhamangaon., 59 I.T.R. 73.

As we read this order in the instant case, when the assessee or dealer made an application for revision, the Additional Judge (Revision) could direct refund because money was being illegally retained by the revenue. If mistake either of law or of fact is established, the assessee is entitled to recover the money and the party receiving these is bound to return the same irrespective of any other consideration. In this case there is no delay in making the application for claiming the refund as set out hereinbefore. It is apparent that the assessment order and the realisation of the money was based on the ultra vires provisions of the Act. This should have been and ought to have been ignored. On that basis the present application was made.

It is true that except special provisions indicated before, there is no specific provision which prescribes a procedure for applying for refund in such a case. But the rules or procedures are hand-maids of justice not its mistress. It is apparent in the scheme of the Act that sales tax is leviable only on valid transaction. If excess amount is realised, refund is also contemplated by the scheme of the Act In this case undoubtedly sales tax on forward contracts have been illegally recovered on a mistaken view of law. The same is lying with the Government. The assessee or the dealer has claimed refund in the revision. In certain circumstances refund specifically has been mentioned. There is no prohibition against refund except the prohibition of two years under the proviso of section 29. In this case that two years prohibition is not applicable because the law was declared by this Court in Budh Prakash Jai Prakash's case on 3rd May, 1954 and the revision was filed in 1955 and it was dismissed in 1958 on the ground that it had been filed after a long delay. Thereafter the assessee had filed an application before the Sales Tax Officer for refund. The refund was claimed for the first time on 24th May, 1959. The Sales Tax Officer had dismissed the application as barred by limitation under Article 96 of the First Schedule of the Indian Limitation Act, 1908.

The assessee filed revision before the court of Additional Judge (Revisions) rejecting the claim for refund. If law of limitation is applicable then section 5 of the Limitation Act is also applicable and it is apparent that the application originally was made within time before two years as contained in the provisio. Article 96 of the First Schedule of the Limitation Act, 1908 prescribes a period of limitation of three years from the date when the mistake becomes known for filing a suit. If that principle is also kept in mind, then when the judgment came to be known in May, 1954, then in our opinion, when the assessee had made an application in 1955, it was not beyond the time.

Where indubitably there is in the dealer legal title to get the money refunded and where the dealer is not guilty of any latches and where there is no specific prohibition

against refund, one should not get entangled in the cobweb of procedures but do substantial justice. The above requirements in this Case, in our opinion, have been satisfied and therefore we affirm the direction of the Additional Judge (Revisions), Sales Tax for refund of the amount to the dealer and affirm the High Court's judgment on this basis.

In the view we have taken, we are of the opinion that question No. 1 need not be answered. So far as question no. 2 is concerend, we are of the opinion that in the view we have taken on question No. 3, this question also need not be specifically answered. We are in agreement with the majority view of the learned judges that question No. 3 should be answered in the affirmative and that really disposes of the controversy between the parties. So far as question No. 4 is concerned, in the way we read the facts of this case, we are of the opinion that there has not been any lapse of several years from the date of the assessment order and we are further of the opinion that in the facts of this case, the Additional Judge (Revision), Sales Tax was justified in entertaining the application in question. The question is answered accordingly.

The appeals accordingly fail and are dismissed with costs.

M.L.A. Appeals dismissed.