1992 (61) ELT 447

GUJARAT HIGH COURT

Hon'ble Judges:M.B.Shah and M.S.Parikh JJ.

Wigman Electrical Engineering Private Limited Versus Union Of India

Special Civil Application No. 3509 of 1983 ; *J.Date :- MARCH 13, 1991

- CONSTITUTION OF INDIA Article - 265 , 14 , 226
- CENTRAL EXCISE ACT, 1944 Section - 11B , 11B(1)
- LIMITATION ACT, 1963 Section - 113

CONSTITUTION OF INDIA - ART.265 - ART.14 - ART.226 - TAXES NOT TO BE IMPOSED SAVE BY AUTHORITY OF LAW - EQUALITY BEFORE LAW - POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS - CENTRAL EXCISE ACT, 1944 - S.11B - S.11B(1) - CLAIM FOR REFUND OF DUTY - LIMITATION ACT, 1963 - S.113.

KeyWords: **Mandamus - Precedent - Alternative remedy - arising out of - civil suit - Claim for refund - cut-off date - equitable grounds - Mistake of law - Period of limitation - refund claim - Refund of duty - refund of excise duty - relevant date - Suit for refund - Ultra vires - under protest - Unjust enrichment - unreasonable delay - Writ of mandamus -**

Cases Referred To :

1. BOOTA MAL V. U.O.I.-AIR 1962 SC 171
2. Bata Shoe Co. V. Jabalpur Municipality, AIR 1977 SC 955
3. Bengal Immunity Co. Ltd. V. State Of Bihar, AIR 1955 SC 661
4. Dhulabhai V. State Of M.P., AIR 1969 SC 78
5. Dindayal V. Rajaram, AIR 1970 SC 1019
6. Firm Of Illuri Subbayya Chetty & Sons V. State Of A.P., AIR 1964 SC 322
7. Firm Seth Radha Kishan V. Administrator, Municipal Committee, AIR 1963 SC 1547
8. General Accident Fire & Life Assurance Corporation Ltd. V. Janmahomed-1, AIR 1941 PC 6
9. I Salonah Tea Co. Ltd. V. Superintendent Of Taxes, 1988 33 ELT 249
10. Jagdambika Pratap Narain Singh V. Central Board Of Direct Taxes, AIR 1975 SC 1816
11. Kamla Mills V.Bombay State, AIR 1965 SC 1942
12. Magbul Ahmed V. Pratap Narain, ILR 57 ALL 242
13. Mahabir Kishore V. State Of M.P., 1989 43 ELT 205
14. Mcdowell & Co. V. Commercial Tax Officer, AIR 1977 SC 1459
15. Nagendranath V. Suresh Chandra, Ilr60 Cal1, AIR 1932 PC 165
16. P.D. Jambhekar V. State Of Gujarat, AIR 1973 SC 309
17. R.C. Jall V. Union Of India, 1962 SUPP3 SCR 436
18. Rajendra Singh V. Sante Singh, AIR 1973 SC 2537
19. Sales Tax Commissioner, U.P. V. Auriaya Chamber Of Commerce, AIR 1986 SC 1556
20. Sales Tax Officer V. Kanahaiya Lal Mukundlal Saraf, AIR 1959 SC 135
21. State Of M.P. V. Nandlal Jaiswal, AIR 1987 SC 251

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22. State Trading Corporation Of India Ltd. V. State Of Mysore, AIR 1963 SC 548
23. Titaghur Paper Mills Co. Ltd. V. State Of Orissa, AIR 1983 SC 603
24. Ujjam Bai V. State Of U.P., AIR 1962 SC 1621

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1992 (61) ELT 447 : 1991 GLHEL_HC 225390

JUDGMENT :-

M.B.Shah, J.

1 In these petitions the vires of sub-sections (4) & (5) of Section 11B of the Central Excises and Salt Act, 1944 is challenged on the ground that it is ultra vires Articles 14 and 265 of the Constitution of India.

2 Section 11B reads as under :-

> "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 purposes of this section, - (A) *** *** *** (B) "relevant date means, - (a) *** *** **** (b) *** *** **** (c) *** *** **** (d) *** *** **** (e) *** *** **** (f) in any other case, the date of payment of duty."

3 At the time of hearing of these petitions the learned advocates for the petitioners submitted as under :-

> (1) Sub-sections (4) & (5) of Section 11B are ultra vires Article 14 of the Constitution of India because, (i) unreasonably shorter period is prescribed for filing an application; (ii) there is no provision for condoning delay in filing an application for refund even on genuine and most reasonable grounds; (iii) the "relevant date" is defined arbitrarily without there being any reference to the date of knowledge on the part of the petitioners that they were not required to pay the duty of excise and were entitled to refund of the said amount; (iv) it discriminates between the person who pays the duty under protest and a person who does not pay the duty under protest without any rhyme or reason. The person who pays the duty under protest is entitled to get refund even after lapse of number of years and is fully protected while an ignorant person, may he be a small businessman, is placed in a disadvantageous

position because he does not pay the duty of excise under protest. Therefore, classification on the basis of the person making the payment of the duty of excise under protest and the person making payment of the duty of excise without any protest is unreasonable and discriminatory. (2) Sub-sections (4) & (5) of Section 11B are ultra vires Article 265 as, (i) Sub-section (5) takes away the right to file civil suit for refund of any amount collected as duty of excise on the ground that the goods in respect of which such amount was collected were not excisable or were exempt from duty of excise. (ii) unauthorised and illegal collection of duty of excise is sought to be retained by the respondents under the said provision.

4 It was pointed out by the learned advocates that under the Central Excise Act duty of excise can be recovered only on the goods which are excisable. Section 3 of the Act empowers the Government to levy and collect in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. "Excisable goods" means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. It was further pointed out that if the goods are manufactured as defined under Section 2(f) of the Act, then and then only duty of excise could be recovered. It was, therefore contended that if the respondents have recovered duty of excise on the goods which are not excisable or which are not manufactured or which are exempted by notification under Section 5A, no duty of excise could be recovered and if any duty of excise is recovered illegally, the respondents are bound to refund it. The learned advocates have further submitted that article 265 of the Constitution provides that no tax shall be levied or collected except by authority or law. As the Central Excise Act does not empower the levy of duty on certain goods, the levy and collection by the respondents is in violation of Article 265 and, therefore, the petitioners are entitled to get refund. However, Section 11B sub-section (5) provides that claim for refund of any amount collected as duty of excise, made on the ground that goods in respect of which such amount was collected were not excisable or, were entitled to exemption from duty, was required to be filed within six months from the relevant date. The result is that if the application is not filed within six months, the respondents would retain unauthorised and illegal collection of duty of excise. It was also pointed out that Central Excise Act nowhere provides that duty of excise is required to be paid by buyers or consumers of the goods. Therefore, if the duty of excise is recovered on the goods which are not excisable or were entitled to exemption from duty, the respondents are required to refund it if suit is filed within the period of three years as provided under Article 113 of the Limitation Act, 1963 , as it would be a mistake of law and facts in its payment on the part of the petitioners.

5 As against this, the learned advocates for the respondents have pointed out that even though it is the primary duty of the manufacturer or producer to pay duty of excise, it is settled law that duty of excise ultimately is borne by the consumer of goods as it is paid by the manufacturer or producer. Merely because right to file civil suit is taken away, it would not mean that sub-section (5) is ultra vires Article 14, nor it could be said that period of six months prescribed under Section 11B(1) is in any way a short period. By grant of refund of excise duty there would be unjust enrichment on the part of the petitioners and, therefore also it cannot be said that period of six months for filing an application is unreasonably short. The Central Excise Act is a complete code. It provides exhaustive remedy to the person aggrieved of filing application, appeal, revision or appeal to the Supreme Court. Therefore, it cannot be

said that as a remedy of filing civil suit is taken away, sub-section (5) is in any way illegal or ultra vires Article 265 of the Constitution.

6 It is true that primary responsibility of paying duty of excise is that of the producer or manufacturer or of a person who removes the excisable goods. It is not that the consumers are required to pay excise duty to the authority. Rule 7 of the Central Excise Rules provides that every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods. Rule 9 specifically provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured, 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 the Rules. Under Rule 225 if any excisable goods are removed in contravention of any conditions prescribed in the Rules, the producer or manufacturer or the licensee or keeper of the warehouse shall be held responsible for such removal as if he had removed the goods himself. Therefore, it is apparent that the primary liability to pay excise duty is that of the producer or manufacturer. However, it is the settled position of law that even though excise duty is primarily a duty on production or manufacture of goods, it is an indirect tax which the manufacturer or producer passes on to the ultimate consumer. Ultimate incidence of excise duty is always borne by the customer. This does not require much consideration as it is established by various decisions. 6A. In McDowell & Co. . Commercial Tax Officer , AIR 1977 SC 1459, the Supreme Court has dealt with this aspect and has held as under :-

> "5. Although some controversy was sought to be raised by counsel for the appellants regarding the nature and character of the excise duty and countervailing duty but as rightly pointed out by the learned Attorney General, the matter has been put beyond doubt by the decisions of this Court. In R.C. Jail v . Union of India , (1962) Supp. 3 SCR 436, after a review of the authorities bearing on the matter, it was held by this Court as follows : The excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost 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.
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> 6B. Again in In re : Sea Customs Act , (1964) 3 SCR 787, it was observed : The question with respect to excise duties was considered by this Court in the case of Amalgamated Coalfields Ltd. v . Union of India , AIR 1962 SC 1281. After considering the previous decisions of the Federal Court In re: The Central Provinces and Berar Sales of Motor Spirit and Lubricant Taxation Act 1939 FCR 18 , Province of Madras v . M/s. Bodu Paidanna -1942 FCR 90 and of the Judicial Committee of the Privy Council in Governor General inCouncil . Province of Madras -1945 FCR 179, this Court observed as follows at p. 1287 :-
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> "With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the customer. Therefore, subject always to the legislative competence of the

taxing authority, 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."

This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event, is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.

It is, therefore, clear that excise duty is a duty on the production or manufacture of goods produced or manufactured within the country though, as observed by one of us (Khanna, J.) in A.B. Abdul Kadir v . State of Kerala , (1976) 3 SCC 219, laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production.

7 Keeping this principle in mind that even though duty of excise is primarily borne by the manufacturer or producer, it is ultimately paid by the consumer, we would be required to test the submissions of the learned advocates for the petitioners whether sub-sections (4) & (5) of Section 11B are ultra vires Article 14 or 265 of the Constitution.

8 Dealing with the first submission that sub-section (1) of Section 11B provides unreasonably shorter period of limitation for filing refund application, we may state that this submission is based on the assumption that because Article 113 of the Limitation Act prescribes period of three years for filing civil suit, period of six months prescribed under Section 11B is shorter one. It should be borne in mind that one of the objects of Law of Limitation is to extinguish stale demands. Equitable considerations are out of place while interpreting the provisions of Law of Limitation. Therefore, if the Legislature prescribes the period of six months for filing application for refund, it cannot be said that the period is unreasonably short one and, therefore, it violates Article 14.

9 The policy underlying the statutes of limitation is considered by the Supreme Court in the case of Rajendra Singh v . Sante Singh , AIR 1973 SC 2537. The Court relied upon Halsbury s Laws of England and quoted with approval para 330 of Halsbury s Laws of England Vol. 24, p. 181, which is as under :

"330. Policy of Limitation Acts. , The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely (1) that long dormant claims have more of cruelty than justice in them; (2) that a defendant might have lost the evidence to disprove a stale claim; and (3) that persons with good causes of actions should pursue them with reasonable diligence."

The Court held that the object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or that may have been lost by a party s own inaction, negligence or laches. Therefore, if the Legislature has provided that application for refund is required to be filed within six months, it cannot be said that it is unreasonably short. To some extent it can be said that it prevents unjust enrichment by the petitioners who have already recovered excise duty from its ultimate consumers. It also incorporates the principle that persons with good causes of action should pursue them with reasonable diligence and the right would be lost by a party s own inaction or negligence. This principle is incorporated in Section 11B which specifically provides that if a person has paid the duty of excise under protest, or that if he has filed any appeal or revision against the order of assessment, period of six months for refund would not be applicable. Under sub-section (3) the Assistant Collector has power to refund the amount without his having to make any claim for refund where as a result of any order passed in appeal or revision refund of any duty of excise becomes due to any person.

10 In a few cases period of six months prescribed under Section 11B may cause hardship but that would hardly be a relevant consideration for determining the validity of Section 11B. In the case of P.D. Jambhekar v . State of Gujarat , AIR 1973 SC 309, the Court has held that interpreting a provision in a statute prescribing a period of limitation for institution of a proceeding, question of equity and hardship are out of place. The relevant observations are as under :-

"But our attention was not drawn to any provision in the Act, or the rules framed under the Act which obliged the Inspector to conduct an inquiry within any specified period after the receipt of the report into the cause of accident. And in interpreting a provision in a statute prescribing a period of limitation for institution of a proceeding, questions of equity and hardship are out of place. See the decisions of the Privy Council in Nagendra Nath v . Suresh Chandra , ILR 60 Cal. 1 = AIR 1932 PC 165 and Magbul Ahmed v . Pratap Narain , ILR 57 All. 242 = AIR 1935 PC 85. We have to go by the clear wording of the section, and the date of knowledge of the commission of the alleged offence alone is made the starting point of limitation."

Even under the general law if a suit for possession of any property is not filed within the prescribed period of limitation, right to such property is extinguished. This is incorporated in Section 27 of the Limitation Act. It provides that at the determination of the period limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. Section 27 of the Indian Limitation Act is of general application. It is not confined to suits and applications for which a period of limitation is prescribed under the Limitation Act. Therefore, if a special law provides a period of limitation during which refund application can be filed, then his right to such property is extinguished. In the case of Dindayal v . Rajaram , AIR 1970 SC 1019, the Court has observed that it is well-settled that the principle underlying Section 28 of the Limitation Act, 1908 (same as Section 27 of the Limitation Act, 1963) is of general application. It is not confined to suits and applications for which a period of limitation is prescribed under the Limitation Act.

11 Therefore, if the Legislature has provided a period of limitation of six months, it cannot be held that it is arbitrary or unreasonable and, therefore, it violates Article 14 of the Constitution of India.

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12 Further, if duty of excise which is borne by the ultimate consumer is required to be refunded to its manufacturer or producer after a long period, it can be said that it would be unjust enrichment of the producer or manufacturer. The principle of unjust enrichment is considered in numerous cases which are not required to be referred to in the present case as we are not directly concerned with it because at present we are dealing with the only question whether the period of six months for filing application for refund of excise duty is unreasonable and arbitrary one as it is shorter than period of three years provided under Article 113 of the Limitation Act. It would suffice if we refer to the case of Mahabir Kishore v . State of M.P. , AIR 1990 SC 313 = 1989 (43) E.L.T. 205 (SC). In paragraph 11, the Court has held as under :-

> "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 unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient s wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved".
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> Considering the aforesaid principle of unjust enrichment, it would be clear that even assuming that the duty of excise was illegally collected by the respondents, yet the petitioners would not be entitled to get refund of it because firstly, "this enrichment is not at the expense of the petitioners" as the duty of excise is borne by the consumers and not by the producers or manufacturers; and secondly, retention of the said amount with the public exchequer would not be unjust because the ultimate payers are not forthcoming to get its refund. Therefore, applying the aforesaid principles it would not justify restitution of the said enrichment to the petitioners. Hence if the Legislature provides even some shorter period for grant of refund, it cannot be said that it is unreasonable one. Further, merely because the provision of Section 5 of the Limitation Act, 1963 which prescribes for condoning delay in some cases, is not made applicable, it cannot be said that prescription of particular period of limitation for Filing an application for refund is arbitrary or violative of Article 14 of the Constitution. A special law enacted for special cases and in special circumstances can provide for different procedure governing the limitation and it is not necessary that in all cases the provisions of law of limitation should be made applicable.

13 Similarly, it cannot be said that the definition of "relevant date" as per the Explanation to Section 11B is unreasonable only because it does not include the date of knowledge on the part of the petitioners that they were not required to pay duty of excise.

14 Further, it cannot be said that the classification between the person who pays the duty under protest and the person who pays the duty without any protest is in arty way unreasonable one. It is obvious that the person who pays the duty under protest is pursuing his remedy with reasonable diligence. There is no inaction or negligence on his part. Therefore, his right would not be lost. He pays the duty of excise under protest even though he believes that he is not required to pay it. If ultimately after classification of the excisable goods or in appeal or in revision his case is accepted, that authority is bound to refund the amount paid by him under protest so that he can clear up the excisable goods.

15 The learned advocates for the petitioners, however, relied upon the decision of the Supreme Court in the case of Sales Tax Commissioner, U.P. v . M/s. Auriaya Chamber of

Commerce , AIR 1986 SC 1556, and submitted that if excise duty is illegally recovered on a mistaken view of law, the petitioners are entitled to get refund of it at any time even after lapse of six months. The State has no right to retain the amount and it is refundable without any period of limitation. In that case the Court was required to deal with a case wherein the provision for taxation of sales-tax on forward contract was held to be ultra vires . Therefore, the levy and collection of sales tax on forward contracts was also ultra vires . Application for revising the assessment order was filed which was dismissed on the ground that it has been filed after a long delay and was barred by limitation. Thereafter application for refund of sales tax was filed which was dismissed by the Sales Tax Officer as barred by period of limitation prescribed under Article 96 of the First Schedule of the Indian Limitation Act, 1908. The assessee thereafter filed revision to the Court of Additional Judge (Revision) Sales Tax, U.P. The Court of Additional Judge directed refund of sales tax. At the instance of Revenue, the Additional Judge referred the four questions mentioned in the aforesaid judgment for the opinion of the High Court. In paragraph 13 the Court has specifically observed as under :-

> "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."

The Court also relied upon the judgment of the Supreme Court in the case of Jagdambika Pratap Narain Singh . Central Board of Direct Taxes , AIR 1975 SC 1816, and observed as under:

> "This Court was dealing with the question of limitation in granting a 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 naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."

After considering the various judgments the Court in paragraphs 29,. 30 & 31 has held as under :-

> "29. 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 of procedures are handmaids 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 for the 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 [AIR 1954 SC 459] 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. 30 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 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, then when the judgment came to be known in May, 1954, then in our opinion, when the assessee had made an application 1955, it was not beyond the time. 31 Where indubitably there is in the dealer legal title to get the money refunded and where the dealer is not guilty of any laches 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."

From the aforesaid decision it can be stated that :-

(1) with regard to refund of moneys received by the State which the State has no legal right to receive, it is ordinarily the duty of the State to refund it subject to any provision of any particular statute or special facts and circumstances Of the cases; (2) to invoke judicial activism to set at naught legislative judgment as incorporated in any statute is subversive of the constitutional harmony and comity of instrumentalities; (3) where there is prohibition against refund on the basis of time-limit, it cannot be said that it is illegal.

16 Further, it cannot be said that the period of six months prescribed under Section 11B(1) for filing application for refund is unreasonably short because it is for the Legislature to prescribe the period of limitation. It is not open to the Court to arrive at the conclusion that as it operates harshly or unjustly in some cases, it is unreasonable. Some cut- off date or prescription of period of limitation is bound to cause hardship to some persons, but that would hardly be a ground for holding that it is arbitrary and, therefore, violative of Article 14 of the Constitution. With regard to the period prescribed under the Limitation Act, the Privy Council in the case of General Accident Fire & Life Assurance Corporation Ltd. . Janmahomed , AIR 1941 PC 6, has observed as under :-

"Before considering the grounds on which the High Court in 60 Born 1027 came to the conclusion above referred to it may be desirable to point out that a Limitation Act ought to receive such a construction as the language in its plain meaning imports. See the decision of this Board in 36 IA 148. As was well stated by Mr. Mitra in his Tagore Law Lectures, Edu. 6 (1932) (Vol. I, P. 256) : A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State ... it must if unambiguous be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it. Very little reflection is necessary to show that great hardship may occasionally be caused by statutes of

limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases."

The aforesaid judgment is relied upon by the Supreme Court in the case of Boota Mal v . Union of India , AIR 1962 SC 1716. In that case the Court had specifically observed that equitable considerations are out of place particularly in provisions of law limiting the period of limitation for filing suits or legal proceedings.

17 From the aforesaid discussion it can be held as under :-

(1) The period of six months prescribed under Section 11B for filing an application for refund of the excise duty even though it is collected or paid under mistake of law or facts is not unreasonably short.

(2) Even if period of six months in some cases may operate harshly or unjustly, yet it would not mean that it is arbitrary or unreasonable. The Court has no jurisdiction on the so-called equitable grounds to enlarge the time allowed by law or to postpone its operation or to introduce the exception not provided by the law.

(3) As stated above, duty of excise is ultimately borne by the consumers. It cannot be said that its non-refund would cause any hardship to the manufacturer or producer. Further, even if great hardship may occasionally be caused by statutes of limitation, in cases of poverty, distress and ignorance of rights, it would hardly be a ground for holding that the prescription of time limit is unreasonable or arbitrary one.

(4) The submission that the period of six months is shorter, is based on a misconception that because period of three years is provided under Article 113 of the Limitation Act, therefore period of six months is shorter one. Take illustration, that in Article 113 of the Limitation .Act itself if it is provided that within six months application for refund of excise duty is required to be filed, can it be said that it would be unreasonable? In our view, it cannot be said to be in any way unreasonable.

(5) Right to get refund of the monies which the State has no legal right to receive is always subject to any special provisions of any particular statute and to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities as held by the Supreme Court in the case of Sales Tax Commissioner, U.P. . M/s. Auriaya Chamber of Commerce , AIR 1986 SC 1556.

(6) It cannot be said that the discrimination between the person who pays the duty under protest and the person who does not pay the duty under protest is in any way arbitrary or unreasonable. Classification between these two classes of persons is reasonable because it is to be presumed that a person who pays the excise duty without protest would recover it from the buyers. Further, the person who pays the duty of excise under protest is vigilant of his rights and pursues his remedy with due diligence. May be that in some cases he might have agreed that if he has recovered the duty of excise from the buyer, he would refund it to him if his contention that the goods are not excisable or he is not required to pay the duty of excise is accepted by the Authority.

18 Now we will deal with the second submission that sub-sections (4) & (5) of Section 11B are ultra vires Article 265 because filing of civil suit for refund is barred and that the duty of excise which is recovered unauthorisedly or illegally is sought to be retained. In our view, this submission is also without any substance because -

> (1) it is not the requirement of the Constitution or any other law that in all cases civil suit is the only remedy for having redress of the grievances; (2) section 9 of the Civil Procedure Code specifically provides that the Court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is always open to the Legislature to bar the jurisdiction of civil courts with respect to a particular class of statutes of civil nature; (3) when a right is created by the statute and the method of enforcing the right or of redressing grievance caused in the exercise of enforcement of the right is provided by the statute, then the general remedy of filing suit could be barred by statutory provision or it can be held that it is impliedly barred.

19 Under the scheme of Central Excise Act elaborate machinery is provided against any wrongful act of the authority either of classification of goods, whether the goods are excisable or not or whether the goods are exempt from payment of excise duty or against assessment of duty of excise. Apart from the elaborate provision for determining the aforesaid disputes, the Central Excise Act provides for appeal under Section 35 of the Act and second appeal under Section 35B to the Appellate Tribunal if the person is aggrieved by the order passed by the Collector in appeals under Section 35A. Section 35EA authorises the Central Board of Excise and Customs or the Collector to exercise the powers which are ordinarily known as revisional powers. Section 35EE also provides for revision to the Central Government against the order passed under Section 35A. Sections 35G and 35H provide for making reference to the High Court and the Supreme Court in certain cases on a particular question of law. Section 35L provides an appeal to the Supreme Court of India. Considering the aforesaid provisions, in our view, the Act provides for an elaborate exhaustive machinery for challenging the order of levy and collection of excise duty. It is settled that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by the statute only must be availed of. Therefore, it cannot be said that Section 11B(5) is ultra vires because aggrieved parties right file civil suit is barred. Further, whether the particular goods are excisable or whether there is exemption from duty of excise as per the notification under Section 5A of the Act, or whether the goods are manufactured as per the definition given under Section 2(f) of the Act or valuation of excisable goods for the purpose of charging the duty of excise or the rate of the excise duty and the assessment orders are matters falling within the jurisdiction of the authority prescribed under the Act. It cannot be said that the decision of the authority on questions (a) whether particular goods are manufactured so as to attract the duty of excise or (b) whether the goods were exempt by a notification under Section 5A or (c) the decision with regard to the nature of the goods is erroneous or is based on a mistaken interpretation of a statute, is illegal and therefore, the decision is without jurisdiction. These questions are within the jurisdiction of the authority under the Act. Even if the decision of the authority is illegal or erroneous, it would not mean that it is without jurisdiction. By virtue of legislation constituting them, the competent authority or the appellate authority have the power to determine finally the preliminary facts on which further exercise of their jurisdiction depends. Appropriate authority has jurisdiction to decide that particular goods are excisable under the charging Section 3 of the Act. Therefore, all questions pertaining to liability of the producer or manufacturer to pay duty of excise in respect of their goods are expressly left to be decided by the appropriate authority

under the Act as the matters falling within their jurisdiction. Hence the whole activity of classification of the goods, assessment of the duty of excise, filing of the return and ending with an order of assessment falls within the jurisdiction of the appropriate authority.

20 Similarly, if the petitioner has paid the duty of excise voluntarily by submitting the returns under the relevant provisions of the Act, on the basis that on the goods produced or removed by him duty of excise was leviable, that means that the petitioner himself conceded the character of the goods in question and no occasion arose for the authority to consider whether on the said goods excise could be collected or not. This type of petitioner cannot be placed in a better position than that of a person who objects to assessment and collection of excise duty and challenges the order before the appellate authority or the revisional authority because the decision of the appellate or revisional authority would be final and cannot be challenged in a civil court by a separate suit.

21 The aforesaid propositions are borne out by the decisions which are discussed hereinbelow.

22 In the case of Kamala Mills v . Bombay State , AIR 1965 SC 1942, Special Bench of the Supreme Court dealt with the similar provision. Section 20 of the Bombay, Sales Tax Act, 1946,.provided that no assessment made and no order passed under the Act or the rules shall be called into question in any Civil Court. The said Section 20 reads as under:

> "20. Save as it 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 is provided in Sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order."

The Court dealt with the contention that if the order passed by the authority was without jurisdiction, it cannot fall within the purview of Section 20 of the Bombay Sales Tax Act. In that case it was contended that as the authority purported to levy the tax in respect of the transactions in question and was attempting to assess outside sales in contravention of Article 286, it was invalid and the order was without jurisdiction and as such, a nullity. For dealing with this contention the Court referred to the observations of Halsbury which are quoted in paragraph (18) with regard to the jurisdiction which read as under:

> "The jurisdiction of an inferior Tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact: when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but subject to that, an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."

After examining the provisions of the Bombay Sales Tax Act the Court arrived at the conclusion that the question whether transaction is assessable under the Sales Tax Act and other allied questions are required to be determined by the appropriate authorities themselves and it would be within the jurisdiction of the said authorities. The Court specifically observed that it was not right that the finding of the appropriate authority that a particular transaction is taxable under the charging section of the Act, is a finding on a collateral fact and it is only if the said finding is correct that the appropriate authority can validly exercise its jurisdiction to levy a sales tax in respect of the transactions in question. The relevant discussion in paragraph (21) is as under :-

> "(21) It would thus be seen that the appropriate authorities have been given power in express terms to examine the returns submitted by the dealers and to deal with the questions as to whether the transactions entered into by the dealers are liable to be assessed under the relevant provisions of the Act or not, In our opinion, it is plain that the very object of constituting appropriate authorities under the Act is to create a hierarchy of special tribunals to deal with the problem of levying assessment of sales tax as contemplated by the Act. If we examine the relevant provisions which confer Jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applies, it is impossible to escape the conclusion 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; whether or not transactions which are not mentioned in the return, but about which the appropriate authority has knowledge, fall within the mischief of the charging section; what is the true and real extent of the transactions which are assessable; all these and other allied questions have to be determined by the appropriate authorities themselves, and so, we find it impossible to accept Mr. Sastri s argument that the finding of the appropriate authorities that a particular transaction is taxable under the provisions of the Act, is a finding on a collateral fact which gives the appropriate authority jurisdiction to take a further step and make the actual order of assessment. The whole activity of assessment beginning with the filing of the return and ending with an 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 authorities as such. We are, therefore, satisfied that Mr. Sastri is not right when he contends that the finding of the appropriate authority that a particular transaction is taxable under the charging section of the Act, is a finding on a collateral fact and it is only if the said finding is correct that the appropriate authority can validly exercise its jurisdiction to levy a sales tax in respect of the transactions in question. In fact, what we have said about the jurisdiction of the appropriate authorities exercising their powers under the Act, would be equally true about the appropriate authorities functioning either under similar Sales-Tax Act, or under the Income-Tax Act."

The Court referred to the decision of the Supreme Court in the case of Smt. Ujjam Bai v . State of Uttar Pradesh -AIR 1962 SC 1621, and held that the question about the taxability of a particular transaction falls within the jurisdiction of the appropriate authorities exercising their powers under the taxing Act and their decision in respect of it cannot be treated as a decision on a collateral fact the finding on which determines the jurisdiction of the said authorities. It is a finding on a fact upon which the authority is entrusted with the jurisdiction to deal with. The Court distinguished the judgment in the case of State Trading Corporation

of India Ltd. v . State of Mysore , AIR 1963 SC 548, wherein it is held that the taxing officer cannot give himself jurisdiction to tax an inter-State sale by erroneously determining the character of the sale transaction. The Court held that Ujjam Bai s case on which the said conclusion is found does not support that view. The Court thereafter posed the question as under :-

> "If the appropriate authority, while exercising its jurisdiction and powers under the relevant provisions of the Act, holds erroneously that a transaction, which is an outside sale, is not an outside sale and proceeds to levy sales-tax on it, can it be said that the decision of the appropriate authority is without jurisdiction?" The Court held in the negative by holding that on an erroneous finding about the character of the transaction if an assessment is made, it cannot be said to be without jurisdiction or outside the purview of the Act.

23 Thereafter the Court considered the question whether relief of refund of tax which is alleged to have been illegally recovered by the respondent should be granted. The said relief was claimed on the ground that at the time when the tax was recovered, the appellant paid it under a mistake of fact and law. According to the appellant, even the respondents might have been labouring under the same mistake of fact and law, because the true constitution and legal position in regard to the jurisdiction and authority of different states to recover sales tax in respect of outside sales was not correctly appreciated until the decision of the Supreme Court in the case of Bengal Immunity Co. Ltd. v . State of Bihar , AIR 1955 SC 661. The Court negatived the said contentions after referring to various authorities. The Court considered the decision in the case of Sales Tax Officer. Banaras v . Kanhaiya Lal Mukundlal Saraf , AIR 1959 SC 135, and dealt with the contention that since the Act does not provide for adequate remedy to recover illegally collected tax, the Court either put a narrow construction on Section 20 so as to permit institution of a suit or, in the alternative, should strike down the section as constitutionally invalid. The Court held that if a citizen is deprived of his property illegally by recovering from him unauthorisedly an amount of tax where no such tax is recoverable from him, he ought to have a proper and appropriate remedy to ventilate his grievance against the State and held as under :-

> "Normally, such a remedy would be in the form of a suit brought before an ordinary civil court; it may even be a proceeding before a specially appointed tribunal under the provisions of a tax statute; and it can also be an appropriate proceeding either under Article 226, or under Article 32 of the Constitution." The Court thereafter considered the provisions of Sections 19, 20, 21 & 22 of the Bombay Sales Tax Act and held that Section 20 should be construed in the same manner in which Section 18A of the Madras General Sales Tax Act was construed by the Court in Firm of Illuri Subbayya Chetty & Sons v . State of Andhra Pradesh , AIR 1964 SC 322. The Court held that the wide words used in Section 20 constitute an absolute bar against the institution of suit and that the said section was constitutionally valid. The Court further negatived the contention that as the transactions were outside: sales and they did not and could not fall under charging section because of Article 226 and the submission that the tax was levied because the appellant and the appropriate authorities committed a mistake of fact as well as law in dealing with the question therefore refund should be granted. The Court held that these questions fall within the purview of the charging section and it could not be said to be without jurisdiction or nullity.

24 Further, similar contentions were considered by the Supreme Court in the case of Firm of Illuri Subbayya Chetty & Sons v . State of Andhra Pradesh , AIR 1964 SC 322. In that case the Court considered Section 18A of the Madras General Sales Tax Act, 1939 which barred filing of civil suit to set aside or modify and assessment made under the Act. In that case the appellant had not urged that the transactions for which it had paid tax were outside the purview of the Act. The Court held that position of the appellant cannot be in any way any better because it did not raise any such contention in the assessment proceedings under the Act. The Court thereafter held that if the order made by the taxing authority under the relevant provisions of the Act in a case where the taxable character of the transaction is disputed, is final and cannot be challenged in a civil suit by a separate suit, the position would be just the same where the taxable character of the transaction is not even disputed by the dealer who accepts the order for the purpose of the Act. The relevant discussion in paragraph 11 is as under :-

> "The facts alleged by the appellant in this case are somewhat unusual. The appellant itself made voluntary returns under the relevant provisions of the Act and included the groundnut transactions as taxable transactions. It was never alleged by the appellant that the said transactions were transactions of sale and as such, not liable to be taxed under the Act. It is true that under Section 5A(2) groundnut is made liable to tax under Section 3(1) only at the point of the first purchase effected in the State by a dealer who is not exempt from taxation under Section 3(3), but at the rate of 2 per cent on his turnover. When the appellant made its voluntary returns and paid the tax in advance to be adjusted at the end of the year from time to time, it treated the groundnut transactions as taxable under Section 5A(2). In other words, the appellant itself having conceded the taxable character of the transactions, in question, no occasion arose for the taxing authority to consider whether the said transactions could be taxed or not; and even after the impugned orders of assessment were made, the appellant did not choose to file an appeal and urge before the appellate authority that the transactions were sale transactions and as such, were outside the purview of Section 5A(2). If the appellant had urged that the said transactions were outside the purview of the Act and the taxing authority in the first instance had rejected that contention, there would be no doubt that the decision of the taxing authority would be final, subject, of course, to the appeals and revisions provided for by the Act. The position of the appellant cannot be any better because it did not raise any such contention in the assessment proceedings under the Act. If the order made by the taxing authority under the relevant provisions of the Act in a case where the taxable character of the transaction is disputed, is final and cannot be challenged in a civil court by a separate suit, the position would be just the same where the taxable character of the transaction is not even disputed by the dealer who accepts the order for the purpose of the Act and then institutes a suit to set it aside or to modify it." Including various other decisions the aforesaid two decisions were considered by the Supreme Court in the case of Dhulabhai v . State of Madhya Pradesh , AIR 1969 SC 78. After discussing in detail the Court held that the result of this inquiry into the diverse views expressed in this Court may be stated as follows :- "(1) Where 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 Tribunal. (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."

25 From the aforesaid judgment it is apparent that Section 11B, sub-section (5) which excludes civil court s jurisdiction to entertain the suit for refund of duty of excise cannot be held to be in any way arbitrary or ultra vires . As discussed above, the provisions of Central Excise Act provide adequate exhaustive remedies for deciding any dispute or claim arising out of the enforcement of the Act. The remedies provided under the Act are adequate and sufficient. Further, the question of correctness of the assessment, levy and collection of duty of excise apart from its constitutionality are for the decision of the authorities as the said orders of the authorities are declared to be final under sub-section (4) of Section 11B. Further, the Central Excise Act contains machinery for refund of duty of excise collected in excess of constitutional limits or collected illegally. Sub-section (3) of Section 11B provides that even as a result of any order passed in appeal or revision under the Act, if refund of any duty of excise becomes due to any person, the Assistant Collector of the Central Excise may refund the amount to such person without his having any claim in that behalf. Thereafter sub-sections (4) and (5) provide that no claim for refund of any duty of excise shall be entertained save as otherwise provided by or under the Act and that no Court shall have any jurisdiction in respect of such claim.

26 Further, in the case of Bata Shoe Co. . Jabalpur Municipality , AIR 1977 SC 955, the Court dealt with similar question and interpreted Section 84(3) of the C.P. & Berar Municipalities Act, 1922. Section 84(3) reads as under :-

"84(3) No objection shall be taken to any valuation, assessment or levy nor shall the liability of any person to be assessed or taxed be questioned, in any other manner or by any other authority than is provided in this Act." The Court considered the relevant provisions of the Act and observed that unless there is constitutional prohibition to the

assessment which is impeached, it cannot be said that a suit would be maintainable. The relevant discussion is as under :- "20. These provisions show in the first place that the defendants indubitably possess the right and the power to assess and recover octroi duty and double duty on goods which are brought within the municipal limits for sale, consumption or use therein. The circumstance that the defendants might have acted in excess or as irregularly in the exercise of that power cannot support the conclusion that the assessment or recovery of the tax is without jurisdiction. Applying the test in Kamla Mills , if the appropriate authority while exercising its jurisdiction and powers under the relevant provisions of the Act, holds erroneously that an assessment already made can be corrected or that an assessee is liable to pay double duty when Rule 14(b), in fact, does not justify such an imposition, it cannot be said that the decision of the authority is without jurisdiction. Questions of the correctness of the assessment apart from its constitutionality are, as held in Dhulabhai , AIR 1969 SC 78, for the decision of the authorities set up by the Act and a civil suit cannot lie if the orders of those authorities are given finality. There is no constitutional prohibition to the assessment which is impeached in the instant case as there was in Bharat Kala Bhandar , AIR 1966 SC 249; R.M. Lakhani , AIR 1970 SC 1002; and Dhulabhai , AIR 1969 SC 78. The tax imposed in those cases being unconstitutional, its levy, as said by Mudholkar, J. who spoke for the majority in Bharat Kala Bhandar , AIR 1966 SC 249 was without a vestige or semblance of authority or even a shadow of right . 21 That is in regard to the power of the authority concerned to re-assess and to levy double duty. Secondly, both the Act and the Rules contain provisions which we have noticed above, enabling the aggrieved party effectively to challenge an illegal assessment or levy of double duty. By reason of the existence and availability of those special remedies, the ordinary remedy by way of a suit would be excluded on a true interpretation of Section 84(3) of the Act. 22 The argument that double duty was levied on the terms of Rule 14(b) goes to the correctness of the levy, not to the jurisdiction of the assessing authority. That rule authorises the imposition of double duty if dutiable articles are imported (a) without paying the duty or (b) without giving declaration to the Octroi Moharrir. It may be that neither of these two eventualities occurred and therefore there was no justification for imposing double duty. But the error could be corrected only in the manner provided in the Act and by the authority prescribed therein. The remedy by way of a suit is barred,"

The Court further held that the observations in the case of Firm Seth Radha Kishan v . Administrator, Municipal Committee, Ludhiana , AIR 1963 SC 1547, to the effect that "a suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions" are contrary to the decision in Kamla Mills case [AIR 1965 SC 1942].

27 Similarly, in the case of Titaghur Paper Mills Co. Ltd. v . State of Orissa , AIR 1983 SC 603, the Court observed as under :-

"No such question arises in a case like the present where the impugned orders of assessment are not challenged on the ground that they are based on a provision which is ultra vires . We are dealing with a case in which the entrustment of power to assess is not in dispute, and the authority within the limits of his power is a Tribunal of exclusive jurisdiction. The challenge is only to the regularity of the proceedings before the learned Sales Tax Officer as also his authority to treat the gross turnover

> returned by the petitioners to be the taxable turnover. Investment of authority to tax involves authority to tax transactions which in exercise of his authority the Taxing Officer regards as taxable, and not merely authority to tax only those transactions which are, on a true view of the facts and the law, taxable."

After considering the provisions of the Orissa Sales Tax Act and the Rules the Court further observed as under :- "Under the Scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute one must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhamption New Water Works Co. . Hawkesford , (1859) 6 CHNS 336 at p. 356 in the following passage :-

> There are three classes of cases in which a liability may be established founded upon statute * * * * But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it * * * * * the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.
>
> The rule laid down in this passage was approved by the House of Lords in Neville v . London Express Newspaper Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago V. Gordown Grant & Co ., 1935 AC 532 and Secretary of State V. Mask & Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petition in limine."

28 However, learned advocates for the petitioners relied upon the decision of the Supreme Court in the case of Salonah Tea Company Ltd. v . Superintendent of Taxes , 1988 (33) E.L.T. 249 (SC) and submitted that in a society governed by rule of law, if the taxes are collected without the authority of law from citizens, they should be refunded because no State has the right to receive or to retain the taxes or moneys realised from citizens without the authority of law. This decision is also sought to be relied upon by the learned advocates for the petitioners for the purpose that even if remedy under sub-section (5) of Section 11B is barred, yet this Court should exercise its jurisdiction under Article 226 for refund of the amount which is collected by the respondent without the authority of law.

29 In our view, the submissions made by the learned advocates on the basis of the aforesaid judgment cannot be accepted. In the aforesaid case the Court was required to deal with a question whether in an application under Article 226 of the Constitution the High Court should have directed the refund of the tax which was illegally collected because the Act under which the tax was recovered was declared as ultra vires the Constitution of India. From

paragraphs 4 & 6 it is abundantly clear that the only question which was considered by the Supreme Court was whether in an application under Article 226 of the Constitution the High Court should have directed refund of a tax which was recovered under the Act which was declared as ultra vires . The Court referred to provisions of Section 72 of the Contract Act and Article 113 of the Limitation Act and held that as the Act under which the assessment was made was ultra vires , writ petition under Article 226 was maintainable for refund of the said amount. The Court mainly considered if there was delay in filing petition for refund, whether the High Court could entertain it. The Court has specifically observed that it is true that in some cases the period of three years is normally taken as a period beyond which the Court should not grant relief, but that is not an inflexible rule. It depends upon the facts of each case. The observations made by the Supreme Court in paragraph 17 specifically negative the contention that in all cases the Court should direct the refund of the amount collected. The Court has observed that refund is to be granted unless it causes injustice or loss in any specific case or violates any specific provision of law. The relevant observations are as under:-

> "17. Similarly, it appears to us that this was a tax realised in breach of the section, the refund being of the money realised without the authority of law. The realisation is bad and there is a concomitant duty to refund the realisation as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law."

Even for exercise of writ jurisdiction under Article 226 Court has held that maximum period fixed by the Legislature as the time within which relief can be obtained can ordinarily be taken to be a reasonable standard by which the delay in seeking remedy under Article 226 could be measured. The relevant observations in paragraph 20 are as under:-

> "The High Courts had power for the purpose of enforcement of fundamental rights and statutory rights to grant consequential reliefs by ordering repayment of money realised by the Government without the authority of law. It was reiterated that as a general rule if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by the extraordinary remedy of Mandamus . Even if there is no such delay, in cases where the opposite party raises a prima facie issue as regards the availability of such relief on the merits OB grounds like limitation the Court should ordinarily refuse to issue the writ of Mandamus . Though the provisions of the Limitation Act did not as such, it was further held, apply to the granting of relief under Article 226, the maximum period fixed by the legislature as the time within which relief by a suit in a Civil Court must be claimed may ordinarily be taken to be reasonable standard by which delay in seeking remedy under Article 226 could be measured. The Court might consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy. Where the delay is more than that period it will almost always be proper for the Court to hold that it is unreasonable."

Further, the Court relied upon the decision in the case of State of Madhya Pradesh and others v . Nandlal Jaiswal and others , AIR 1987 SC 251, and held as under :-

> "In State of Madhya Pradesh and others, etc., etc. V. Nandlal Jaiswal and other etc. etc. [AIR 1987 SC 251J this principle was reiterated by Bhagwati, CJ. that it was well settled (hat the power of the High Court to issue an appropriate writ under Article 226

of the Constitution was discretionary and the High Court in the exercise of its discretion did not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there was inordinate delay on the part of the petitioner in filing a writ petition and such delay was not satisfactorily explained, the High Court might decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay was premised upon a number of factors. The High Court did not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it was likely to cause confusion and public inconvenience and bring in its train new injustices. It was emphasised that this rule of laches of delay is not a rigid rule which can be cast in a straitjacket formula for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would be their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it. We are in respectful agreement with this approach also."

30 In our view, the aforesaid decision nowhere touches the question which is sought to be raised by the petitioner in this petition that if the provision of the Act bars the civil suit for refund of duty of excise or any tax then it would be ultra vires Article 14 or 265. The Court mainly dealt with the question whether in an application under Article 226 of the Constitution High Court should have directed the refund of the tax which was illegally collected as the Act under which the tax was recovered was declared as ultra vires the Constitution of India. Further, from the aforesaid decisions it can be held as under :-

(1) If the tax is illegally collected there is concomitant duty to refund the realisation as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law. Therefore, if duty of excise is ordered to be refunded in spite of provisions contained in sub- sections (4) and (5) of Section 11B, then it would be clearly in violation of specific provision of law and that is not permissible.

(2) The High Court should ordinarily refuse to issue writ of Mandamus on the ground such as limitation by considering the period fixed by the Legislature as a time within which relief must be claimed either by filing civil suit or taking appropriate proceedings under the said statute. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed by the statute but where the delay is more than that period, it will almost always be proper for the Court to hold that it is unreasonable delay.

31 Further it is an established law that when the statute by which liability is created provides exhaustive remedy, the remedy provided by the statute must be followed and the High Court ordinarily would not exercise its writ jurisdiction under Article 226 of the Constitution of India. In this view of the matter, in our view, there is no substance in the submission of the learned advocates for the petitioners that even if the remedy of filing an application for refund under sub-section (4) of Section 11B is barred or remedy of having recourse to Civil Court is barred under sub-section (5), yet this Court should exercise its jurisdiction under Article 226 of the Constitution.

32 In the result, there is no substance in the contentions raised by the learned advocates for the petitioners. Hence these petitions are rejected.

33 With regard to the rest of the matters where additional questions are involved, those matters will be notified separately.

34 It is clarified that Special Civil Applications Nos. 3704/88,3705/88,3706/88, 5930/90 & 5931/90, which are at the admission stage, are rejected. Rule issued in Special Civil Applications Nos. 3509/83,1611/86. 708/87,1868/87, 3772/87. 349/88, 350/88, 7823/88 & 4810/89 is discharged with no order as to costs.

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