CASE NO.:
Appeal (civil) 3255 of 1984

PETITIONER:
MAFATALAL INDUSTRIES LTD. ETC. ETC.

RESPONDENT:
UNION OF INDIA ETC. ETC.

DATE OF JUDGMENT: 19/12/1996

BENCH:
A.M.AHMADI CJI & JAGDISH SARAN VERMA & S.C.AGRAWAL & B.P.JEEVAN REDDY & A.S.ANAND & B.L.HANSARIA & S.C.SEN & K.S.PARIPOORNAN & B.N.KIRPAL

JUDGMENT:
JUDGMENT

Judgement Delivered By:
A.M.AHMADI CJI
B.P.JEEVAN REDDY & K.S.PARIPOORNAN, JJ.
B.L. HANSARIA & S.C. SEN, JJ.

A.M.AHMADI, CJI

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

The first of these is the issue regarding the extent to which the jurisdiction of ordinary courts is ousted in respect of claims for refund of taxes illegally levied and collected. In my view, it would be incorrect to hold, as Reddy, J. has done, that every claim for refund of illegal or unauthorised levy tax is necessarily required to be made in accordance with the provisions of the Central Excise Act, 1944 (hereinafter called "the Excise Act"). The leading authority governing this issue is the decision of this court in Dhulabhai and others Vs. State of Madhya Pradesh and Another, [1968] 3 S.C.R. 662. In this case, after analysing the leading decisions in the field, this Court laid down the Following propositions with a view to determining the extent to which the jurisdiction of civil courts can be ousted:

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

principles of judicial procedure.
(2) Where there is 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 to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit lies.
(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."

In view of these propositions, which have been

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

Class I: "Unconstitutional Levy"-- where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.

Cases falling within this class are clearly outside the ambit of the Excise Act. In such cases assessees can either file a suit under Section 72 of the contract Act, 1872 (hereinafter called "Contract Act") or invoke the writ jurisdiction of the High Court under Article 226 of the Constitution.

Class II: "Illegal Levy"-- Where claims for refund are founded on the grounded that there is misinterpretation/misapplication/erroneous interpretation of the Excise Act and the Rules framed thereunder.

Ordinarily, all such claims must be preferred under the provisions of the Exercise Act and the Rules framed thereunder by strictly adhering to the stipulated procedure. However, in cases where the authorities under the Excise Act arrogate to themselves jurisdiction even in cases where there is clear want of jurisdiction, the situation poses some difficulty . Reddy, J. has held that in all cases, except where unconstitutionality is alleged, the remedy is to be pursued within the framework of the Excise Act. This is a dangerous proposition for it will not cater to situations where the authorities under the Excise Act assume authority in cases where there is an inherent lack of jurisdiction. This is because, if one were to follow Reddy, J.'s reasoning , the authorities under the Act will have the final say over situations in which they totally lack inherent jurisdiction in cases which are ultra vires the Excise Act but intra vires the constitution. To that extent, I would hold that in cases where the authorities under the Excise Act initiate action though lacking in inherent jurisdiction, the remedy by way of a suit under Section 72 of the Contract Act or a writ under Article 226 of the Constitution, will lie. Such a conclusion will not frustrate the exclusion of jurisdiction of civil courts by the Excise Act because the areas where an authority acting under a statute is said to lack inherent jurisdiction have been clearly demarcated by several decisions of this court.

Class III: "Mistake of Law" -- Where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction.

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

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

section 17 (1) (c) of the Limitation Act.

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

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

> "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2)."
>
> (Emphasis added)

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

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

B.P.JEEVAN REDDY

Article 289(1) of the Constitution of India declares that the "property and income of a State shall be exempt from Union taxation". The question in this batch of appeals is whether the properties of the States situated in the Union Territory of Delhi are exempt from property taxes levied under the municipal enactments in force in the Union Territory of Delhi. The Delhi High Court has taken the view that they are. That view is challenged in these appeals preferred by the New Delhi Municipal Corporation and the Delhi Municipal Corporation.

Leave granted in the Special Leave Petitions.

Prior to 1911-12, a large part of the territory now comprised in the Union Territory of Delhi was a district of the Province of Punjab. By a proclamation dated September 17, 1912, the Governor General took the said territory under his immediate authority and management, to be administered as a separate Province to be known as the Province of Delhi. [This was in connection with the decision to shift the Capital from Calcutta to Delhi.] In the same year, the Delhi Laws Act, 1912 {1912 Act] was enacted. It came into force on and with effect from the Ist day of October, 1912. Schedule-A to the Act defined the "territory" covered by the new Province. Sections 2 and 3 of the 1912 Act provided inter alia that the creation of the new Province of Delhi shall not effect any change in the territorial application of any enactment. One of the Acts so applying to the territory comprised in the new Province of Delhi was the Punjab Municipal Act, 1911.

In the year 1915, another Act called "The Delhi Laws Act, 1915" [1915 Act] was enacted. Under this enactment, certain areas formerly comprised in the United Provinces of Agra and Oudh were included in and added to the Province of Delhi with effect from Ist April, 1915. Section 2 of the 1915 Act also contained a saving clause similar to Section 2 of the 1912 Act.

In the Constitution of India, 1950, as originally enacted, the First Schedule contained four categories of States, viz., Part ‘A’, Part ‘B’, Part ‘C’ and Part ‘D’. Part ‘D’ comprised only of Andaman and Nicobar Islands. The Chief Commissioner’s Province of Delhi was one of the Part ‘C’ States. By virtue of the Part ‘C’ States [Laws] Act, 1950, the laws in force in the erstwhile Chief Commissioner’s Province of Delhi were continued in the Part ‘C’ State of Delhi. This Act came into force on the 16th day of April, 1950.

In the year 1951, the Parliament enacted the Government of Part ‘C’ States Act, 1951. This Act contemplated that there shall be a legislature for each of the Part ‘C’ States specified therein which included Delhi. Section 21 stated that the legislature of a Part ‘C’ State shall have the power to make laws with respect to any of the matters enumerated in List-II and List-III of the Seventh Schedule to the Constitution. In the case of Delhi legislature, however, it was provided that it shall not have power to make laws with respect to matters specified therein including "the constitution and powers of municipal

corporations and other local authorities, of improvement trusts and of water supply, drainage, electricity, transport and other public utility authorities in Delhi or in New Delhi". Section 22 provided that any law made by the legislature of a Part'C' State shall, to the extent of repugnancy with any law made by Parliament, whether enacted earlier or later, be void. It is necessary to notice the two distinctive features of the legislatures of Part 'C' States; not only were they created under an Act made by Parliament, the laws made by them even with respect to any of the matters enumerated in List-II were subject to any law made by the Parliament. In case of repugnancy, the law made by legislature was to be of no effect. So far as Delhi is concerned, the Parliament placed certain additional fetters referred to in Section 26.

It is stated that in the year 1952, a legislature was created for Delhi which functioned upto November 1, 1956 when the Government of Part 'C' States Act, 1951 was repealed by Section 130 of the States' Reorganisation Act, 1956. While repealing the Government of Part 'C' States Act, 1951, the States' Reorganisation Act, 1956 did not provide for the creation or continuance of legislatures for the Part 'C' States. The legislature constituted for Delhi thus came to an end.

By Constitution Seventh [Amendment] Act, 1956, some of the Part 'C' States ceased to exist, having been merged in one or the other State while some others continued - designated as Union territories. The categorisation of the States into Parts A,B,C and D was done away with. In its place, the First Schedule came to provide only two categories, viz., "(i) the States" and "(ii) the Union territories". The Seventh [Amendment] Act specified six Union territories, viz., Delhi, Himachal Pradesh, Manipur,Tripura, Andaman and Nicobar Islands and Laccadiv Minicoy and Amindivi Islands. Delhi thus became a Union territory. With the inclusion of Goa and other former Portugese territories in the Union, the number of Union territories grew to eight by 1962. In that year, the Constitution Fourteenth [Amendment} Act, 1962 was enacted. Pondicherry was added as a Union territory as S1.No.9. More important, the said Amendment Act introduced Article 239-A. The new Article provided that "Parliament may by law create for any of the Union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry, a body, whether elected or partly nominated, and partly elected to function as a legislature for the Union territory, or a council of ministers, or both with such constitutional powers and functions in each case, as may be specified in the law" [Emphasis added]. It is significant to note that the said article did not provide for creation of a legislature or a council of ministers, as the case may be, for the Union Territory of Delhi.

Pursuant to Article 239-A, Parliament enacted the Government of Union Territories Act, 1963 [1963 Act]. Obviously, this Act applied only to those Union territories as were referred to in Article 239-A. It did not apply to Delhi. This Act provided for creation of Legislative Assemblies for the Union territories mentioned in Article 239-A and the extent of their legislative power. Section 3(1) declared that "there shall be a Legislative Assembly for each Union territory" whereas Section 18(1) provided that "subject to the provisions of this Act, the Legislative Assembly of a Union territory may make laws for the whole or any part of the Union territory with respect to any of the matters enumerated in the State List or the Concurrent List

in the Seventh Schedule to the Constitution insofar as any such matter is applicable in relation to Union territories." Sub-section (2) of Section 18 read with Section 21, however, conferred over-riding power upon the Parliament to make any law with respect to any matter for a Union territory or any part thereof. In case of inconsistency between a law made by Parliament and a law made by the legislature of any of these Union territories, the latter was to be void to the extent of repugnancy, notwithstanding whether the Parliamentary law was earlier or subsequent in point if time. Section 19 of the Act exempted the property of the Union from all taxes imposed by or under any law made by the Legislative Assembly of a Union territory except insofar as is permitted by a law made by Parliament.

By the Constitution Sixty Ninth [Amendment] Act, 1991, Article 239-AA was introduced in Part-VIII of the Constitution . This Article re-named the Union Territory of Delhi as the "National Capital Territory of Delhi" and provided that there shall be a Legislative Assembly for such National Capital Territory. The Legislative Assembly so created was empowered by clause (3) of the said Article "to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List, insofar as any such matter is applicable to Union territories, except, matters with respect to Entries 1,2 and 18 of the State List and Entries 64,65 and 66 of that List insofar as they relate to the said Entries 1, 2 and 18". Clause (3) further provided that the power conferred upon the Legislative Assembly of Delhi by the said article shall not derogate from the powers of the Parliament "to make laws with respect to any matter for a Union territory or any part thereof". It further provided that in the case of repugnancy, the law made by Parliament shall prevail, whether the Parliamentary law is earlier or later to the law made by the Delhi Legislative Assembly. The Parliament is also empowered to amend, vary or repeal any law made by the Legislative Assembly. Article 239-AA came into force with effect from February 1, 1991. Pursuant to the article, the Parliament enacted the Government of National Capital Territory of Delhi Act, 1991. It not only provided for constitution of a Legislative Assembly but also its powers as contemplated by Article 239-AA. This Act too came into force on February 1, 1991. The subordinate status of the Delhi Legislature is too obvious to merit any emphasis.

So far as the MUNICIPAL LAWS GOVERNING THE TERRITORY OF DELHI is concerned, the following is the position: by Delhi Laws Act, 1912, referred to supra, the Punjab Municipal Act continued to govern the territory comprised in the Chief Commissioner's Province of Delhi. The Act is stated to have been extended to Part 'C' State of Delhi under a notification issued under Part 'C' State [Laws] Act, 1950. In the impugned judgment, the High Court has stated the following facts:

> "The various Punjab enactments which were then in force in the territory of Delhi continued to be in force by virtue of the Delhi Laws Act of 1912 and later by the Part C States Laws Act of 1950 and the Union Territories Laws Act of 1950. The application and the later extension of this law to the Union Territory of Delhi was, therefore, not by the authority of the State

> Legislature but that of the Central Legislature, that is, the Central Legislature under the Government of India Act followed by the Central legislature under the Constitution of India, that is, the Parliament of India..... The Delhi Laws Act 1912, the Union Territories [Laws] Act, 1950 as indeed the Part C States [Laws] Act, 1950 were all central statutes and when a provincial Act or an Act which may be treated as a provincial Act or State Act was extended to a territory by a particular legislature, it would be deemed to be the enactment of such a legislature and this principle is clearly recognised by the Supreme Court in the case of Mithan Lal v. The State of Delhi and another, 1959 S.C.R.445...It is thus clear that on the extension of the Act to the Union Territory of Delhi by the various Central Legislative enactments referred to above, it became a Central Act or an Act of Parliament as if made by virtue of power of Parliament to legislate for the Union territory of Delhi by virtue of clause (4) of Article 246 of the Constitution of India."

The correctness of the above factual statement has not been disputed by anyone before us. Indeed, the contention of Sri P.P. Rao, who led the argument on behalf of the respondents-State governments was to the same effect. He contended that inasmuch as the Punjab Municipal Act has been extended to Part 'C' State of Delhi Under the Part 'C' State [Laws] Act, 1950 with effect from April 16, 1950, it is a post-constitutional enactment made by Parliament and hence the taxes levied thereunder constitute Union taxation. He placed strong reliance upon the decision in Mithan Lal v. The State of Delhi & Anr. [1959 S.C.R.445] and also certain observations in T.M. Kanniyan v. Income Tax Officer, Pondicherry & Anr. [1968 (2) S.C.R.103] in that behalf. It is obvious that this was also the case of the State governments before the Delhi High Court. We, therefore, proceed on the basis that the Punjab Municipal Act was extended to Part 'C' State of Delhi under and by virtue of the Part 'C' State of Delhi under and by virtue of the Part 'C' States [Laws] Act, 1950 which came into of the force on April 16, 1950.

By virtue of the Constitution Seventh [Amendment] Act, 1956, the Part 'C' State of Delhi was designated as a Union Territory. The Punjab Municipal Act continued to govern the Union Territory of Delhi. In the year 1957, the Parliament enacted the Delhi Municipality Act, 1957. The First Schedule to the Act specified the boundaries of New Delhi within which area the Punjab Municipal Act continued to be in force. The remaining area was designated as the Delhi Municipal Corporation area and the Delhi Municipal Corporation Act, 1957 was made applicable to it. In the year 1994, the Parliament enacted the new Delhi Municipal Corporation Act, 1994 repealing Punjab Municipal Act, 1911. This Act has been brought into force with effect from May

25, 1994. It is, however, confined in its application to the area comprised in the New Delhi Municipal Corporation. Delhi and New Delhi are thus governed by different municipal enactments. The Delhi Municipal Corporation Act and New Delhi Municipal Corporation Act are, without a doubt, post-constitutional laws enacted by Parliament.

PART - II

Article 1(1) of the Constitution of India declares that India, i.e., Bharat, shall be a Union of States. As amended by the Constitution Seventh [Amendment] Act, clauses (2) and (3) Article 1 read:

> "(2) The States and the territories thereof shall be as specified in the First Schedule.
> (3) The territory of India shall comprise--
> (a) the territories of State;
> (b) the Union territories specified in the First Schedule; and
> (c) such other territories as may be acquired."

Clause (30) in Article 366 defines the "Union territory" in the following words:

> "'Union territory' means any Union Territory specified in the First Schedule and includes any other territory comprised with the territory of India but not specified in that Schedule."

The expression "State" is not defined in the Constitution. It is defined in the General Clauses act, 1397 which is made applicable to the interpretation of the Constitution by Article 367. As on the date of the commencement of the Constitution, clause (58) in Section 3 of the General Clauses Act defined "State" in the following words"

> "(58). 'State' shall mean a Part A State, a Part B State or a Part C State."

The said definition was amended by the adaptation of Laws Order No.1 of 1956 issued by the President in exercise of the power conferred upon him by Article 372-A of the Constitution introduced by the Constitution Seventh [Amendment] Act. The amended definition reads thus:

> "(58) 'States'--
> (a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1958, shall mean a Part A State, a Part B State or a Part C State; and
> (b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory."

The definitions in the General Clauses Act, it is necessary to remember, have to be read and applied subject to the opening words in Section 3, viz., "unless there is anything repugnant in the subject or context....".

Part-XI of the Constitution contains provision governing relations between the Union and the States. This part is divided into two chapters, viz., Chapter-I containing Articles 245 to 255 and Chapter-II containing Articles 256 to 263. Chapter-I carries the title

"legislative relations" while Chapter-II is called "Administrative relations". Article 245, which carries the heading/marginal note "The extent of laws made by Parliament and the Legislature of States" contains two clauses. Clause (1) says that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State." Article 246 is of crucial relevance herein and must, therefore, be set out in its entirety:

> "246. subject-matter of laws made by Parliament and by the Legislatures of States.-(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule to the Constitution referred to as the 'Union List').
>
> (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1) the legislature of any State...also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule to the Constitution referred to as the 'Concurrent List').
>
> (3) Subject to clauses (1) and (2), the Legislature of any State....has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to the Constitution referred to as the 'State List').
>
> (4) Parliament has power to make laws with respect to any matter for any of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."
>
> [Emphasis added]

It is relevant to point out that in clauses (2) and (3), as originally enacted - and upto the Seventh [Amendment] Act - the expression "State" was followed by the words "specified in Part-A or Part-B of the First Schedule". Similarly, the words, "in a State" in clause (3), were followed by the words "in Part-A or Part-B of the First Schedule". In other words, clauses (2) and (3) of Article 246 expressly excluded Part 'C' and Part 'D' States from their purview. The position is no different after the Constitution Seventh [Amendment] Act, which designated the Part-C States as Union territories. They ceased to be states. As rightly pointed out by a Constitution Beach of this Court in T.M. Kanniyan, the context of Article 246 excludes Union territories from the ambit of the expression "State" occurring therein. As a matter of fact, this is true of Chapter-I of Part-XI of the Constitution as a whole. It may be remembered that during the period intervening between The Constitution Seventh [Amendment] Act, 1962, there was no provision for a legislature for any of the Union

territories. Article 239-A in Part-VII - "The Union Territories" - [which before the Seventh Amendment was entitled "The States in Part-C of the First Schedule"] introduced by Constitution Fourteenth [Amendment] Act did not itself create a legislature for Union territories; it merely empowered the Parliament to create them for certain specified Union territories [excluding Delhi] and to confer upon them such powers as the Parliament may think appropriate. Thus, the legislatures created for certain Union territories under the 1963 Act were not legislatures in the sense used in Chapter-III of Part-IV of the Constitution, but were mere creatures of the Parliament - some sort of subordinate legislative bodies. They were unlike the legislatures contemplated by Chapter-III of Part-VI of the Constitution which are supreme in the field allotted to them, i.e., in the field designated by List-II of the Seventh Schedule. The legislatures created by the 1963 Act for certain Union territories owe their existence and derive their powers from the Act of the Parliament and are subject to its over-riding authority. In short, the State legislatures contemplated by Chapter-I of Part-XI are the legislatures of States referred to in Chapter-III of Part-VI and not the legislatures of Union territories created by the 1963 Act. Union territories are not States for the purposes of Part-XI [Chapter-I] of the Constitution.

Article 248 confers the residuary legislative power upon the Parliament. The said power includes the power to make any law imposing a tax not mentioned in either List-II or List-III. Articles 249, 250, 252 and 357 confer upon the Parliament power to make laws with respect to matters enumerated in List-II in certain exceptional situations, which may, for the sake of convenience, be called a case of "substitute legislation". It would be enough to refer to the marginal headings of these four Articles. They read:

> "249. Power of Parliament to legislate with respect to a matter in the State in the national interest.
>
> 250. Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.
>
> 252. Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.
>
> 357. Exercise of legislative powers under Proclamation issued under article 356."

We may now set out ARTICLE 285 AND 289:

> "285. exemption of property of the Union from State taxation.-- (1) The property of the Union Shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by an authority within a State.
>
> (2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately

before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

289. Exemption of property and income of a State from Union taxation.-- (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing or authorising the imposition of, any tax to such extent, if any, as Parliament many by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business or any income accruing in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government."

A federation pre-supposes two coalescing units: the Federal Government/Centre and the States/Provinces. Each is supposed to be supreme in the sphere allotted it/them. Power to tax is an incident of sovereignty. Basic premise is that one sovereign cannot tax the other sovereign. Article 285 and 289 manifest this mutual regard and immunity but in a manner peculiar to our constitutional scheme. While the immunity created in favour of the Union is absolute, the immunity created in favour of the States is a qualified one. We may elaborate: Article 285 says that "the property of the Union shall...be exempt from all tax imposed by a State or by any authority within a State" unless, of course, Parliament itself permits the same and to the extent permitted by it. [Clause (2) of Article 285 saves the existing taxes until the Parliament otherwise provides, but this is only a transitional provision.] The ban, if it can be called one, is absolute and emphatic in terms. There is no way a State legislature can levy a tax upon the property of the Union. So far as Article 289 is concerned, the position is different. Clause (1), had it stood by itself, would have been similar to clause (1) of Article 285. It says that "the property-and income-of a State shall be exempt from Union taxation". But it does not stand alone. It is qualified by clause (2) and clause (3) is an exception to clause (2). But before we refer to clause (2), a word with respect to the meaning and ambit of the expression "property" occurring in this article. Expression "property" is wide enough to take in all kinds of property. In Re. the Bill to amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944 [1964 (3) S.C.R.787], all the learned Judges [both majority and dissenting] were agreed that the expression must be understood in its widest sense. There is no reason to put a restricted construction thereon. Indeed, there is no controversy about this proposition before us. Coming to clause (2), it says that the ban imposed by clause (1) shall

not prevent the Union from imposing or authorising the imposition of any tax to such extent, if any, as the Parliament may by law provide, in respect of (a) trade or business of any kind carried on by or on behalf of the Government of a State or (b) any operations connected with such trade or business or (c) any property used or occupied for the purposes of such trade or business or (d) any income accruing or arising in connection with such trade or business. [The inspiration for this provision may perhaps be found in certain United States' decision on the question of the power of the units of a federal polity to tax each others' properties.] Clause (3) empowers the Parliament to declare, by law, which trade or business or any class of trades or businesses is incidental to the ordinary functions of the Government, whereupon the trades/businesses so specified go out of the purview of clause (2).

It would be appropriate at this state to notice the ratio of two judgments of this Court dealing with Article 289. In Re: Sea Customs Act, a Special Bench of nine learned Judges, by a majority, laid down the following propositions: (a) clause (1) of Article 289 provides for exemption of property and income of the States only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs; (b) duties of excise and customs are not taxes on property or income; they are taxes on manufacture/production of goods and on import/export of goods, as the case may be, and hence, outside the purview of clause (1) of Article 239. The other decision in Andhra Pradesh State Road Transport Corporation v. The Income Tax Office [1964 (7) S.C.R.17] is the decision of a Constitution Bench. The main holding in this case is that income of the A.P.S.R.T.C. is not the income of the State of Andhra Pradesh since the former is an independent legal entity and hence, Article 289(1) does not avail it. At the same time, certain observations are made in the decision regarding the scheme of Article 289. It is held that clause (2) is an exception of a proviso to clause (1) and as such whatever is included in clause (2) must be deemed to be included in clause (1). In other words, the trading and business activities referred to in clause (2) are included in clause (1) and precisely for this reason the exception in clause (2) was provided. Clause (3), it was held, is an exception to clause (2). In the words of the Constitution Bench:

> "The scheme of Art.289 appears to be that ordinarily, the income derived by a State both from government and non-governmental or commercial activities shall be immune from income-tax levied by the Union, provided, of course, the income in question can be said to be income of the State. This general proposition flows from clause (1).
>
> Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf: that is to say, the income from trade or business carried on by the Government of a State or on its behalf which would not have been taxable under clause (1), can be

taxed, provided a law is made by Parliament in that behalf. If clause (1) had stood by itself, it may not have been easy to include within its purview income derived by a State from commercial activities, but since clause (2), in terms, empowers Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in cl. (1) and that alone can be the justification for the words in which cl. (2) has been adopted by the Constitution. It is plain that cl.(2) proceeds on the basis that but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under cl.(1). That is the result of reading clauses (1) and (2) together.

Clause (3) then empowers Parliament to declare by law that any trade or business would be taken out of the purview of cl.(2) and restored to the area covered by cl.(1) by declaring that the said trade or business is incidental to the ordinary functions of government. In other words, cl.(3) is an exception to the exception prescribed by cl.(2). Whatever trade or business is declared to be incidental to the ordinary functions of government, would then be exempt from by cl.(2). and would then be exempt from Union taxation. That, broadly stated, appears to be the result of the scheme adopted by the three clause of Art.289."

PART - III

The crucial question arising in this batch of appeals pertains to the meaning of the expression "Union taxation" occurring in Article 289(1). According to the appellants-municipal corporations, the property taxes levied either by Punjab Municipal Act, 1911, as extended to and applicable in the New Delhi Municipal Corporation area or by the Delhi Municipal Corporation Act, 1957 applicable to the Delhi Municipal Corporation area do not fall within the ambit of the expression "Union taxation". According to them, "Union taxation" means levy of any of the taxes mentioned in the Union List [List-I in the Seventh Schedule to the Constitution]. May be, it may also take in levy of Stamp duties [which is the only taxation entry in the Concurrent List] by Parliament, but by no stretch of imagination, they contend, can levy of any tax provided in the State List [List-II in the Seventh Schedule] can be characterised as Union taxation. Merely because the Parliament levies the tax provided in List-II, such taxation does not amount to Union taxation. There are many situations where the Parliament is empowered by Constitution to make laws with respect to

matters enumerated in List-II. For example, Articles 249, 250, 252 and 357 empower the Parliament to make laws with respect to matters enumerated in List-II in certain specified situations. If any taxes are levied by Parliament while legislating under any of the above articles, such taxation cannot certainly be termed as "Union taxation". It would still be State taxation. The levy of taxation by Parliament within the Union territories is of a similar nature. Either because the Union territory has no legislature or because the Union territory has a legislature but the Parliament chooses to act in exercise of its over-riding power, the taxes levied by a Parliamentary enactment within such Union territories would not be Union taxation. It is relevant to notice, the learned counsel contend, that the legislatures of the Union territories referred to in Article 239-A as well as the legislature of Delhi created by Article 239-AA are empowered to make laws with respect to any of the matters enumerated in List-II and List-III of the Seventh Schedule, just like any other State legislature; any taxes levied by these legislatures cannot certainly be characterised as "Union taxation". Merely because the Parliament has been given an over-riding power to make a law with respect to matters enumerated even in List-II, in suppression of the law made by the legislature of the Union territory, it does not follow that the law so made is any the less a law belonging to the sphere of the State. The test in such matters - it is contended - is not who makes the law but to which matter in which List does the law in question pertain. Clause (4) of Article 246 specifically empowers the Parliament to make laws with respect to any matter enumerated in List-II in the case of Union territories. This shows that even the said clause recognises the distinction between List-I and List-II in the Seventh Schedule, it is submitted.

The learned Attorney General appearing for the Union of India supported the contentions of the appellant-municipal corporations.

On the other hand, the contentions of the learned counted for the respondents are to the following effect: a Union territory is not a "State" within the meaning of Article 246. Even prior to the Seventh [Amendment] Act, Part ‘C’ States, or for that matter Part-D States, were not within the purview of the said article. The division of the legislative powers provided by clauses (1), (2) and (3) of article 246 has no relevance in the case of a Union territory. Union territory, as the name itself indicates, is a territory belonging to Union. A Union territory has no legislature as contemplated by Part-VI of the Constitution. A Union territory may have a legislature or may not. Even if it is bestowed with one, it is not by virtue of the Constitution but by virtue of a Parliamentary enactments, e.g., Government of Part ‘C’ States Act, 1951 [prior to November 1, 1956] and Government of Union Territories Act, 1963. Even the legislature provided for Delhi by Article 239-AA of the Constitution with effect from February 1, 1992 is not a legislature like that of the States governed by Part-VI of the Constitution. Not only the powers of he legislature are circumscribed by providing that such legislature cannot make laws with reference to certain specified entries in List-II but any law made by it even with reference to a matter enumerated in the State List is subject to the law made by Parliament. In any event, the position obtaining in Delhi after February 1, 1992 is not relevant in these appeals since these appeals pertain to a period anterior to the said date. The Punjab Municipal Act,

1911[as extended and applied to the Union Territory of Delhi by Part 'C' States [Laws] Act] and the Delhi Municipal Corporation Act, 1957 are Parliamentary laws enacted under and by virtue of the legislative power vested in Parliament by clause (4) of Article 246. The taxes levied by the said enactments constitute "Union taxation" within the meaning of Article 289(1) and hence, the properties of the States in the Union Territory of Delhi are exempt therefrom. Reliance is placed upon the majority opinion in Re.: Sea Customs Act in support of the above propositions. It is submitted that there are no reasons to take a different view now.

On a consideration of rival contentions, we are inclined to agree with the respondents-States. The States put together do not exhaust the territory of India. There are certain territories which do not form part of any State and yet are the territories of the Union. That the States and Union territories of the Union. That the States and Union territories are different entities, is evident from clause (2) of Article 1 - indeed from the entire scheme of the Constitution. Article 245(1) says that while Parliament may make laws for the whole or any part of the territory of India, the legislature of a State may make laws for the whole or any part of the State. Article 1(2) read with Article 245(1) shows that so far as the Union territories are concerned, the only law-making body is the Parliament. The legislature of a State cannot make any law for a Union territory; it can make laws only of that State. Clauses (1), (2) and (3) of Article 246 speak of division of legislative powers between the Parliament and State legislatures. This division is only between the Parliament and the State legislatures, i.e., between the Union and the States. There is no division of legislative powers between the Union and Union territories. Similarly, there is no division of powers between States and Union territories. So far as Union territories are concerned, it is clause (4) of Article 246 that is relevant. It says that the Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Now, the Union territory is not included in the territory of any State. If so, Parliament is the only law-making body available for such Union territories. It is equally relevant to mention that the Constitution, as originally enacted did no provided for a legislature for any of the Part 'C' States [or, for that matter, Part'D' States]. It is only by virtue of the Government of Part 'C' States Act, 1951 that some Part 'C' States including Delhi got a legislature. This was put an end to by the States Reorganisation Act, 1956. In 1962, the Constitution Fourteenth [Amendment] Act did provide for creation/constitution of legislatures for Union territories [excluding, of course, Delhi] but even here the Constitution did not itself provide for legislatures for those Part'C' States; it merely empowered the Parliament to provide for the same by making a law. In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by Sixty-Ninth [Amendment] Act [Article 239AA] but even here the legislature so created was not a full fledged legislature not did have the effect of - assuming that it could - lift the National Capital Territory of Delhi from Union territory category to the category of States within the meaning of Chapter-I of Part-XI of the Constitution . All this necessarily means that so far as the Union territories are concerned, there is not such thing as List-I, List-II or List-III. The only legislative body is

Parliament - or a legislative body created by it. The Parliament can make any law in respect of the said territories - subject, of course, to constitutional limitations other than those specified in Chapter-I of Part-XI of the Constitution. Above all, Union Territories are not "States" as contemplated by Chapter-I of Part-XI; they are the territories of the Union falling outside the territories of the States. Once the Union territory is a part of the Union and not part of any State, it follows that any tax levied by its legislative body is Union taxation. Admittedly, it cannot be called "State taxation"- and under the constitutional scheme, there in no third kind of taxation. Either it is Union taxation or State taxation. This is also the opinion of the majority in Re.:Sea Customs Act. B.P. Sinha, C.J., speaking on behalf of himself, P.B. Gajendragadkar, Wanchoo and Shah, JJ. - while dealing with the argument that in the absence of a power in the Parliament to levy taxes on lands and buildings [which power exclusively belongs to State legislatures, i.e., Item 49 in List-II], the immunity provided by Article 289(1) does not make any sense - observed thus:

> "It is true that List I contains no tax directly on property like List II, but it does not follow from that the Union has no power to impose a tax directly on property under any circumstances. Article 246(4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. This means that so far as Union territories are concerned Parliament has power to legislate not only with respect to items in List I but also with respect to items in List I but also with respect to items in List II. Therefore, so far as Union territories are concerned, Parliament has power to impose a tax directly on property as such. It cannot therefore be said that the exemption of States' property from Union taxation directly on property under Art.289(1) would be meaningless as Parliament has no power to impose any tax directly on property. If a State has any property in any Union territory that property would be exempt from Union taxation on property under Art.289(1). The argument therefore that Art.289(1) cannot be confined to tax directly on property because there is no such tax provided in List I cannot be accepted."

Rajagopala Iyyengar,J. agreed with Sinha, CJ. on this aspect, as indeed on the main holding. The decision in Re.:Sea Customs Act has been rendered by a Bench of nine learned Judges. The decision of the majority is binding upon us and we see no reason to take a different view. Indeed, the view taken by the majority accords fully with the view

expressed by us hereinabove.

Now, so far as the analogy of laws made by Parliament under Articles 249, 250, 252 and 357 are concerned, we think the analogy is odious. Articles 249, 250 and 357 are exceptional situations which call for the Parliament to step in and make laws in respect of matters enumerated in List-II and which laws have effect for a limited period. Article 252 is a case where the State legislatures themselves invite the Parliament to make a law on their behalf. These are all situations of what may be called "substitute legislation" - either because of a particular situation or because there is no legislature at a given moment to enact laws. As against these provisions, clause (4) of Article 246 is a permanent features and laws made thereunder are laws made in the regular course.

In this connection, it is necessary to remember that all the Union territories are not situate alike. There are certain Union territories [I.e., Andaman and Nicobar Islands and Chandigarh] for which there can be no legislature at all - as on today. there is a second category of Union territories covered by Article 239-A [which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry - now, of course, only Pondicherry survives in this category, the rest having acquired Statehood] which have legislatures by courtesy of Parliament. The Parliament can, by law, provide for constitution of legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. The Parliament had created legislatures for these Union territories under the "The Government of Union Territories Act, 1963", empowering them to make laws with respect to matters in List-II and List-III, but subject to its over-riding power. The third category is Delhi. It had no legislature with effect from November 1, 1956 until one has been created under and by virtue of the Constitution Sixty-Ninth [Amendment] Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B read with clause (8) of Article 239-AA shows how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part-VI of the Constitution. In us, it is also a territory governed by clause (4) of Article 246. As pointed out by the learned Attorney General, various Union territories are in different stages of evolution. Some have already acquired Statehood and some may be on the way to it. The fact, however, remains that those surviving as Union territories are governed by Article 246(4) notwithstanding the differences in their respective set-ups - and Delhi, now called the "National Capital Territory of Delhi", is yet a Union territory.

It would be appropriate at this state to refer to a few decisions on his aspect. In T.M. Kanniyan, a Constitution Bench speaking through Bachawat, J. had this to say:

> "Parliament has plenary power to legislate for the Union territories with regard to any subject. With regard to Union territories, there is no distribution of legislative power. Article 246(4) enacts that 'Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.' In

R.K. Sen v. Union [1966] 1 S.C.R.480, it was pointed out that having regard to Art.367, the definition of 'State' in s.3(58) of the General Clauses Act. 1897 applies for the interpretation of the Constitution unless there is anything repugnant in the subject or context. Under that definition, the expression 'State' as respect any period after the commencement of the Constitution (Seventh Amendment) Act, 1956 'shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory'. But this inclusive definition is repugnant to the subject and context of Art.246. There, the expression 'State' means the States specified in the First Schedule. There is a distribution of legislative power between Parliament and the legislatures of the States. Exclusive power to legislate with respect to the mattes enumerated in the State List is assigned to the legislatures of the State established by Part VI. There is no distribution of legislative power with respect to Union territories. That is why Parliament is given power by Art.246(4) to legislate even with respect to matters enumerated in the State List. If the inclusive definition of 'State' in s.3(58) of the General Clauses Act were to apply to Art.246(4), Parliament would have no power to legislate for the Union territories with respect to matters enumerated in the State List and until a legislature empowered to legislate on those matters is created under Art.239A for the Union territories, there would be no legislature competent to legislate on those matter is created under Art.239A for the Union territories, there would be no legislature competent to legislate on those matters; moreover, for certain territories such as the Andaman and Nicobar Islands no legislature can be created under Art.239A, and for such territories there can be no authority competent to legislate with respect to matter enumerated in the State List. Such a construction is repugnant to the subject and context to Art.246. It follows that in view of Art.246(4), Parliament has plenary powers to make laws for Union territories on

> all matters. Parliament can by law extend the Income-tax Act, 1961 to a Union territory with such modifications as it thinks fit. The President in the exercise of his powers under Art.240 can make regulations which have the same force and effect as an Act of Parliament which applies to that territory. The President can therefore by regulation made under Art.240 extend the Income-tax Act, 1961 to that territory with such modifications as he thinks it.
>
> The President can thus make regulations under Art.240 with respect to a Union territory occupying the same field on which Parliament can also make laws. We are not impressed by the argument that tush overlapping of powers would lead to a clash between the President and Parliament. The Union territories are centrally administered through the President acting through an administrator. In the cabinet system of Government the President acts on the advice of the Ministers who are responsible to Parliament....It is not necessary to make any distribution of income-tax with respect to Union territories as those territories are centrally administered through the President."
>
> [emphasis added]

We respectfully agree with the above statement of law.

We do not think it necessary to refer to or discuss the propositions laid down in Management of Advance Insurance Co.Ltd. V. Shri Gurudasmal & Ors. [1970 (3) S.C.R.881] holding that the amended definition of "State" in clause (58) of Section 3 of the General Clauses Act applies to interpretation of Constitution by virtue of Article 372-A nor with the contrary proposition in the dissenting judgment of Bhargava, J. in Shiv Kirpal Singh v. Shri V.V. Giri [1971 (2) S.C.R.197 at 313]. It is enough to say that context of Article 246 - indeed of Chapter - I in Part XI - excludes the application of the said amended definition.

In Mithanlan [Supra], T.L. Venkatrama Iyer, J., speaking for the Constitution Bench, while dealing with an argument based on Article 248(2) observed:

> "That Article has reference to the distribution of legislative powers between the Centre and the States mentioned in Parts A and B under the three Lists in Sch.VII, and it provided that in respect of matters not enumerated in the Lists including taxation, it is Parliament that has power to enact laws. It has no application to Part C States for which the governing provision is Art, 246(4). Moreover, when a notification is issued by the appropriate Government

> extending the law of a Part A State to a Part C State, the law so extended derives its force in the State to which it is extended from 6.2 of the part C States (Laws) Act enacted by Parliament. The result of a notification issued under that section is that the provisions of the law which is extended become incorporated by reference in the Act itself, and therefore a tax imposed thereunder is a tax imposed by Parliament. There is thus no substance in this contention."
>
> [Emphasis added]

To the same effect is the decision of a Division Bench in Satpal & Co. v. Lt. Governor [1979 (3) S.C.R 651].

It is then argued for the appellants that if the above view is taken, it would lead to an inconsistency. The reasoning in this behalf runs thus: a law made by the legislature of a Union territory levying taxes on lands and buildings would be "State taxation", but if the same tax is levied by a law made by the Parliament, it is being characterised as "Union taxation"; this is indeed a curious and inconsistent position, say the learned counsel for the appellants. In our opinion, however, the very premise upon which this argument is urged is incorrect. A tax levied under a law made by a legislature of a Union territory cannot be called "State taxation" for the simple reason that Union territory is not a "State" within the meaning of Article 246 [or for that matter, Chapter-I of Part-XI] or Part-VI or Article 285 to 289.

Lastly, we may refer to the circumstance that Delhi Municipal Corporation Act, 1957 was enacted by Parliament. Hence, so far as the Delhi Municipal Corporation area is concerned, the taxes are levied under and by virtue of a Parliamentary enactment. So far as the New Delhi Municipal Corporation area is concerned, the taxes were levied till 1994 under the Punjab municipal Act, 1911 as extended and applied by the Part 'C' State [Laws] Act, 1950 enacted by Parliament. It is held by this Court in Mithanlal that extension of an Act to an area has the same effect as if that Act has been made by the extending legislature for the area. The Court Said:

> "Moreover, when a notification is issued by the appropriate Government extending the law of a Part A State to a Part C State, the law so extended derives its force in the State to which it is extended from s.2 of the Part C States (Laws) Act enacted by Parliament. The result of a notification issued under that section is that the provisions of the law which is extended become incorporated by reference in the Act itself, and therefore a tax imposed thereunder is a tax imposed by Parliament. There is thus no substance in this contention."

[Also see T.M. Kanniyan [1968 (2) S.C.R.203 at 108].]

It must accordingly be held that with effect from 1950, it is as if the property taxes are levied by a Parliamentary enactment. In 1994, of course, Parliament itself enacted the

New Delhi Municipal Corporation Act [with effect from May 25, 1994] repealing the Punjab Municipal Act. Taxes levied under these enactments cannot but be Union taxation - Union taxation in a Union Territory.

For all the above reason, we hold that the levy of taxes on property by the Punjab Municipal Act, 1911 [as extended to Part 'C' States of Delhi by Part 'C' States (Laws) Act, 1950], the Delhi Municipal Corporation Act, 1957 and the New Delhi Municipal Corporation Act, 1994 [both Parliamentary enactments] constitutes "Union taxation " within the meaning of Article 289(1).

PART - IV

The Delhi Municipal Corporation Act, 1957, the Punjab Municipal Act, 1911 [as extended to the Union Territory of Delhi] and the New Delhi Municipal Corporation Act, 1994 [N.D.M.C. Act] specifically exempt the properties of the Union from taxation. Section 119 of the Delhi Municipal Corporation Act is in terms of Article 285 of the Constitution. It reads:

> "119. Taxation of Union properties -- (1) Notwithstanding anything contained in the foregoing provisions of this Chapter, lands and buildings being properties of the Union shall be exempt from the property taxes specified in section 114:
> Provided that nothing in this sub-section shall prevent the Corporation from levying any of the said taxes on such lands and buildings to which immediately before the 26th January 1950, they were liable or treated as liable, so long as that tax continues to be levied by the Corporation on other lands and buildings."

Sub-section (3) of Section 61 is also in terms of Article 285 of the Constitution. It reads:

> "Nothing in this sub-section shall authorise the imposition of any tax which the provincial legislature has no power to impose in the Province under the Constitution--
> Provided that a committee which immediately before the commencement of the Constitution shall lawfully levying any such tax under this section as then in force may continue to levy such tax until provision to the contrary is made by Parliament."

Sub-section (1) of Section 65 of the N.D.M.C. Act is again in the same terms as Article 285.

None of the above enactments provide any exemption in favour of the properties of a State. Section 115(4) of the Delhi Municipal Corporation Act, Section 61 of the Punjab Municipal Act and Section 62 of the N.D.M.C Act levy property tax on all the properties within their jurisdiction. From the fact that properties of the Union have been specifically exempted in terms of Article 285 but the properties of the States have not been exempted in terms of Article 289 shows that so far as these enactments go, they purport to levy tax on the properties of the States as well. The State governments, it is equally obvious, are not

claiming exemption from municipal taxation under any provision of the concerned State enactment but only under and by virtue of Article 289 of the Constitution. They are relying upon clause (1) of Article 889 which is undoubtedly in absolute terms. Clause (1) of Article 289 says, "the property and income of a State shall be exempt from Union taxation". But clause (1) does not stand alone. It is qualified by clause (2) - which in turn is qualified by clause (3). Where an exemption is claimed under clause (1), we cannot shut our eyes to the said qualifying clause and give effect to clause (1) alone. In the decision in A.P.S.R.T.C., this Court has held that clause (2) is an exception to clause (1) and that clause (3) is an exception to clause (2). When a claim for exemption is made under clause (1) of Article 289, the Court has to examine and determine the field occupied by clause (1) by reading clauses (1) and (2) together. If there is a la w made by Parliament within the meaning of clause (2), the area covered by that law will be removed from the field occupied by clause (1). By way of analogy, we may refer to sub-clause (f) of clause (1) and clause (5) of Article 19, which has been explained by a Special Bench of eleven Judges in R.C. Cooper v. Union of India [1970 (1) S.C.C.248] in the following words: "Clause (5) of Article 19 and clauses (1) and (2) of Article 31 prescribe restrictions upon State action, subject to which the right to property may be exercised." But before we elaborate this aspect, it would be appropriate to examine the meaning and scheme of Article 289 and the object underlying it.

Since Article 289 is successor to Section 155 of the Government of India Act, 1935 - no doubt, with certain changes - it would be helpful to refer to and examine the purport and scope of Section 155 [as it obtained prior to its amendment in 1947]. We would also be simultaneously examining the scheme and purport of Article 289. It would be appropriate to read both Article 289 and Section 155 together:

> "289. Exemption of property and income of a State from Union taxation -- (1) The property and income of a State shall be exempt from Union taxation.
>
> (2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.
>
> (3) nothing in clause (2) shall apply to any trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.
>
> 155.(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a federated State shall not be liable

> to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India;
>
> Provide that-
>
> (a) where a trade or business of any kind is carried on by or on behalf of the Government of a province in any part of British India, outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any property occupied for the purposes thereof;
>
> (b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.
>
> (2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date."

The first distinguishing feature to be noticed is that while Section 155 spoke of "lands and buildings" belonging to the Government of a Province situate in British India being exempt from Federal taxation [we are leaving out the portion relating to Rulers of Acceding States/Federating States], Article 289(1) speaks of "the property" of a State being exempt from Union taxation. The second material difference is between proviso (a) to Section 155(1) and clause (2) of article 289 corresponding to it. Under the proviso, trade or business carried on by a Provincial government was excluded from the exemption provided in the main limb of sub-section (1) whereas clause (2) does not itself deny the exemption to such trade or business; it merely enable the Parliament to make a law levying tax on such trade or business. This change has a certain background, which we shall refer to later. The third distinguishing feature between the said proviso and clause (2) is this: while the denial of exemption provided by the proviso was to the trade or business carried on by a Provincial government outside its territory, clause (2) of Article 289 contains no such restrictive words. The fourth distinguishing feature is the provision in clause (3) of Article 289, which enables the Parliament to declare which trades/ businesses are incidental to ordinary functions of government, in which event those trades/businesses go out of the purview of clause (2); no such provision existed in Section 155.

Even under the Government of India Act, 1935 the power to levy taxes on lands and buildings was vested in the Provincial legislatures alone. Federal legislature had no power to levy such taxes. If so, the question arises - why did the British Parliament provide that the lands and buildings of a Provincial government situated in British

India are exempt from Federal taxation. Since, no Federal tax could ever have been levied by the Federal legislature on lands or buildings, is the exemption meaningless? This is the question which was also agitated before the learned Judges who answered the Presidential reference in Re.: Sea Customs Act. Sri P.P. Rao and other learned counsel appearing for the State governments submit that the said exemption is neither meaningless nor unnecessary. They submit that the language used in the main limb of sub-section (1) of Section 155 was used advisedly to meet a specific situation. Their explanation, as condensed by us in our words, is to the following effect:

> even at the time of enactment and commencement of the Government of India Act, 1935, the area now comprised in the Union Territory of Delhi was comprised in the Chief Commissioner's Province of Delhi; besides Delhi, there were several other Chief Commissioner's Provinces within British India; every Provinces government and almost every major native State had properties in Delhi for one or the other purpose; prior to the commencement of the 1935 Act, there was no such thing as division of powers between the Centre and the Provinces; Provinces were mere administrative units; the concept of division of powers between the Federation [Centre] and its units [Provinces], i.e., the concept of a Federation, broadly speaking, was introduced by the said Act for the first time; in such a situation, it was necessary that the mutual respect and regard between the Centre and the Provinces basic to a federal concept, is affirmed and given due constitutional recognition even before the enactment of the Delhi Laws Act, 1912, the Governor General in Council with the sanction and approbation of the Secretary of State for India, had, by proclamation published in Notification No.911 dated the 17th day of September, 1912, taken under his immediate authority and management, the territories mentioned in Schedule-A to the Act [that portion of the district of Delhi comprising the tehsil of Delhi and police station of Mehrauli] which were formerly included in the Province of Punjab, with a view to provide for the administration thereof by a Chief Commissioner as a separate Province to be known as the Province of Delhi; it was the said status which was affirmed by the Delhi Laws Act, 1912; Section 5 of

> the Government of India Act, 1935 made a clear distinction between the Provinces and the Chief Commissioner's Provinces; while the Provinces were provided with legislatures [Chapter-III of Part-III of the Act], the Chief Commissioner's Provinces, governed by Part - IV of the Act, had no legislatures of their own; the only legislature for them was the Federal legislature; any tax levied in the Chief Commissioner's Province should have been levied only by the Federal legislature or the Governor General, as the case may be; Section 99(1) of the Act provided that "the Federal Legislature may make laws for the whole or any part of British India or for any Federated State and a Provincial Legislature may make laws for the Province or for any part thereof"; all this shows that the tax on lands or buildings in the Chief Commissioner's Provinces including Delhi could have been levied only by Federal legislature; Section 155(1) was meant to exempt the lands or buildings of Provincial governments from such federal taxation - it is submitted.

We find the above explanation cogent and acceptable. It fully explains the use of the words "lands and buildings" in Section 155(1) of the Act. We think it unnecessary to repeat the whole reasoning once again.

As against the words "lands and buildings" belonging to a Provincial government in Section 155 of the Government of India Act, 1935, Article 289(1) uses a single expression "Property" and says that property of a State shall be exempt from Union taxation. The expression "Property" is indubitably much wider. It takes in not only lands and buildings but all forms of property. While the Constituent Assembly debates do not throw any light upon the reason for this change - from "lands or buildings" to "property" - it is, in all probability, attributable to the large number of representations made by several Provincial governments to the Constituent Assembly that not merely the lands or buildings but any and every trade and business carried on by a State government should equally be entitled to exemption. Sri B.Sen invited our attention to those representations and submitted that it is these representations which induced the Constituent Assembly to draft clause (2) of Article 289 in a manner different from proviso (1) to Section 155(1). Be that as it may, The fact remains that the expression "property" in Article 289(1) has to be given its natural and proper meaning. It includes not only lands and buildings but all forms of property. The explanation offered by the learned counsel appearing for the States, set out in extension hereinabove, for the use of the words "lands or buildings" in Section 155(1) is equally valid for clause (1) of Article 289 insofar as it pertains to lands and buildings.

It must be remembered that both Section 155(1) and Article 289(1) exempt the income as well derived by a Provincial Government/State government from Union taxation.

Both the property and income of the States are thus exempt under clause (1) of Article 289 subject, of course, to clause (2) thereof.

Now what does clause (2) of Article 289 say? It may be noticed that the language of the first proviso to Section 155 and of clause (2) of Article 289 is practically identical [except for the two distinguishing features mentioned hereinbefore]. It would, therefore, suffice if we discuss the proviso. It says - omitting reference t Princely States - that where a trade or business of any kind is carried on by or on behalf of the government of a Province in any part of British India [outside that Province], nothing in sub-section (1) shall exempt that Government from any Federal taxation in respect of that trade of business or any operations connected therewith or any income arising in connection therewith or any property [i.e., lands and buildings] occupied for the purposes thereof. It is necessary to emphasis that the proviso to Section 155(1) which by its own force levied taxes upon the trading and business operations carried on by the Provincial governments did not either define the said expressions or specify which trading or business operations are subject to taxation. On this account. the proviso was not and could not be said to have been, ineffective or unenforceable. It was effective till January 26, 1950. Clause (2) of Article 289 also similarly does not define or specify - nor does it require that the law made thereunder should so define or specify. It cannot be said that unless the law made under and with reference to clause (2) specifies the particular trading or business operations to be taxed, it would not be a law within the meaning of clause (2). Coming back to the language of clause (2), a question is raised, why does the proviso speak of taxation in respect of trade or business when the main limb of sub-section (1) speaks only of taxes in respect of lands or buildings and income? Is the ambit of proviso wider than the main limb? Is it an independent provision of a substantive nature notwithstanding the label given to it as a proviso? Or is it only an exception? It is asked. We are, however, of the considered opinion that it is more important to give effect to the language of and the intention underlying the proviso than to find a label for it. It is clarificatory in nature without a doubt; it appears to be more indeed. It is concerned mainly with the "income" [of Provincial governments] referred to in the main limb of sub-section (1). It speaks of tax on the "lands or buildings" in that context alone, as we shall explain in the next paragraph. The idea underlying the proviso is to make it clear that the exemption of income of Provincial government operates only where the income is earned or received by it as a government; it will not avail where the income is earned or received by the Provincial government on account of or from any trade or business carried on by it - that is a trade or a business carried on with profit motive. In the light of the language of the proviso to Section 155 and clause (2) of Article 289, it is not possible to say that every activity carried on by the government is governmental activity. A distinction has to be made between governmental activity and trade and business carried on by the government, at least for the purpose of this clause. It is for this reason, we say, that unless an activity in the nature of trade and business is carried on with a profit motive, it would not be a trade or business contemplated by clause (2). For example, mere sale of government properties, immovable or movable, or granting of leases and licences in respect of its properties does not

amount to carrying on trade or business. Only where a trade or business is carried on with a profit motive - or any property is used or occupied for the purpose of carrying on such trade of business - that the proviso [or for that matter clause (2) of Article 289] would be attracted. Where there is no profit motive involved in any activity carried on by the State government, it cannot be said to be carrying on a trade or business within the meaning of the proviso/clause (2), merely because some profit results from the activity*. We may pause here a while and explain why we are attaching such restricted meaning to the words "trade or business" in the proviso to Section 155 and in clause (2) of Article 289. Both the word import substantially the same idea though, ordinarily speaking, the expression "business" appears to be wider in its content. The expression, however, has no definite meaning; its meaning varies with the context and several other factors. See Board of Revenue v. A.M. Ansari [1976 (3) S.C.C.512] and State of Gujarat v. Raipur Manufacturing Company [1967 (1) S.C.R.618]. As observed by Lord Diplock in Town Investments Limited v. Department of Environment [1977 (1) All.E.R.813-H.L.], "the word 'business' is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindley, C.J. pointed out in Rolls v. Miller embrace almost anything which is an occupation, as distinct from a pleasure - anything which is an occupation or a duty which requires attention is a business....'." Having regard to the context in which the words "trade or business" occur - whether in the proviso to Section 155 of the Government of Indian Act, 1935 or in clause (2) of Article 289 of our Constitution - they must be given, and we have given, a restricted meaning, the context being levy of tax by one unit of federal upon the income of the other unit, the manifold activities carried on by governments under out constitutional scheme, the necessity to maintain a balance between the Centre and the States and so on.

*For example, almost every State government maintains one or more guest-houses in Delhi for accommodation their officials and others connected with the affairs of the State. But, when some rooms/accommodation are not occupied by such persons and remain vacant, outsiders are accommodated therein, though at higher rates. This activity cannot obviously be called carrying on trade or business nor can it be said that the building is used or occupied for the purpose of any trade or business carried on by the State government.

ordinarily speaking, the expression "business" appears to be wider in its content. The expression, however, has no definite meaning; its meaning varies with the context and several other factors. See Board of Revenue v. A.M.Ansari [1976 (3) S.C.C.512] and State of Gujarat v. Raipur Manufacturing Company [1967 (1) ALL.E.R.813-H.L.], "the word 'business' is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings, as Lindlay,C.J. pointed out in Rolls v. Miller embrace 'almost anything which is an occupation, as distinct from a pleasure - anything which is an occupation or a duty which requires attention is a business..."-" Having regard to the context in which the words "trade or business" occur - whether in the proviso to Section 155 of the Government of Indian Act, 1935 or in clause (2) of Article 289 of our constitution - they must be given, and we have given, a restricted meaning, the context being levy of tax by one unit of federation upon

the income of the other unit, the manifold activities carried on by governments under our constitutional scheme, the necessity to maintain a balance between the Centre and the State and so on.

Proviso (i) not only speaks of trade or business carried on by the Provincial governments [outside their respective territories] but also "any operations connected therewith or any income arising in connection therewith or any property occupied for the purposes thereof." So far as operations connected with the trade or business is concerned, they naturally go along with the main trade or business. No difficulty is expressed by anyone on this count. Similarly, with respect to any income arising in connection with such trade or business too, no difficulty is expressed since the income is an incident of the trade of business. Difficulty is, however, expressed regarding the other set of words "or any property occupied for the purposes thereof". The said words, in our opinion, mean that if any property, i.e., any land or building is occupied by the Provincial government for the purpose of any trade or business carried on by the Provincial government, such land or building too loses the benefit of exemption contained in the main limb of sub-section (1); it becomes liable to Federal taxation. To repeat, the central idea underlying the proviso is to remove the trading or business operations from the purview of the main limb of sub-section (1) of Section 155. Now, coming to clause (2) of Article 289, position is the same with the two distinguishing features mentioned supra, viz., (a) under this clause, removal of exemption is not automatic; it comes about only when the Parliament makes a law imposing taxes in respect of any trade or business carried on by a State government and all activities connected therewith or any property used or occupied for the purposes of such business as also the income derived therefrom. If any property - whether movable or immovable - is used or occupied for the purpose of any such trade or business, it can be denied the exemption provided by clause (1) but this denial can be only by way of a law made by Parliament and (b) the exception contemplated by clause (2) is not confined to trade and business carried on by a State outside its territory as was provided by the first proviso to Section 155. Even the trade or business carried on by a State within its own territory can also be brought within the purview of the enactment made [by Parliament] in terms of the said clause.

Adverting to the matters before us, the question is whether the Parliament has made any law as contemplated by clause (2) of Article 289? For, if no such law is made, it is evident, all the properties of State governments in the Union Territory of Delhi would be exempt from taxation. [Parliament has admittedly not made any law as contemplated by clause (3) of Article 289.] We have observed hereinbefore that the claim of exemption put forward by State governments in respect of their properties situated in N.D.M.C. and Delhi Municipal Corporation areas is founded - and can only be founded - on Article 289. The States invoke clause (1) of he article but we are of the considered opinion that clause (1) cannot be looked at in isolation; it must be read subject to clause (2). All the three clauses of Article 289 are parts of one single scheme. Hence, when a claim for exemption with reference to clause (1) is made, one must see what is the field on which it operates and that can be determined only by reading it along with clause (2). The exemption provided by Article 289(1) is a qualified one - qualified by clause (2), as explained hereinbefore. It is

not an absolute exemption like the one provided by Article 285(1). If there is a law within the meaning of clause (2), the field occupied by clause (1) gets curtailed to the extent specified in clause (2) and the law made thereunder. It is, therefore, necessary in this case to determine whether the Punjab Municipal Act, Delhi Municipal Corporation Act and N.D.M.C. Act are or can be deemed to be enactments within the meaning of clause (2) of Article 289. These enactments - and certainly the Delhi Municipal Corporation Act and N.D.M.C. Act - are post-constitutional enactments. As stated hereinbefore, these enactments while specifically exempting the Union properties in terms of Article 285, do not exempt the properties of the States in terms of Article 289*. The

*As a matter of fact, "Section 115(4) of the Delhi Municipal Corporation Act and Section 62(1) of the N.D.M.C. Act expressly exempt properties used exclusively for 'charitable purposes' or 'for public worship' [as defined by them] but do not provide for an exemption in the case of the properties of the States in terms of Article 289. It cannot be said, or presumed, that Parliament was not aware of, or conscious of, Article 289 while enacting the said Acts. Section 62(1) and (2) of the N.D.M.C Act read: "62(1). Save as otherwise provided in this Act, the property tax shall be levied in respect of all lands and buildings in New Delhi except -- (a) lands and buildings or portions of lands and buildings exclusively occupied and used for public worship or by a society or body for a charitable purpose:

Provided that such society of body is supported wholly or in part by voluntary constitutions, applies its profits, if any, or other income in promoting its objects and does not pay any dividend or bonus to its members.

Explanation.-- 'Charitable purpose' includes relief of the poor, education and medical relief but does not include a purpose which relates exclusively to religious teaching;

(b) lands and buildings vested in the Council, in respect of which the said tax, if levied, would under the provisions of this Act be leviable primarily on the Council; omission cannot be said to be unintentional - particularly in the case of Delhi Municipal Corporation Act and N.D.M.C. Act. The intention is clear and obvious: the enactments do not wish to provide for any exemption in favour of properties of the States situated within their respective jurisdictions. Texes are levied on all properties within their jurisdiction [except the properties specifically exempted], irrespective of who owns then and to what use they are put. In such a situation, the question is, how should they be understood? Two views can be taken: one that since the said enactments do not expressly purport to have been made under and as contemplated by clause (2) of Article 289, they should not be read and understood as laws contemplated by or within the meaning of the said clause (2). The effect of this view would be that the properties of the State in Union Territory of Delhi will be totally exempt irrespective of the manner of their

(c) agricultural lands and buildings (other than dwelling houses).

(2) Lands and buildings or portions thereof shall not be deemed to be exclusively occupied and used for public worship or for a charitable purpose within the meaning of clause (1) of sub-section (1) if any trade or business is carried on in such lands and buildings or portions thereof or if in respect of such lands and buildings or portions thereof, any rent is derived.

use and occupation. In other words, the consequence would be

that the relevant provisions of the said enactments would be ineffective and unenforceable against all the properties held by the States in the Union Territory/National Capital Territory of Delhi, irrespective of the nature of their user or occupation. The second view is that since there is always a presumption of constitutionality in favour of the statutes and also because the declaration of invalidity or inapplicability of a statute should be only to the extent the enactment is clearly outside the legislative competence of the legislative body making it or is squarely covered by the ban or prohibition in question, the declaration of invalidity should not extend to the extent the enactments can be related to and upheld with reference to some constitutional provision, even though not cited by or recited in the enactment. Similarly, the declaration of inapplicability should only be to the extent the law is plainly covered by the ban or prohibition, as the case may be. What is not covered by the constitutional bar should be held to be applicable and effective. In our respectful opinion the latter view is consistent with the well-known principles of constitutional interpretation and should be preferred. We may pause here and explain our view-point. If the law had expressly stated that it is a law made under and with reference to clause (2) of Article 289, no further question would have arisen. The only question is where it does not say so*, can its validity or applicability be sustained with reference to clause (2). In our considered opinion, it should be so sustained, even though it may be that the appellant-corporations have not chose to argue this point specifically. As would b evident from some of the decisions referred to hereinafter, the fact that a party or a government does not choose to put forward an argument cannot be a ground for the court not to declare the correct position in law. The appellants are saying that all the properties of the States are not exempt because the taxes levied by them do not constitute "Union taxation" within the main of clause (1) of Article 289. We have not agreed with them. We have held that the taxes levied by the aforesaid enactments do constitute "Union taxation" within the meaning of

*This is the normal situation. No enactment states that it is made under and with reference to a particular head of legislation in the Seventh Schedule to the Constitution or a provision in the Constitution. Only when the enactment is questioned on the ground of legislative competence, is the court required to ascertain the head of legislation or provision to which the enactment is referable.

clause (1) of Article 289 and that by virtue of the exemption provided by clause (1), taxes are not leviable on State properties. In view of the fact that clauses (1) and (2) of Article 289 go together, form part of one scheme and have to be read together, we cannot ignore the operation and applicability of clause (2), at the same time. Reference to a few decisions would bear out our view. In Charanjit Lal Chowdhary v. Union of India [1950 S.C.R.869], Fazl Ali, J. stated: "....it is the accepted doctrine of the American Courts, which I consider to be well-founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles". In Burrakur Coal Co. V. Union of India [A.I.R.1961 S.C. 654 at 963 = 1962 (1) S.C.R.44], Mudholkar, j., speaking for the Constitution Bench, observed: "Where the validity of a law made by a competent legislature is challenged in a Court of

law, that Court is bound to presume in favour of its validity. Further, while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained." In Rt.Rev.Msgr. Mark Netto v. State of Kerala & Ors. [1979 (1) S.C.C.23], the Constitution Bench considered the question whether a rule made by the Government of Kerala is violative of the right conferred upon the minorities by Article 30. It was held:

> "In that view of the matter the Rule in question its wide amplitude sanctioning the withholding of permission for admission of girl students in the boys minority school is violative of Article 30. if so widely interpreted it crosses comes in the region of interference with the administration of the institution, a right which is guaranteed to the minority under Article 30. The Rule, therefore, must be interpreted narrowly and is held to be inapplicable to a minority educational institution in a situation of the kind with which we are concerned in this case. We do not think it necessary or advisable to strike down the Rule as a whole but do restrict its operation and make it inapplicable to a minority educational institution in a situation like the one which arose in this case."

Reference may also be made to another Constitution Bench decision in Sanjeev Coke Manufacturing Co. v. M/s. Bharat Coking Ltd. & Anr. [A.I.R.1983 S.C.239 = 1983 (1) S.C.C.147]. The following observation in Para 26 are apposite:

> "The deponents of the affidavits filed into Court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the Court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the Court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak

> for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliamentary intention by the executive government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said."

Lastly, we may quote the pertinent propositions enunciated in Ram Krishna Dalmia v. Justice Tendolkar [1959 S.C.R.279] to the following effect:

> "(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
> (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and...."

These are well-settled propositions. Applying them, it must be held that the aforesaid Municipal Laws are inapplicable to the properties of State governments to the extent such properties are governed and saved by clause (1) of Article 289 and that insofar as the properties used or occupied for the purpose of a trade or business carried on by the state government [as explained hereinbefore] are concerned, the ban in clause (1) does not avail them and the taxes thereon must be held to be valid and effective. It may be reiterated that the Delhi Municipal Corporation Act, 1957 and the N.D.M.C. Act, 1994 are post-constitutional enactments and that the Punjab Municipal Act too must be deemed to be a post-constitutional enactment for the reasons given hereinabove. It must, therefore, be held that the levy of property taxes by the said enactments is valid to the extent it relates to lands and buildings owned by State governments and used or occupied for the purposes of any trade or business carried on by such State government. In other words, the levy must be held to be invalid and inapplicable only to the extent of those lands and buildings which are not used or occupied for the purposes of any trade or business carried on by the State government, as explained hereinbefore. It is for the appropriate assessing authorities to determine which land/building falls within which category in accordance with law and in the light of this judgment and take appropriate further action. In this connection, we may mention that the assessing authorities

under the Act have to decide several questions under the Act including the questions whether any land or building is being used for "charitable purpose" or "public worship". They also have to decide whether a land is an "agricultural land". These are difficult questions as would be evident from a reference to the plethora of decisions under the Income Tax Act where these expressions occur. For this reason, neither the exemption can be held to be ineffective nor the authorities can be said to have no jurisdiction to decide these questions. Appeals are provided to civil courts against the orders of the assessing authorities.

In the light of the above position of law, it is for the Union of India to consider whether any steps are to be taken to maintain the balance between the Union and the States in the matter of taxation.

PART - V

The following conclusions flow from the above discussion:

(a) the property taxes levied by and under the Punjab Municipal Act, 1911, the New Delhi Municipal Corporation Act, 1994 and the Delhi Municipal Corporation Act, 1957 constitute "Union taxation" within the meaning of clause (1) of Article 289 of the Constitution of India;

(b) the levy of property taxes under the aforesaid enactments on lands and/or buildings belonging to the State governments is invalid and incompetent by virtue of the mandate contained in clause (1) of Article 289. However, if any land or building is used or occupied for the purposes of any trade or business - trade or business as explained in the body of this judgment - carried on by or on behalf of the State government, such land or building shall be subject to levy of property taxes levied by the said enactments. In other words, State property exempted under clause (1) means such property as is used for the purpose of the government and not for the purposes of trade or business;

(c) it is for the authorities under the said enactments to determine with notice to the affected State government, which land or building is used or occupied for the purposes of any trade or business carried on by or on behalf of that State government.

We direct that this judgment shall operate only prospectively. It will govern the Financial Year 1996-97 [commencing on April 1, 1996] and onwards. For this purpose, we invoke our power under Article 142 of the Constitution. The reasons are the following;

(a) according to the judgment under appeal, the properties of the State were exempt in toto whereas according to this judgment, some of the properties of the State situated within the Union Territory of Delhi may become liable to tax. The assessees are the State governments and the taxes are being levied under a Parliamentary enactment. This inter-State character of the dispute is a relevant factor;

(b) from the year 1975 upto now, there have been no assessments because of the judgment of the High Court; and

(c) retrospective assessment of properties under the above enactments appears to be a doubtful proposition - at any rate, not an advisable thing to do in all the facts and circumstances of this case.

Before parting with this case, it would be appropriate to refer to a submission of Sri B.Sen. He submitted that the exemption provided by clause (1) of Article 289 does not and cannot apply to compensatory taxes like water tax, drainage tax and so on. Even where the enactment does not specifically and individually enumerate these components of property taxes, i.e., where the levy is of a composite tax

known as "Property tax", it must be presumed, says Sri B.Sen, that part of the property taxes are compensatory in nature. We are, however, not inclined to express any opinion on this aspect in the absence of any material placed in support thereof. We cannot permit this new plea, which does not appear to be a pure question of law, to be raised for the first time at the time of arguments in these appeals/writ petitions.

The appeals and writ petitions are accordingly disposed of in the above terms. The judgment of the High Court shall stand modified to the extent it is contrary to this judgment.

There shall be no order as to costs.

Paripoornan, J.

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

2. Stated briefly, the controversy centres round the tenability or otherwise of the claim for refund of the amounts paid be way of excise duty under the Central Excises and Salt Act, 1944, now titled as Central Excise Act, 1944 (hereinafter referred to as 'the Excise Act') on the ground that it was so done under "mistake of law". It will be convenient to deal with the controversy by adverting to the minimal facts in the main appeal argued before us - Civil Appeal No. 3255 of 1984 - Mafatlal Industries Ltd., Ahmedabad v. Union of India. The appellant is a textile mill situate at Ahmedabad. The appellant and a few other mills manufacture "blended yarn". The said blended yearn was captively consumed by the various mills for manufacture of fabric, popularly known as "art silk" fabric. For the period prior to March 16/17, 1972, the mills paid excise duty on blended yarn manufactured for captive consumption under Tariff Item 18 or 18A of the First Schedule to the Excise Act. In Special Application No. 1058/72 filed by M/s. Calico Mills, who manufactured fabrics and was captively consuming blended yarn, produced by it for manufacturing fabric known as "art silk fabric", a Division Bench of the Gujarat High Court by judgment dated 15.1.1976, held that the levy of the excise duty on blended yarn prior to March 16/17, 1972, under tariff Item 18 or 18A was clearly ultra vires. The High Court directed refund of the excise duty levied for 3 years prior to institution of the petition, which was instituted on 6.5.1972. The appellant and other mill-owners stated that as a result of the declaration of the law as aforesaid by the Court, they were not liable to pay excise duty on blended yarn up to March 16/17, 1972 and that they had paid the excise duty on the same upto that date under mistake of law. They requested for refund of the excise duty so paid till March 16/17, 1972, stating that such duty was illegally recovered from them. The Revenue did not refund the excise duty as claimed. So, the appellant and others filed suits within three years of the aforesaid judgment (15.1.1976) for refund of excise duty illegally recovered from them, with interest. The trial court decreed the suits. In the appeals filed by the Union of India against the aforesaid

decrees passed by the trial court, the High Court of Gujarat allowed the appeals and set aside the decrees passed by the trial courts, by judgment dated 6.4.1984. It was held that in order to successfully sustain the claim of restitution based on Section 72 of the Contract Act, the person claiming restitution should prove "loss or injury" to him, and in the cases before them, the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric, and so the claim for restitution will not lie. In other words, in cases where an assessee has "passed on" the duty paid by or realised from him, he has suffered no loss or injury, and the action for restitution is unsustainable. The aforesaid statement of the law is seriously disputed by the appellants in Civil Appeal No. 3255/84 and others.

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

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

5. In this batch of cases, the claims by different assessees for refund of excise duty paid by them under mistake of law arise over a period of years, and the claims were made in different proceeding - before the departmental authorities, by way of civil suits and writ petitions under Article 226 of the Constitution, which are in appeal before us.
Broadly, the basis for the various refund claims can be classified into 3 groups or categories:
(I) The levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.
(II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.
(III) Mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.
For the periods during which the refund were claimed, there were different statutory provisions which governed the subject. They are -
(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;
(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the then Central Excises & Salt Act;
(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.
The circumstances and grounds on the basis of which the refund can be claimed, the period within which it should be so done, the forum before which the claim should be preferred and whether the decision thereon is subject to the jurisdiction of ordinary courts, vary from period to period. We shall advert to such provision and their impact on various aspects regarding the claim for refund a little later.
Rule 11 of the Central Excise Rules which dealt with claims for refund of duty as it was in force prior to 7.8.1977, is to the following effect:
Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months. - No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertance, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be.
It should be noted that Rule 11 before amendment did not provide for any ouster of jurisdiction of courts. We shall deal with Rule 11-A as amended and Sections 11A and B of the Excise Act a little later. The Revenue states that in view of these later provisions, there is ouster of jurisdiction of courts, relating to claims for refund.

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

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

8. The claim for refund in these cases is based upon the plea that excise duty was paid when it was not exigible. It was so done under mistake of law. Refund is claimed basing the action under Section 72 of the Contract Act, which is to the following effect:
Liability for person to whom 72. A person to whom money has money is paid or thing been paid, or anything delivered, delivered, by mistake or under by mistake or under coercion, coercion. must repay or return it.
Illustrations
(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and

B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.
(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.
Chapter V of the Indian Contract Act is styled thus : "Of Certain Relations Resembling Those Created By Contract". The Chapter contains five sections - Section 68 to 72. The rights and liabilities dealt with in those Sections accrue from relations resembling those created by contract. It is not a real contract, but one implied in law or a quasi-contract.
Law is fairly settled that "Money paid under a mistake or on a consideration which has wholly failed or under duress falls under the general head of money "had and received." An action for money "had and received." An action for money "had and received" is an action "founded on simple contract" which has been called quasi contract or restitution". Pollock & Mulla Indian Contract And Specific Relief Acts (10th Edition) page 598.

9. The Law of Restitution is founded upon the principle of "unjust enrichment". As stated by the learned authors, Lord Goff of Chieveley and Gareth Jones "The Law of Restitution" (3rd Edn.) 1986. "It presupposes three things : first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit. These three subordinate principles are closely interrelated." (page 16).
Cheshire Fifoot & Furmston's "Law of Contract" (12th Edn.) 1991, page 649.)

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

> It is the major theme of Birks' work that this phrase ambiguously conceals two different ideas in the law of restitution. The first, and most natural meaning, is that the defendant's gain represents a loss to the plaintiff : in Birks' terminology a 'subtraction from' the plaintiff'. The second, and less obvious meaning, is that the defendant's gain has been acquired by committing a wrong against the plaintiff.
>
> (Emphasis supplied)

The person claiming restitution should have suffered a "loss of injury". In my opinion, in cases where the assessee or the person claiming refund has passed on the incidence of tax to a third person, how can it be said that he has suffered a loss of injury? How is it possible to say that he has got ownership or title to the amount claimed, which he has already recouped from a third party? So, the very basis requirement for a claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him; in, other words, he has not passed on the liability. If it is not so done, the action for restitution or refunds, should fail.

11. In this connection, the decision of a three-member Bench of this Court in Mulamchand v. State of Madhya Pradesh affords some guidance. The appellant in that case, purchased a right to pluck, collect and remove the forest produce from the proprietOrs. The right was acquired before the propriety rights vested in the State of Madhya Pradesh by Act No. 1 of 1951 - called the Abolition Act. Acting under the Act, in April, 1951 the Deputy Commissioner auctioned the forest produce of villages covered by the purchases of the appellant. Amongst others, the appellant had deposited a sum of Rs. 10,000 towards the right to collect lac from the forest. It turned out that the provisions of Article 299 of the Constitution were not complied with and the contract entered into by appellant therein with the

State of Madhya Pradesh was void. The appellant claimed refund on the basis that there was no valid contract. The trial court as well as the appellant court held that the appellant having worked out the contract by collecting the lac from the jungles in pursuance of the agreement, was not entitled to refund of the amount of deposit. In the appeal filed by the appellant, this Court held that if the money is deposited and the goods are supplied or services rendered in terms of the contract, the provision of Section 70 of the Contract, Act may be applicable and, can be invoked by the aggrieved party to the void contract. This Court further held at pages 1222-23, thus:
The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. In Fibrosa v. Fairbaim, (1943) AC 32 Lord Wright has stated the legal position as follows:

> ...any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.
>
> (7) In Nelson v. Larholt (1948) 1 KB 339 Lord Denning has observed as follows.

It is no longer appropriate to draw a distinction between law and equity, Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution of the justice of the case so requires.
(Emphasis supplied)
This Court further stated the law thus:
...It is well established that a person who seeks restitution has a duty to account to the defendant for what he has received in the transaction from which his right to restitution arises. In other words, an accounting by the plaintiff is a condition of restitution from the defendant (See 'Restatement of the Law of Restitution', American Law Institute, 1937 Edn., p. 634).
(Emphasis supplied)
The observations extracted above indisputably point out that a person who seeks restitution, has a duty to disclose or account for what he has received in the transaction. An accounting is a condition precedent in an action for restitution. By way of analogy, it can be stated that in cases where restitution is claimed under Section 72 of the Contract Act, on the ground of payment due to mistake of law, the person claiming restitution, should plead and prove that "he has not passed on" the liability to another. That is the nature of "accounting" in cases falling under Section 72 of the Contract Act. In my opinion, the High Court was justified in law in holding that since the excise duty paid by the appellant was ultimately passed on to the buyers of the fabric, and that the appellant has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, was unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991).

12. Mr. F.S. Nariman, Senior Counsel for the appellants, contended that in an action for restitution under Section 72 of the Contract Act, the question as to whether the incidence of duty or tax has been passed on, is an irrelevant factor. There is no such requirement in the statute. The sheet-anchor of the appellant's case is founded on the decision of the Constitution Bench in Kanhaiya Lal's case (supra), which was followed by a Bench of 7 Judges in Aluminium Industries' case (1965) 16 STC 689. It was argued that the decision in Kanhaiya Lal's case was followed subsequently

in Tilokchand Motichand and Ors. v. H.B. Munshi and Anr. D. Cawasji & Co., Etc. Etc. v. The State of Mysore and Anr. [1975] 2 SCR 511; Dhanyalakshmi Rice Mills Etc. v. The Commissioner of Civil Supplies and Anr. Etc. The plea was that the law laid down in Kanhaiya Lal's case has stood the test of time for nearly four decades and there is no requirement either in Section 72 of the Indian Contract Act or in any of the above decisions, holding that in order to claim refund or restitution based on Section 72 of the Contract Act, the liability (duty) should not have been passed on. Our attention was also invited to the decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No. 2) (1992) 3 All ER 737, of the Canadian Court in Air Canada case (59 D.L.R. (4th series) 161) (in particular dissenting judgment of Wilson, J.), of the decision of the Australian Court in Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 69 A.L.J. 51, of the European Economic Committee in San Giorgio S.P.A. case (1985) 2 C.M.L.R. 658, and the decision of the United State Supreme Court in United States v. Jefferson Electric Manufacturing Co., 78 Lawyers' Edition 859, It was argued that the preponderance of judicial opinion in other jurisdictions also is in favour of the view, that "passing on" of the liability, is an irrelevant factors for consideration in an action for restitution, and at any rate, it cannot form the basis of a valid defence in an action for "restitution". Mr. Parasaran, Senior Counsel for the Union of India contended that the question of "passing on" of the liability never arose for consideration in Kanhaiya Lal's case nor was it decided. The said decision cannot be an authority for the proposition that a person claiming refund of tax on the ground of mistake of law is not obliged to allege and prove that it has not been passed on; on the other hand, it is mandatory for a claimant in such cases to allege and prove that he suffered a loss or detriment. Then and then alone, that Court can grant the equitable relief of restitution. Counsel also contended that the principle in Kanhaiya Lal's case (supra) has not been uniformally followed by this Court subsequently. Counsel also distinguished the various foreign decisions that were brought to our notice and highlighted the fact that those decisions were rendered on their own facts. Counsel further contended that in cases of indirect levy of tax (ess or fee) which was passed on, this Court has negatived the claim for refund in a few cases. Our attention was invited to the following decisions: Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc.; State of Madhya Pradesh v. Vyankatlal and Anr, 566-568; Amar Nath Om Parkash and Ors. Etc. v. State of Punjab and Ors. Etc; Indian Aluminium Company Limited v. Thane Municipal Corporation [1992] Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores Etc.

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

consideration -
(i) Whether the term "Mistake" occuring in Section 72 of the Contract Act took within its fold "mistake of Law" as well as "mistake of fact"?
(ii) Whether the tax paid under mistake of law can be recovered under Section 72 of the Indian Contract Act?
This Court held that word "mistake" occuring in Section 72 of the Contract Act has been used without any qualification or limitation and, so, it takes within its fold "mistake of law" as well as "mistake of fact". On the second question, this Court held that once it is established that the payment, even though it be a tax, has been made by the party under a mistake of law, the party is entitled to recover the same and a party who received the tax is bound to repay or return it. This Court held that there can be no distinction in a tax liability and any other liability on a plain reading of Section 72 and the plea that tax paid by mistake of law cannot be recovered under Section 72, will not be a proper interpretation of the relevant provisions, but to make a law, adding such words as "otherwise than by way of taxes" after the word "paid". The scope of Section 72 was considered only within a limited sphere. It should be noticed that no question was raised before this Court that in order to claim refund (restitution) of sales tax paid, - (an indirect levy) - under Section 72, the claimant should necessarily prove that he has sustained "a loss, or injury". In other words, the tax collected by him has not been passed on to a third party. Dealing with the plea that the position in law obtaining in England, America and Australia that money paid under mistake of law could not be recovered, and that similar considerations should weigh in interpreting Section 72, the Court held that the true meaning and intent of Section 72 should be interpreted on its own terms, divorced from all considerations, as to what was the state of previous law or the law in England or elsewhere. This Court made further observations to the following effect:
If it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Indian Contract Act, even though such a distinction has been made in America vide the passage from Willoughby on the Constitution of the United States, Vol. 1, p. 12 op cit. To hold that tax paid by mistake of law cannot be recovered under Section 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid".
Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of Section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If, once that circumstance is established the party is entitled to the relief claimed.
No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other.
The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him. Merely because the State of U.P. had not retained the monies paid by respondent but had spent them away in the ordinary course of the business of the State would not make any difference to the position and under the

plain terms of Section 72 of the Indian Contract Act the respondent would be entitled to recover back the monies paid by it to the State of U.P. under mistake of Law.

(Emphasis supplied)

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

> ...there are two observations of a general character which I wish to0 make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

(Emphasis supplied)

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

It also appears that there is some inconsistency in the Kanhaiya Lal's case. The basis in an action for restitution under Section 72 of the Contract Act, rests upon the equitable doctrine of unjust enrichment. The Court observed on page 1364 that the recovery of the money paid under mistake of law or fact can be recovered "subject however to questions of estoppel, waiver, limitation or the like". Even so, at page 1366, the Court has observed "equitable considerations could scarcely be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claims by him." The very basis of the claim, though statutorily incorporated in Section 72 of the Contract Act, is equitable in nature and if so, how can it be said that equitable considerations should not be applied in adjudicating the claim for restitution (refund)? If an assessee has passed on the tax to the consumer or a third party and sustained no loss or injury, grant of refund to him will result in a windfall to him. Such a person will be unjustly enriched. This will result in the assessee or the claimant obtaining a benefit, which is neither legally nor equitably due to him. In other words, such a person is enabled to obtain an unjust benefit" at the cost of innumerable persons to whom the liability (tax) has been passed on and to whom really the refund or restitution is due. The above factors certainly disentitle such a person from claiming restitution. If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto.

15. Shri Nariman and Shri Sorabjee also contended that if the relief of refund is withheld or denied on the ground that the assessee has passed on the tax (liability) to the consumer or third party, It will result in a position where the State is enabled to retain and appropriate the unlawful collection to itself. The plea was that Article 265 of the Constitution of

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

Preamble

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizen:

JUSTICE, social, economic and political;

xxxx xxxx xxxx

Article 39(b)-(c):

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(Emphasis supplied)

Mr. Parasaran also urged that it should be borne in mind that excise duty is an indirect levy or tax which could be passed on. Innumerable persons bear the brunt. And it is passed on, ordinarily by prudent businessmen. The decisions in R,C. Jail v. Union of India [1962] Suppl. 3 SCR 436 and The Province of Madras v. Boddu Paidanna and Sons (1942) F.C.R. 90, were referred to. Reference also was made to Section 64A of Sale of Goods Act, 1930 which was substituted later by Act 33 of 1963 to show that the levy could be passed on and so recognised by statute, and in the above background, there is a presumption that excise duty has been passed on. The scope of Article 39(b) of the Constitution, as laid down by this Court in State of Karnataka and Anr. Etc, v. Shri Ranganatha Reddy and Anr. Etc.; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. and Anr.; State of Tamil Nadu Etc. Etc. v. L. Abu Kavur Bai and Ors. was highlighted. Reliance was placed on Amar Nath Om Prakash and Ors. Etc. v. State of Punjab and Ors. Etc., at pp. 96, 97, 99, 100; Shiv Shanker Dal Mills Etc. Etc. v. State of Haryana and Ors. Etc. and Walaiti Ram Mahabir Prasad v. State of Punjab and Ors. AIR (1984) P&H 120, at p. 124, to stress the point that the persons claiming refund who were only middle-men, should not be unjustly enriched and allowed to make a "fortune" as it were, at the expense of innumerable unidentifiable innocent consumers and that "public interest" requires that such persons claiming refund should not be unduly or unjustly benefited; and, public interest is better served, if the State is allowed to retain the collection of tax, which could be made/spent, for the benefit of the "public.

16. On an evaluation of the rival pleas urged in the matter, I am of the view that the plea of Counsel for Union of India should prevail. Following the decision in the Province of Madras case (supra) and other cases, a Constitution Bench of this Court in R.C. Jall v. Union of India (supra) at page 451 stated the nature and character of excise duty, thus: Excise duty is primarily a duty on the production of manufactured of goods produced or manufactured within the country. It in an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer.

(Emphasis supplied)
Section 64A of the Sale of Goods Act after its amendment by Act 33 of 1963, in providing that in contract of sale amount of increased or decreased taxes, may be added or deducted by the seller or by the buyer, in case of increase or decrease or remitted, after the making of the contract for the sale or purchase of such goods, without stipulation as to the payment of tax where a tax was not chargeable at the time of making the contract, expressely states that the provisions shall apply to any duty of customs or excise and any tax on the sale or purchase of goods. The scope of Article 39(b) of the Constitution which has as its basis the concept of "distributive justice", as explained in three cases referred to in the previous paragraph; Shri Ranganatha Reddy [1978] 1 SCR 641; Sanjeev Coke v. Bharat and L. Abu go to show that the words "material resources" occuring in Article 39 Clause (b) will take in, natural or physical resources and also movable or immovable property and it would include all private and public sources of meeting material needs, and not merely confined to public possessions. So also, the three cases, shiv Shanker Dal Mill's case [1980] 1 SCR 1170, Amar Nath Om Prakash's case [1985] 2 SCR 72 and Walaiti Ram Mahabir Prasad, AIR 1984 (P&H) 120, emphasise the principle that the persons who have passed on the burden of the levy - middlemen - should not be allowed to profiteer by illgotten gains and unjustly enriched. An analysis of the above decisions in detail will point out that if Article 265 of Constitution is literally interpreted and in isolation, and refund ordered, in cases where excise duty has been passed on, it will result in a mockery, totally ignoring the other salient features of the Constitution and the ground realities. As the Preamble states, the Constitution was enacted by the people, to secure to all the citizen, justice, political, social and economic. It is fairly settled by the decisions of this Court, that the directive principles contained in Part IV of the Constitution are fundamental in the governance of this country and all organs of the State including the judiciary are bound to enforce those directives. In interpreting the various provisions of the Constitution, the courts have to be realistic and should be alive to the needs of the times. The courts have a responsibility to ensure proper and meaningful interpretation of the directive principle and to adjust or harmonise the objectives enshrined in the Preamble - justice, political, social and economic and the directive principles contained in Part IV, with the individual rights. In the process, it is permissible to restrict, abridge, curtail and in extreme cases, abrogate other rights in the Constitution, if found necessary and expedient, in particular situations. In the light of the above, I hold that Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to the claim of restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto. The observation of a three-Member Bench of this Court in Orissa Cement Ltd. v. State of Orissa [1991] Supp. 1 SCC 430 (498 para 69), is apposite in this context.
We are inclined to accept the view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

17. It is open to the Court to deny the equitable remedy of refund (restitution) in such cases. The attempt of persons who have passed on the liability in claiming refund is only to strike at a bargain - to make a fortune at the expense of innumerable unidentifiable consumers. Such persons have suffered no loss. On the other hand, if the State is allowed to retain the amount, it will be available to the community at large and

could be made use of for public purposes. On this basis as well, the denial of refund or restitution is valid. There is nothing abhorrent or against public policy if refund or restitution is withheld in such a situation. It should also be stated that in cases of indirect levy of tax which was passed on, this Court has negatived the claim for refund in a few cases, mentioned in paragraph 12 (supra); - Shiv Shanker Dal Mills v. State of Haryana ; State of Madhya Pradesh v. Vyankatlal and Anr.; Amar Nath Om Prakash and Ors. v. State of Punjab and Ors.; Indian Aluminium Company Limited v. Thane Municipal Corporation [1992] 1 Supp. 1 SCC 480 (488-489) and State of Rajasthan and Ors. v. Novelty Stores etc.

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

19. In this context, it will not be out of place to note that academicians have bestowed great thought and in various articles dealt with the matter in sufficient detail, particularly with reference to the foreign decisions brought to our notice. To mention a few, they are -
(1) When Money is paid in Pursuance of a void authority...." - A duty to replay? by Peter Birks: (Public Law (1992) page 580)
(2) "Restitution of taxes, levies and other imposts: Defining the extent of the Woolwich Principle" - by J. Beatson: Law Quarterly Review Vol. 109 (1993) Page 401.
(3) "Restitution of Overpaid Tax, Discretion and Passing-on" - by J. Beatson. (Law Quarterly Review Vol. 111 (1995) page 375 Notes.
(4) "Unjust Enrichment" - by Steve Hedley (Cambridge Law Journal 1995 (578-599).
(5) "Unjust Enrichment Claims: A Comparative Overview" - by Brice Dickson (Cambridge Law Journal (1995) (100-126)
(6) "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution" - by Graham Virgo; (British Tax Review (1993) (442-467)
(7) "Payments of Money under Mistake of Law: A Comparative View" - by Gareth Jones [Cambridge Law Journal (1993) Comment (225)]
(8) "Restitution, Misdirected Funds and Change of Position" - by Ewen McKendrick [Modern Law Review (1992) Vol. 55 (377-385)].
In some of the articles, the defences to a claim for restitution of overpaid taxes, has been dealt with the detail. One of them is the article by Graham Virgo’s appearing in British Tax Review (1993) (pp. 442-467) titled "The Law of Taxation is not an Island - Overpaid Taxes and the Law of Restitution", pages 462 and 463 under the sub-heading "Passing on", the learned author has made the following comment:
(vii) Passing on 484
Since restitution at common law is based upon the principle of reversing an unjust enrichment, it is important to determine whether the defendant was actually enriched at the plaintiff’s expense. This raises a difficult problem where the Revenue was initially enriched at taxpayer’s expense, by virtue of the receipt of overpaid tax, but the taxpayer did not ultimately suffer a loss because the burden of the payment was passed on to somebody else. This could arise if the taxpayer pays excessive VAT and passes the amount overpaid on to customers 495. As a matter of principle it could be argued that, in such a case, the taxpayer should not be allowed to recovery the amount overpaid from the Revenue, because recovery would mean that the taxpayer was unjustly enriched at the expense of those who ultimately bore the burden of the tax 506. A possible solution to this is to allow those who effectively paid the tax to recover from the tax payer, who in turn should recover from the Revenue, However, typically in cases of passing on there are many people who effectively bear the burden of the tax and to encourage actions by them would be impractical and unrealistic, Thus, in such cases the best approach is to allow the Revenue a defence of passing on and enable it to retain the tax and use it for the public benefit.

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

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

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

(Emphasis supplied)

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

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

20. Mention may also be made about the Law Commission’s Report in England, Law Consultation Paper No. 120 "Restitution of Payments made under a mistake of law" - wherein, after discussing the entire case law of England

and other jurisdiction, an observation is made thus:
3.85. In principle there would appear to be no reason why such a defence should not apply to cases where the authority can prove on the balance of probabilities that the payer would be unjustly enriched because the charge has been passed on. The views of consulters on the general issue of a "passing on" defence are invited.
In Kanhaiya Lal's case [1959] SCR 1350 at page 1367, this Court was not inclined to accept the defence in mitigation that the State has not retained the amount, but has spent them away in the ordinary course of governmental activities. This plea in defence based on the theory of "Change of Position" has been dealt with by Graham Virgo in his article in British Tax Review (1993) at pages 458-459. See also the views expressed in this behalf by a two-Member Bench of this Court in D. Cawasji & Co. v. State of Mysore

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

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

23. As stated by me earlier in paragraph 5 of this judgment, the claims for refund can be classified broadly into 3 groups. They are -
(I) the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.
(II) the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure.
(III) mistake of law - the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the

period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law.

24. The relevant provisions of law that existed during different periods dealing with the claim for refund are different in content and scope. They are as follows:
(a) Period up to 7.8.1977 - Rule 11 of the Central Excise Rules, before amendment;
(b) Period from 7.8.1977 to 16.11.80 - Rule 11 of the Central Excise Rules, as amended;
(c) Period from 16.11.1980 to 19.9.1991 - Section 11A and Section 11B of the Central Excises & Salt Act; and
(d) Period after 19.9.1991 - Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.
Rule 11 of the Central Excise Rules which was in force prior to 7.8.1977, has been quoted in paragraph 5 of this judgment. It contains no specific provision relating to ouster of jurisdiction of the courts.

25. Rule 11 of the Central Excise Rules as amended, Section 11A and Section 11B before Amendment Act 40 of 1991 and Section 11B, as amended by Act 40 of 1991, will be more important to consider the question of ouster of jurisdiction of courts. Sections 11C, 11D as also Sections 12A to D of the Act, will throw light on the scheme of the Act as amended. They are as follows (insofar as they are relevant in the instant cases):-
Rule 11 as amended
Rule 11. Claim for refund of duty. -
(1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty. Provided that the limitation of six months shall not apply where any duty has been paid under protest.
Explanation.- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.
(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.
(3) Whether as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.
Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.
Explanation. - For the purposes of this rule, 'refund' includes rebate referred to in Rules 12 and 12A.
Section 11-A
11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously, refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words 'six months', the words 'five years' were substituted.
Explanation. -...
(u) 'relevant date' means, -
(a) in the case of excisable goods on which duty of excise has not been

levied or paid or has been short-levied or short-paid...
(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;
SECTION 11-B BEFORE AMENDMENT BY ACT 40/1991
11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:
Provided that the limitation of six months shall not apply where any duty has been paid under protest.
(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.
(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.
(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.
(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.
Explanation. - For the purpose of this section....
(B) 'relevant date' means -
(1) in any other case, the date of payment of duty.
SECTIONS 11B, 11D AND 12A TO D, AS AMENDED BY ACT 40/1991
11B. Claim for refund of duty. - (1) Any person claiming refund of any duty or excise may make as application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:
Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:
Provided further that the limitation of six months shall not apply where any duty has been paid under protest.
(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the* foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -
(a) rebate of duty of excise on excisable goods exported out of India or on excisable material used in the manufacture of goods which are exported out of India;
(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;
(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:
Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.
(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).
Explanation. - For the purposes of this section,...
(B) 'relevant date' means -
(f) in any other case, the date of payment of duty.
(Emphasis supplied)
Section 11C deals with the power of Central Government to dispense with recovery of excise duty in certain specified cases, which is not necessary for our discussion. Section 11D and Sections 12A to D highlight the new scheme of the Act, relating to refund and they are as follows:
11D. Duties of excise collected from the buyer to be deposited with the Central Government.
(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against duty of excise payable by the person on the finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise.
12A Price of goods to indicate the amount of duty paid thereon
Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.
12B. Presumption that incidence of duty has been passed on to the buyer
Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.
12C. Consumer welfare fund
(1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.
(2) There shall be credited to the Fund, in such manner as may be prescribed, -
(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;
(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);
(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.
12D. Utilisation of the Fund
(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.
(2) The Central Government shall maintain or, if it thinks fit, specify the

authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.
It is evident that Rule 11, before amendment, provided a time limit to apply for refund. Rule 11(4) as amended, Section 11B Clauses (4) and (5) before amendment and Section 11B Clause (3) after amendment, specifically oust the jurisdiction of the ordinary courts. Detailed provisions are also provided to ventilate the grievances and making such provisions exclusive. Other ancillary or incidental provisions are specified in Sections 11D and 12A to D - Section 11D provides that every person, who collects excise duty from the buyer, should deposit the same with the Central Government. It will be adjusted against the duty of excise payable by the person concerned on finalisation of the assessment. Section 11D requires clarification. Excise duty is, ordinarily paid or payable at the time of clearance of the goods. The sale of the goods may be later. So, if excise duty due is already paid by the manufacturer, and later collected by him when the goods are sold, such collection, need not be paid to the Government. Only if the duty has not been paid already or if any excess is collected over the duty already paid, then only an occasion arises for payment of the duty collected or excess collected - and this is the purport of Section 11D. The said section (Section 11D) should be understood in the above practical and business sense. Section 12A provides that the price of the goods sold should indicate the amount of duty, which will form part of the price. Section 12B states that the person, who has paid the duty of excise on any goods under the Act, shall be deemed to have passed on the incidence of such duty to the buyer of such goods. It is a rebuttable presumption. Section 12C creates the "Consumer Welfare Fund". The amount of duty referred to in Sections 11B(2), 11C(2) and 11D(2) shall be credited in the said Fund. Section 12D provides that the Fund shall be utilised for the welfare of the consumers.

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

27. It is settled law that exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. There are a few decisions of Judicial Committee of the Privy Council and innumerable decisions of this Court which have dealt with the matter in detail. I propose to deal, only with the landmark decisions on the subject. In Secretary of State v. Mask & Co., AIR (1940) P.C. 105, the Judicial Committee laid down the law thus:

> ...It is settled law that the exclusion of the jurisdiction of the Civil
> Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (Emphasis supplied)

The scope of the above observation has been explained by a Constitution Bench of this Court, in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh . The minimal facts in this case will be relevant to understand the scope of the decision. The case arose under the Madras General Sales Tax Act, 1939. Section 18A of the Act provided that no suit or other proceeding shall except expressly provided in the Act, be instituted in any court to set aside or modify any assessment made under

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

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

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

28. The decision of the Privy Council in Mask & Co. case (supra), and other decisions of the Privy Council and of this Court, were surveyed in detail by a Constitution Bench of this Court in Dulabhai Etc. v. State of Madhya Pradesh and Anr. In that case, the assessees filed a suit for refund of the tax on the ground that it was illegally collected from them being against the constitutional prohibition contained in Article 301 of the Constitution of India and not saved in Article 304(a) of the Constitution. Section 17 of the relevant Act was pleaded in defence as a bar to the maintainability of the suit. Section 17 provided that no assessment made ' and no order passed under the Act or the Rules by any of the statutory authorities, shall be called in question in any case. The court held that notwithstanding, the alternate remedies by way of appeal, revision,

rectification and reference to the High Court, the tax therein was levied without a complete charging section and this affected the jurisdiction of the tax authorities, and so, the suit was maintainable, and decreed the suit. After referring to the relevant decisions and in particular, Secretary of State v. Mask & Co., AIR (1940) P.C. 105; Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh , this Court held in paragraph 28 of the judgment, thus:

The Constitution Bench, however went on to examine the rulings of the Judicial Committee in Mask and Co.'s and Realign Investment Co.'s cases, 67 Ind App 222 - AIR (1940) PC 105 and 74 Ind App 50 : AIR (1947) PC 78. Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction... (Emphasis supplied)

Referring to the facts Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh, it was further observed:

The case of Firm of Illuri Subbayya may be said to be decided on special facts with additional reference to the addition of Section 18-A excluding the jurisdiction of civil court and the special remedies provided in Sections 12-A to 12-D by which the matter could be taken to the highest civil court in the State. (Emphasis supplied)

This Court also considered the facts and the actual decision of the Special Bench of of 7-Judges in Kamala Mills Ltd. v. State of Bombay in detail, with reference to Section 20 of the Bombay Sales Tax Act, 1946, and observed thus:

The Special Bench refrained from either accepting the dictum of Mask Co. 's case, 67 Ind App 222 - AIR (1940) PC 105 or rejecting it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the civil courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with. It is evident from the above, that the principle laid down in Mask & Co. case, though explained, was not questioned, or departed from, either, in Illuri Subbayya Chetty's case or Kamala Mills case. In a subsequent decision - Ram Swamp v. Shikar Chand, a Constitution Bench of this Court again considered the scope of the decisions in Mask & Co.'s case (supra) and Kamala Mills's case (supra). Ram Swamp's case arose under the U.P. (Temporary) Control of Rent and Eviction Act. Section 3(4) of the Act provided that the order passed by the designated authority shall be final and Section 16 thereof further provided that the order passed by the State Government or the District Magistrate, shall not be called in question in any court. In other words, the jurisdiction of civil courts was excluded in relation to the matters covered by orders included within the provisions of Sections 3(4) and 16 of the said Act. The Constitution Bench approached the matter thus:

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

(Emphasis supplied)

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

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

(Emphasis supplied)

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

In Kamala Mills Ltd. v. The State of Bombay, C.A. No. 481 of 1963, dated 23.4.1965 ; while dealing with a similar point, this Court has considered the effect of the two decisions of the Privy Council, one in the case of Mask and Co., 67 Ind App 222. AIR (1940) PC 105 (supra), and the other in Raleigh Investment Co. v. Governor-General in Council, 74 Ind App 50 at pp. 62-63: AIR (1947) PC 78 at pp. 80-81. The Conclusion reached by this Court in M/s. Kamala Mill's case C.A. No. 481 of 1963 dated 23.4.1965: (supra) also support the view which we are taking in the present appeal. (Emphasis supplied)

It is evident that in Ram Swamp's case, this Court expressed the view that the decision in Kamala Mills' case is in accord with Mask & Co.'s case, and the bar of jurisdiction of civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity - in other words, where the order or proceeding is attacked as one passed without jurisdiction. Again, the principle laid down in Mask & Co.'s case was only reiterated and observations were made that the decision in Kamala Mills' case was in accord with the decision in Mask & Co. 's case. It is important to notice that Gajendragadkar, C.J., spoke for the Bench in all the three decisions: Illuri Subbayya Chetty AIR (1.964) SC 322; Kamala Mill AIR (1965) SC 942 and Ram Swamp AIR (1966) SC 893.

In considering Mask & Co. AIR (1940) PC 105 and Kamala Mills AIR (1965) SC 1942 the Constitution Bench in Ram Swamp's case AIR (1966) SC 893 held that if the proceeding assailed is totally invalid and a nullity or without jurisdiction, the jurisdiction of the civil courts is not barred. Again, the principle laid down in Mask & Co (supra) was only affirmed.

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

Neither of the two cases of Firm of Illuri Subbayya [1964] 1 SCR 752 : AIR (1964) SC 322 or Kamala Mills [1966] 1 SCR 64 - AIR (1965) SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

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

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

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays

down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
(5) where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.
(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.
(Emphasis supplied)
Dulabhai's case (supra) has been consistently followed by this Court later - see: Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Gum v. The State of Andhra Pradesh and Ors. and other cases.

29. Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai's case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application. Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills Ltd., Jalandhar [1988] Supp. SCC 683; Escorts Ltd. v. Union of India and Ors. [1994] Supp. 3 SCC 86. Rule 11 before and after amendment, or S. 11B, cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups or categories enumerated in paragraph 5 of this Judgment is as follows:
Category (I) where the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act:-
In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution, and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. [Dulabhai's case (supra) - para 32 - Clauses (3) and (4)].
Category (II) where the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act. Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure:-
Under this category every error of fact or law committed by the statutory authority or Tribunal, irrespective of its gravity, or nature of infirmity will not be covered. It is confined to exceptional cases, "where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of

judicial procedure", as stated in Mask & Co.'s (supra) and in Dulabhai's case (supra). The scope of the above dicta, should be understood in the background of/in accord with the observations of the earlier Constitution Bench of this Court in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh, to the following effect:

> ...Non-compliance with the provisions of the statute, to which reference is made by the Privy Council must, we think, be noncompliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void.... [Dulabhai's case (supra) -- para 32 Clause (1)]
>
> (Emphasis supplied)

Here also, the appropriate action should be laid within the period of limitation provided by the appropriate law and also can invoke Section 72 of the Contract Act, as the case may be.

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

In this category, assessees who initiated proceedings and impugned the assessments/claimed refund, for any reason, either by way of suit or petition under Article 226 of the Constitution, and the action was dismissed on merits, they cannot maintain an action over again. He who fights and runs away, cannot have another day. If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim cannot, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law. The claim will be unsustainable and barred by res judicata. Tilokchand Motichand and Ors. v. H.B. Munshi, Commissioner of Sales Tax, Bombay and Anr. (This will be confined to the period for which action was laid and lost).

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

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

31. As observed earlier, proposition No. (1) or clause No. (1) enunciated in Dulabhai's case (supra) should be understood in the background of or in accord with the observations of the earlier Constitution Bench in Illuri Subbayya Chetty's case - AIR (1964) SC 322 (at pp. 325-326)] as quoted in para 27 (supra) - (see para 29 of this judgment).

Opinions may differ as to when it can be said that in the "public law"

domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (Referred to in Illuri Subbayya Chetty's case and approved in Dulabhai case). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact situation obtaining, in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or Tribunal, makes the decision rendered ultra-vires or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147 : (1969) 1 All ER 208 (H.L.), the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses", are construed restrictively, and such provisions whatever their stringent language be, have been held not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means, "the authority to decide", and it is determinable at the commencement, and not at the conclusion of the inquiry. The said approach has been given a go bye in Anisminic case, as we shall see from the discussion hereinafter (See De Smith, Woolf and Jowell - Judicial Review of Administrative Action (1995 edn.) P. 268; Halsbuny's Laws of England (4th edn.) p. 114 - para 67 - foot note (9). As Sir William Wade observes in his book, Administrative Law (7th edn.), 1994, at p. 299, "The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task". The decision in Anisminic case has been cited with approval in a number of cases by this Court: Citation of few such cases; Union of India v. Tarachand Gupta & Bros. A.R. Antulay v. R.S. Nayak and Anr. R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) and Anr. N. Parthasarathy Etc. Etc. v., Controller of Capital Issues and Anr. Etc. Etc.; Associated Engineering Co. v. Government of Andhra Pradesh and Anr.; Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors. Delivering the judgment of a two-Member Bench in Shri M.L. Sethi v. Shri R.P. Kapur Methew, J. in paragraphs 10 and 11 of the judgment explained the legal position after Anisminic case to the following effect:

The word "jurisdiction" is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denman in R. v. Bolton, [1841] 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd., (1969) 2 AC 147 Lord Reid said:

Put there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

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

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

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

The observation of the learned author (S.A. De Smith) was continued in its third edition (1973) at page 98 and in its fourth edition (1980) at page 112 of the book. The observation aforesaid was based on the then prevailing academic opinion only as is seen from the foot notes. It should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowell - Judicial Review of Administrative Action - 5th edition (1995) as is evident from page 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

32. After 1980, the decision in Anisminic case came up for further

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

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

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

(Emphasis supplied)

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

The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an inquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an inquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior Court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited

power to decide that matter incorrectly.
A tribunal lacks jurisdiction if (I) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject matter, the value of that subject matter, or the non-existence of any other prerequisite of a valid adjudication. Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably.
Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. (p. 114)
There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question. (pp. 119-120)
The presumption that error of law goes to jurisdiction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; but with the modem approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The courts will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament" (p.120)
Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof (pp. 121-122)
(Emphasis supplied)

34. H.W.R. Wade and C.F. Forsyth in their book - Administrative Law, Seventh Edition (1994) - discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over Fact and Law" in Chapter 9, pages 284 to 320. The decisions before Anisminic and those in the post Anisminic period have been discussed in detail. At pages 319-320, the authors give the Summary of Rules thus:
Jurisdiction over fact and law: Summary
At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. The overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:
Errors of fact
Old rule The court would quash only if the erroneous fact was jurisdictional.
New rule The court will quash if an erroneous and decisive fact was
(a) jurisdictional

(b) found on the basis of no evidence; or
(c) wrong, misunderstood or ignored.
Errors of law
Old rule The court would quash only if the error was
(a) jurisdictional; or
(b) on the face of the record.
New rule The court will quash for any decisive error, because all errors of law are now jurisdictional.
(emphasis supplied)

35. The scope of the exclusionary clauses contained in the statutes has been considered in great detail with reference to the decisions of the superior courts in England and also the decisions of the Supreme Court of India by Justice G.P. Singh (former Chief Justice, M.P. High Court) in "Principles of Statutory Interpretation", 6th edition (1996) at page 475. The law is stated thus:
A review of the relevant authorities on the point leads to the following conclusions:
(1) An Exclusionary Clause using the formula 'an order of the tribunal under this Act shall not be called in question in any Court' is ineffective to prevent the calling in question of an order of the tribunal if the order is really not an order under the Act but a nullity.
(2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of enquiry e.g., when (a) authority is assumed under an ultra vires statute; (b) the tribunal is not properly constituted, or is disqualified to act; (c) the subject-matter or the parties are such over which the tribunal has no authority to inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.
(3) Cases of nullity may also arise during the course or at the conclusion of the inquiry, These cases are also cases of want of jurisdiction if the word 'jurisdiction' is understood in a wide sense. Some examples of these cases are (a) when the tribunal has wrongly determined a jurisdictional question of fact or law; (b) when it has failed to follow the fundamental principles of judicial procedure, e.g. has passed the order without giving an opportunity of hearing to the party affected; (c) when it has violated the fundamental provisions of the Act, e.g., when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters; (d) when it has acted in bad faith; and (e) when it grants a relief or makes an order which it has no authority to grant or make; "as also (f) when by misapplication of the law it has asked itself the wrong question.
With great respect to the learned author, I would adopt the above statement of law, as my own.
I would conclude this aspect by holding that the jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

36. Two decisions of this Court rendered after Section 11B of the Act was amended in 1991, deserve mention. They are - Union of India and Ors. v. Jain Spinners Limited and Anr; Union of India and Ors. v. ITC Ltd. [1993] Supp. (4) SCC 326. In Jain spinners case, the application for refund itself was filed before the concerned statutory Authority (Assistant Collector, Central Excise). While the said application was pending, Section 11B of the Act came into force. There was an earlier interim order passed by the High Court directing the deposit of the duty levied with a liberty to the Revenue to withdraw it, subject to the condition that the amount will be refunded if the assessee succeeded ultimately. The Assistant Collector applying the amendments effected in 1991, declined to order refund, holding that the assessee had passed on the incidence of duty to others. It was upheld by this Court notwithstanding the interim orders and other proceedings of the High Court. Basically, the application for refund was

filed before the concerned statutory authority, who negatived the claim by giving effect to the provisions of the Amendment Act. There was no attack in the above case that the levy or collection as one unauthorised or unconstitutional or without jurisdiction or illegal. In Union of India v. ITC Ltd. the Jain Spinners case (supra) was followed. The main aspect that arose for consideration in the latter case was whether the assessee had passed on the incidence of duty to the consumers or other persons. In spite of the repeated orders of this Court, the assessee failed to establish that the burden of excess excise duty was borne by it and was not passed on to any other person. The assessee had filed five applications for refund. Three of them were allowed by the statutory authorities in the appeals. Only two refund applications were rejected which were assailed in the High Court. The High Court allowed the said applications, directing the Revenue to refund the amounts due as per the two refund applications. In Appeal, this Court stressed the fact that the assessee was not able to substantiate that the burden of excess excise duty was borne by it and was not passed on to any other person. Incidentally, this Court also referred to the amended provisions of the Act (11B, 12B etc.) and held that the amended provisions would apply when the matter regarding refund was still pending for adjudication in this Court. In this case also the levy or collection was not assailed as unconstitutional or illegal or without jurisdiction and, in consequence refund was called for. The above two cases did not deal with the maintainability of action in the ordinary courts where the levy or collection is assailed on the ground that it is unconstitutional, illegal or without jurisdiction.

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

38. As stated, Section 11B(2) and Section 11B(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11B(2) and (3) as amended in 1991 cannot apply to:
1. ’Refund’ made or due as per orders passed by Court, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.
2. refunds ordered by the statutory authority concerned which have become final.

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

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

and Ors. v. Union of India and Ors. and Union of India and Anr. Etc. Etc. v. A. Sanyasi Rao and Ors. Etc. Etc. etc.]

40. Before closing I should specifically deal with two important aspects. In this judgment I have dealt with cases where duty is paid on items which are consumed as such. Due to paucity of details, the case of captive consumption has not been dealt with. It is made clear that whatever is stated in this judgment will not apply in the cases of goods which are captively consumed.
Chapter II-A of the Act was inserted by way of amendment in 1991. The establishment, working, administration and utilisation to the Consumer Welfare Fund is in its stage of infancy. The scheme or set-up envisaged by Sections 12C and 12D and its working will require an in-depth evaluation by the appropriate authorities in order to vouchsafe that the scheme is not rendered a mere ritual or illusory, but is meaningful and effective for the present, I do not want to deal with that aspect in detail.

41. For the sake of convenience, I shall summarise my conclusions as here-under: (in case of doubt, the body of the judgment should be looked into).
(A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991.)
(B) The decision in Kanhaiya Lal’s case and the cases following the same, cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.
If the decision in Kanhaiya Lal’s case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect of the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in para 29 - Clause III shall also be borne in mind.
(C) Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.
(D) The presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the ’duty" element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an indepth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge to the taxpayer, the burden of proving that the liability has not been passed on should lie on him.
(E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc., as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No. (1) (3) (4) and (5) in Dulabhai’s case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application.
(F) The attack against the illegal or unauthorised levy as also the relief of refund may fall ordinarily within the three categories specified in paragraph 29 of the judgment. An action by way of suit or writ petition

under Article 226 of the Constitution of India will lie in the cases, and subject to the conditions stated in paragraphs 29 and 30 of the judgment.
(G) The jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).
(H) Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. If the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases.
(I) It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply, only to (1) refund applications made under the statute and filed before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the "commencement of the Amendment Act, 1991. (cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).
(J) The proviso to Section 11B(2), provides, that the duty of excise will be refunded in few specified cases, subject to certain conditions - one of them is the manufacturer - in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said, that the provisions ushered in by Amendment Act, 1991 - and the scheme formulated in Sections 11B and 12A to B -- (in the light of the clarifications made in the body of the judgment, and more particularly in paras 25 and 40 above) are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm. (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein).

42. The principles laid down in this judgment should be applied to the fact situation obtaining in individual cases and should be disposed of accordingly.
The matters may be placed before My Lord the Chief Justice for appropriate orders in this behalf.

Hansaria, J.

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

Sen, J.

1. Leave granted in the Special Leave Petitions.
2. In C.A. No. 3255 of 1984 and a number of other cases which have been heard together, questions have been raised, firstly, as to whether a refund of Central Excise Duty wrongly realised from a tax-payer can be withheld on the ground of what is described as 'unjust enrichment', without any specific provision of law to that effect; secondly, whether the position was altered after the Central Excise Act, 1944 was amended by the Central Excises and Customs Law (Amendment) Act, 1991 which came into effect on September 20, 1991? By virtue of this amendment Section 11B along with a few other sections of the Central Excise Act, 1944 stood amended. I shall deal with both these questions separately. But before entering into that controversy, it is important to bear in mind the provisions of Article 265 of the Constitution and its amplitude. It has also to be seen what is the scope, meaning and purport and also the import of what is described as 'unjust enrichment'. A challenge has also been made to the validity of the amendments made to the Central Excise Act. That will also have to be examined.
ARTICLE 265
3. Article 265 of the Constitution lays down that "no tax shall be levied or collected except by authority of law." The mandate of the Constitution is lucid and clear and must be taken to mean what it says. 'No tax' takes in every type of tax. It has been contended on behalf of the Union of India that Article 265 merely lays down that no direct tax shall be levied or collected except by authority of law. The first question is that if that was the intention of the Constitution makers, then why did they not say so in so many words? 'Taxation' has been defined in Article 366(28) to include the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly. Therefore, the word 'tax' will include any tax general, local or special. That means every kind of tax direct or indirect will come within the ambit of Article 265.
4. It has also to be noted that Article 265 is included in Part XII of the Constitution which deals with Finance, Property, Contracts and Suits. Chapter I of Part XII deals with Finance. Under this heading, both direct and indirect taxes have been dealt within a number of Articles. Article 268 deals with stamp duties and duties of excise on medicinal and toilet preparations. Article 269 deals with duties in respect of succession to property other than agricultural land, estate duty in respect of property other than agricultural land, terminal taxes on goods or passengers, taxes on railway fares and freights, taxes other than stamp duties on transactions in stock-exchanges and futures markets and taxes on the sale or purchase of newspapers and on advertisements published therein. Article 270 deals with taxes on income other than agricultural income. Article 272 deals with Union duties of excise, other than duties of excise on medicinal and toilet preparations. Article 276 deals with taxes for the benefit of a State or a municipality, district board, local board or other local authority in respect of professions, trades, callings or employments. Article 277 deals with taxes, duties, cesses or fees which were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area. Article 287 deals with tax on the consumption or sale of electricity. All these Articles go to show that Part XII, Chapter I, deals with not only direct taxes like taxes on income or duties in respect of succession to property, but also deals with indirect taxes like stamp duty, duties of excise on medicinal and toilet preparations, other duties of excise, terminal taxes on goods, taxes on railway freights, taxes on transactions in stock- exchanges and futures markets and taxes on sale or purchase of newspaper. In the context of all these Articles in Chapter I of Part XII dealing with direct and indirect taxes, it is difficult to hold that the mandate at the beginning of the Chapter that "no tax shall be levied or collected except by authority of law", was meant to be confined to direct taxes only and not to other types of taxes which were specifically enumerated in a number of other Articles in Chapter I of Part XII of the Constitution.
5. Moreover, this argument, if accepted, will have dangerous implications.

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

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

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

37C Saving of laws giving effect to certain directive principles. - Notwithstanding anything contained in Article 13, no law giving effect of the policy of the State towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his asS.

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

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

10. The Court has a duty to uphold the Constitution in letter and spirit. If the Court comes to the conclusion that a levy of tax is unlawful, the Court will direct the Government to return the tax. It is not for the Court to enquire how the tax-payer has managed his affairs after payment of the

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

11. A point has been made that the manufacturer has passed on the burden of the illegal levy to his customers by raising his price of the goods. But that is no reason why the guarantee given by the Constitution should not be enforced. The manufacturer may have been compelled to raise the price because of the imposition of an illegal levy. But that is no reason to dilute the mandate contained in Article 265 of the Constitution. Article 265 forbids the State from making an unlawful levy or collecting taxes unlawfully. The bar is absolute. It protects the citizens from any unlawful exaction of tax. So long as Article 265 is there, the State cannot be permitted to levy any tax without authority of law and if any tax has been collected unlawfully that must be restored to the person from whom it was collected. If the tax has been collected from any person unlawfully, it is the taxpayer’s money which is in unlawful possession of the State. The State has a constitutional obligation to give back the money to the tax-payer. An act done in violation of constitutional mandate is void and no right flows out of that void act to the State. The State is in unlawful possession of the taxpayer’s property. The State cannot retain it on any equitable ground nor can it give it to any other person out of any supposed equitable consideration. The constitutional mandate cannot be ignored on the pretext of any rule of equity or on the ground of what is perceived as substantive justice. Every word of the Constitution has to be treated as sacrosanct and respected and obeyed by the State and the Legislature and enforced by the Court.

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

manner, then such amendment or Act is as offensive to the Constitution as the illegal levies themselves were. If the tax has been illegally exacted from a person, then he has been denied the protection given to him by the Constitution. The denial of the right to recover the unlawfully collected tax is denial of the protection given to citizen by Article 265.

13. A similar question was examined by the Judicial Committee of the Privy Council in an appeal from Australia in Commissioner for Motor Transport v. Antill Ranger & Co. Pvt. Ltd. (1966) 3 All. E.R. There, certain charges had been levied by the State of New South Wales under an Act in connection with inter-State transactions. These charges where held to be violative of Section 92 of the Commonwealth of Australian Constitution. Subject to imposition of uniform duties of customs, Section 92 guarantees freedom of trade, commerce and intercourse among the States by internal carriage or ocean navigation. The levy under the Principal Act having been declared unlawful, an Act called the state Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 was passed barring and extinguishing the right of recovery of any sums collected or recovered under the Principal Act. It was made clear that the provisions of the Barring Act would apply to proceedings pending at the commencement of the Act as well as proceedings brought after the commencement of the Act. The validity of the Barring Act was challenged. It was pointed out by the Judicial Committee that if the Act was valid, it would be a complete answer to the claim of the taxpayers. But the validity of the relevant provisions of the Barring Act could be no greater or no less if they had been contained in the Principal Act itself. It was held that neither prospectively nor retrospectively can a State law make lawful that which the Constitution says is unlawful. If the statute laid down that the charges in respect of inter-State trade should be imposed and that, if they were illegally imposed and collected, they should nevertheless, be retained, such an enactment would be illegal. The statutory immunity accorded to illegal acts is as offensive to the Constitution as the illegal acts themselves.

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

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

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

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

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

18. An argument was advanced before the Judicial Committee that the Barring Act did not impose any burden on trade but only barred the right of

property viz., the right to sue for money...which accrued after the trading operations were over, the Judicial Committee rejected this argument by observing that "...an enactment whose only object is to validate an exaction which the section renders unlawful would in their Lordships' opinion be a mockery of the spirit of the Constitution".

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

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

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

Section 424 Refund of automobile accessories tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924...unless either -

(1) pursuant to a judgment of a court in an action duly begun prior to April 30, 1928 ; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him:....

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

The contention is made that sub-division (a) (2), when construed and applied as we hold it should be infringes the due process clause of the Fifth Amendment to the Constitution in that it strikes down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent, because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before Section 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that Section 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects

them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.
We do not perceive in the restriction any infringement of due process of law....
23. What the U.S. Supreme Court held in that case was that the new enactment did not infringe the due process of law and, therefore, could not be struck down. The U.S. Supreme Court did not have to consider the impugned section in the light of a provision similar to Article 265 of the Indian Constitution. But there were two important observations which have to be borne in mind:
(1) If the tax was erroneous and illegal, a right accrued to the taxpayer when he paid the tax to have it refunded without showing as to whether he bore the burden of tax or shifted it to the purchaser.
(2) Section 424 applied to rights accrued theretofore and still subsisting but not sued on prior to April 30, 1928.
24. A question similar to the one dealt with by the American Supreme Court also came up before the Supreme Court of Canada, in the case of Air Canada v. British Columbia (1989) 59 D.L.R. 4th 161. The principles laid down in Air Canada case cannot be understood unless one bears in mind the peculiar facts of the case which has been recorded in detail in the judgment of La Forest, J.
25. The dispute was confined to the taxes paid by Air Canada in the 23 month period between August 1, 1974 and July 1, 1976. The tax was levied under the Gasoline Tax Act, 1948. The Act as it stood on August 1, 1974 provided that every purchaser shall pay a tax equal to 10 cents per gallon on all gasoline purchased except gasoline purchased for use in an aircraft, which was taxed at a lower rate. Section 2 defined "Purchaser" as under:
"Purchaser" means any person who within the Province purchases gasoline when sold for the first time after its manufacture in or importation into the Province.
26. An identical provision in a cognate statute was struck down by the Privy Council which led to retroactive amendment of the Gasoline Tax Act by inserting Section 25 which was as under:
25(1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976 purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.
(2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15c a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but
(a) where gasoline was purchased for use in an aircraft the tax shall be 8c a gallon, and
(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10c a gallon.
(3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17c a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but
(a) where gasoline was purchased for use in an aircraft the tax shall be 5c a gallon, and
(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12c a gallon.
(4) x x x x x x
(5) Where after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have

been confiscated by the government without compensation.
27. These amendment were statutorily given retroactive character by Section 62(5) of the Finance Statutes Amendment Act, 1981. By this change of definition of purchaser what was an indirect tax earlier was converted into a direct tax. The tax was on gasoline purchased by a purchaser for his own use or consumption or for consumption of other persons at his expense or on behalf of or as an agent for the principal for use or consumption by the principal or by other persons at his expense. Although, it was provided by Sub-section (5) that the amount which was collected before the amendment of the Act between August 1, 1974 and July 1, 1976 as tax shall be conclusively deemed to have been confiscated by the Government without compensation, according to La Forest, J., the Section really does not mean what it says. A fund of money illegally collected was lying with the Province. Having imposed the tax retroactively, the Province merely was enabled to retain the amount in its hands by adjusting it against the tax which has subsequently become payable by the amended provision. The tax retained and the tax payable were identical amounts. This in sum and substance, was the judgment of La Forest, J. The rest of the observations of La Forest, J. in Air Canada case appears to be obiter.
28. After referring to the amended Section, La Forest, J. said:
That the tax is a direct tax I have no doubt. Since at least bank of Toronto v. Lambe (1887), 12 App. Cas. 575, the generally accepted test of what constitutes a direct tax has been that of John Stuart Mill: A direct tax is one which is demanded from the very person who it is intended or desired should pay it". That person is clearly identified in the definition in the 1976 Act as the ultimate consumer of the gasoline; there is no passing on of the tax to others, whatever may be the opportunities of recouping the amount of the tax by other means (a. very different thing).
29. Referring to the new Section 25 brought into existence by the 1981 Act, La Forest, J. identified the real issue of the case in the following words:
None of the judges in the courts below casts any doubt on the legislative power of the province to impose a retroactive tax in the manner provided in Section 25(1) to (4). What they really disagreed about was the effect of Section 25(5) on those provisions. In common with these judges. I am unable to see any constitutional impediment to the province's enacting Section 25(1) to (4). On the reasoning regarding the 1976 Act, these provisions seem to be a proper exercise of its power to impose direct taxation in the province, the sole difference being that the 1981 provisions are given retroactive effect, a result that is not constitutionally barred. The real question, then, is whether when Section 25(1) to (4) are conjoined to Section 25(5), they become so coloured by the latter provision as to make all of Section 25 ultra vires.
30. That question was answered by La Forest, J. in the following words:
That, of course, raises the issue whether Section 25(5) is itself ultra vires. There are, in my view, some serious difficulties in establishing its invalidity. It may be, if the provision stood alone, that it could be successfully maintained that it violates the principle, in the Amax decision. I need not consider that situation because it does not stand alone. It is the fifth of five subsections, the first four of which impose a valid direct tax, and it must obviously be read in that context. It must also be read in light of the well-known principle that it must be assumed that the legislature intended to stay within the confines of its constitutional competence. While, as Esson, J.A. notes, the expression "confiscated" is distasteful, one should not permit it to mislead us regarding the purpose of Section 25(5). The function of the courts is not to give the legislature lessons in tact. Their function, rather is to attempt to discover what the legislature, however, clumsily was attempting to achieve by the language it used, a task that should, as already noted, be informed by the presumption that the legislature intended to stay within its constitutional powers.
In the context in which it appears, Section 25(5) seems to be nothing more nor less than machinery for collecting the taxes properly imposed in the first four subsections of Section 25. It must be remembered that the amounts illegally collected under the ultra vires provision before 1974 would be equal to the taxes levied under Section 25(1) to (4).

Administratively, the taxes levied under the invalid scheme were collected in the same manner and in the same amounts and from the same taxpayers as would have occurred if the scheme had originally been framed along the lines of Section 25(1) to (4). What the legislature attempted to do by Section 25(5), therefore, was to provide collection machinery whereby the moneys owing by the taxpayers under the latter provision could simply be taken out of the equal amounts it had collected from those taxpayers under the invalid tax. It was in that sense that the moneys were deemed to have been confiscated by the government.

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

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

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

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

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

It is, in my view, impossible to divorce Section 25(1) to (4) from Section 25(5) of the Gasoline Tax Act, R.S.B.C. 1979, c.152. The only possible basis for the confiscation under Section 25(5) is the imposition of the retroactive tax under Section 25(1) to (4). Certainly the payments made under the ultra vires legislation could not support such a confiscation since the moneys were not as a constitutional matter properly exigible under that legislation....

Averting to "Mistake of Law" Wilson, J. observed:

...Whatever the nature of the mistake, the key question, my colleague suggests, should be whether the respondent has been unjustly enriched at the appellants' expense or whether there is some specific reason which makes restitution inappropriate in the circumstances. My colleague concludes that there was unjust enrichment in this case but he finds two reasons why restitution is inappropriate. The first is that the appellants in all likelihood passed on the burden of the ultra vires tax. to their customers; the unjust enrichment of the respondent was therefore not shown to be at the expense of the appellants. The second is that the general rule of recovery should, as a matter of policy, be reversed where the person unjustly enriched is a governmental body....

Wilson, J. went on to observe:

It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the

taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

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

My colleague advances another reason why the appellants should be denied recovery in this case, he says, in effect, that the appellants would be receiving a "windfall" if they received their money back because in all likelihood they have already recouped the payments made on account of the ultra vires tax from their customers. In terms of my colleague's analysis, the appellants are unable to show that the unjust enrichment of the province was at their expense. In my view there is no requirement that they be able to do so. Where the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained. As Dickson, J. stated in Amax, supra, at p.10:

To allow moneys collected under compulsion, pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

...

Indeed, even on my colleague's unjust enrichment analysis Dickson, J. found in Nepean, supra, that there were no equitable reasons of principle or policy to preclude recovery from Ontario Hydro.

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

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

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

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

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

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

In the present case the invoices given by the plaintiffs to their customers for lump sum contracts did not set out any amounts charged for materials, labour or taxes; simply the lump sum itself was shown. The evidence discloses that many factors, including the competitive environment and the plaintiff's profit margin goals, influence the amount of the lump sum. In my opinion, it cannot be said in such a case that the tax is passed directly and specifically to customers so that they become the true taxpayers. While it is difficult to make specific comparisons, the situation in the present case more closely resembles the tax paid on aircraft parts and equipment in C.P. Air than the tax paid on alcoholic drinks in that case.

I find that in all the circumstances no passing- on defence is available and that the plaintiffs are entitled to restitution of the amounts they are claiming as wrongly paid taxes, subject to any applicable limitation period.

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

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

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

It will be a matter for consideration whether the fact that the plaintiff has passed on the tax or levy so that the burden has fallen on another should provide a defence to his claim. Although this is contemplated by the

Court of justice of the European Communities in the San Giorgio case, it is evident from Air Canada v. British Columbia that the point is not without its difficulties; and the availability of such a defence may depend on the nature of the tax or other levy....

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

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

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

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

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

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

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

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

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

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

49. In none of these countries any constitutional provision akin to Article 265 fell for consideration. The debate whether a taxpayer is entitled to get refund when the levy is found illegal is concluded by Article 265 of the Constitution in our country. The protection afforded to the taxpayer is

total and complete. It cannot be taken away under any circumstances or by any legislative action. The Constitution being sacrosanct and overriding, in my view, any tax collected unlawfully, must be returned to the taxpayer. Whether the taxpayer has passed on the burden of the tax to the consumers or not is a matter of no consequence.

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

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

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

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

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

53. Repeatedly, in various contexts, it has been emphasised that constitutional rights of citizens should not be watered down however desirable the end result of a particular case may be. The Constitution is to last for ever. If for one particular case, out of its perceived notion of expediency, the Court cuts down the scope and effect of a constitutional provision, the Court will be failing in its bounden duty to uphold the Constitution. The Court should not be guided by any policy of expedition but only by the dictates of what has been laid by the Constitution and what the American Courts refer to as "Imperative of Judicial Integrity." It is the imperative of judicial integrity that Article 265 is upheld as it is.

If it is allowed to be destroyed in this case, there is no reason why other Articles of the Constitution should not slowly and steadily be whittled away to take away all the other guarantees given to the citizens by the Constitution. This case, then, would be a dangerous precedent for demolition of the Constitution, article by article.

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

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

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

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

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

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

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

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

The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto, the introduction of a new central duty of excise has required the enactment of a self-contained law and the preparation of a separate set of statutory rules. There are now no less than 10 separate excise Acts (the excise on kerosene being covered by a part of the Indian Finance Act, 1922) and 11 sets of statutory rules; and there are also 5 Acts relating to salt, the duty on which is by a wide margin the oldest of our taxes on indigenous commodities. The taxes being closely akin to one another, the methods of collection follow the name general pattern and many of the provisions of the various Acts are identical or closely similar; and this is the case also with many of the statutory rules. The an glomeration of statute and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organised administration.

...

3. The intention of the Bill is to reproduce provisions already existing in the Acts which it is proposed to appeal but in the process certain small amendments have been made, either in modernising the language or for dovetailing the provisions and otherwise adapting them to present

circumstances. These amendments are the minimum consistent with each blending and adaptation.

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

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

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

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

61. Elaborate provisions were made for payment of excise duty on various products, the manner in which the duty was to be paid, imposition of penalty in case of evasion of duty and also the remedies to a tax-payer including refund of any excess amount of duty paid. If an assessee succeeded in appeal, the appellate authority was competent to give suitable direction to grant relief to the assessee. For example, under the Sugar (Excise Duty) Order, 1934 duty was imposed on certain varieties of sugar. Provisions was made for filing of monthly returns (Rule 5). The Collector was empowered to make assessment and also summary assessment (Rule 6). Provisions for refunds and remissions of duty were made (Rule 9). Any dispute could be determined by a suitably empowered officer (Rule 11) and appeal also lay to such authority as the Local Government might direct (Rule 12). Any order of the Collector or such authority could be revised by the Local Government or such higher authority as the Local Government might direct. A time limit for filing of appeals was provided in Rule 13. Rule 16 entitled the Collector to recover duty which had been short levied through inadvertence, error or misconstruction of the law by the Collector, or through misstatement as to quantify on the part of the owner of a factory, or even when erroneously refunds had been made. Rule 17 provided, "No duty which has been paid and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be returned unless such claim is made within three months from the date of such payment". Likewise, in the Mechanical Lighters (Excise Duty) Order, 1934 a duty of excise was imposed on manufacture of mechanical lighters. Such manufacturer was required to take a licence from the Collector (Rule 4). The manufacture could only take place in terms of the licence. Every holder of licence had to keep a correct daily account (Rule 7). Within five days after the close of such month, every holder of a licence had to submit to the Collector a monthly return showing the number of mechanical lighters removed from the manufactory during that month (Rule 8). On receipt of the return, the Collector would make an assessment. The Collector was empowered to make a summary assessment (Rule 9). Provisions for refunds and remissions were contained in Chapter IV. Chapter V dealt with miscellaneous provisions including provision for preferring an appeal, firstly to the Local Government or to such higher authority as the Local Government might direct. Appeal could also be made to the Central Board of Revenue and any order could be revised by the Governor General in Council (Rule 22). Rule 23 imposed a time limit of three months for preferring an appeal. Rule 26 dealt with short levy through inadvertence, error or misconstruction on the part of the Collector, or through mis-statement as to the quantity on the part of the owner of the manufactory. Recovery could also be made when erroneous refunds had been made. Such claims of refund had to be, made within three months from the date of such payment. Some

provisions were made in the other Orders or statutes by directly providing for payment of tax, appeals and refunds or by incorporating provisions of other Acts like Sea Customs Act. What is important to remember is that it was never in doubt that it was the manufacturer who was liable to pay tax and also entitled to get refund of any tax paid to the State through "inadvertence, error or misconstruction."

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

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

64. This argument cannot be upheld for three reasons:

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

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

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

(3) Under the Central Excise Act, there is only one tax which is levied by Section 3 and the tax-payer is the person who pays the charge levied by Section 3. The taxable event under the charging section is manufacture. This is the duty which a manufacturer has to pay before he can remove the manufactured goods from his factory. What the buyer of the goods pays to the manufacturer is the price of the goods. No duty is levied by the Central Excise Act upon the buyer. What the buyer pays to the manufacturer is not under any charge imposed by any statute. What he pays is the price of the goods. The price is a matter of contract between the buyer and the seller. Whatever the buyer pays and the seller gets is the price of the goods, even though the tax element is included in the price. I shall refer to the decided cases later in the judgment.

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

3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.

(1) There shall be levied and collected in such manner as may be prescribed

duties of excise on all excisable goods which are produced or manufactured in India as and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985.
PROVIDED that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -
(i) in a free trade zone and brought to any other place in India; or
(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India,
shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962), on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975).
Explanation 1 : Where in respect of any such like goods, any duty of customs leviable under the said Section 12 is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable under the said Section 12 at the highest of those rates.
Explanation 2 : In this proviso, -
(i) "free trade zone" means the Kandla Free Trade Zone and the Santa Cruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify in this behalf;
(ii) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.
(1A) The provisions of Sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, Government, as they apply in respect of goods which are not produced or manufactured by Government.
(2) The Central Government may, by notification in the official gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as chargeable with duty ad valorem and may alter any tariff values for the time being in force.
(3) Different tariff values may be fixed -
(a) for different classes or descriptions of the same excisable goods; or
(b) for excisable goods of the same class or description --
(i) produced or manufactured by different classes of producers or manufacturers; or
(ii) sold to different classes of buyers:
PROVIDED that in fixing different tariff values in respect of excisable goods falling under Sub-clause (i) or Sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods.
67. Actually there has been a very little change in the charging section since 1944, except that since 1985 excise duty has to be paid at the rates set forth in the "Schedule to the Central Excise Tariff Act, 1985". Before this amendment with effect from 28.2.1986, the levy was at the rates set forth in the First Schedule of the Central Excise Act. Since 1944 the taxable event continues to be production and manufacture or excisable goods. The moment any excisable goods are produced or manufactured, levy of excise duty is attracted. The time and manner of payment of duty have been fixed by Rule 9 of the Central Excise Rules:
RULE 9. time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon

has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:
Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under Rule 27 or Rule 47 or in a warehouse appointed or registered under Rule 140 or may be exported under bond as provided in Rule 13:
Provided further that such goods may be removed without payment or on part payment of duty leviable thereon if the Central Government, by notification in the Official Gazette, allow the goods to be so removed under Rule 49:
68. Rule 9A inter alia lays down that the rate of duty and tariff valuation shall be the rate and valuation in force in the case of goods removed from a factory or a warehouse on the date of the actual removal of such goods from such factory or warehouse. Even if any excisable goods are lost after manufacture, the duty will have to be paid. Clause (iii) of sub Rule (4) of Rule 9A provides:
Rule 9A(4). The rate and valuation, if any, applicable to cases of losses of goods shall -
(i)...
(ii)...
(iii) where the loss occurs in storage, whether in a factory or in a warehouse, be the rate and valuation, if any, in force on the date on which such loss is discovered by the proper officer or made known to him.
69. These provisions have undergone minor alterations from time to time but there is not the slightest doubt that the levy of excise duty is on manufacture of goods. The taxable event is the manufacture. The duty will have to be paid regardless of the destination of the goods. Even if the goods are lost before clearance, duty will have to be paid, whether the manufacturer after removal of the goods, is able to sell the goods or not is a matter of no consequence. Once the taxable event has happened the duty has to be paid. There is no escape from it. This is a strict liability foisted on manufacture by Section 3. But nothing in excess of this strict liability can be collected by the Excise Officers, If something is levied or collected which is beyond the charging section, then that has to be paid back to the tax-payer. Whatever tax has been levied or collected in violation of law has to be restored to the person from whom such illegal levy has been extracted. Otherwise the guarantee under Article 265 becomes meaningless.
70. The argument that the real tax-payer is the person who buys the goods from the manufacturer or the ultimate consumer because duty is included in the price, forms a component of the price and is thereby passed on to the consumer, does not bear scrutiny. Excise duty is payable because of the charge levied by Section 3. Whether the manufacturer is able to sell his goods or not, excise duty will have to be paid. If a man is able to pass on the burden or not is something with which the Excise Act is not concerned. If as a result of high excise tariff the price becomes too high and the goods become unsaleable, the manufacturer may go out of business but will not be absolved from payment of duty. Hardships suffered by the manufactures may be redressed by the Government for which power has been retained in the Central Excise Act (Section 5A). But a manufacturer cannot decline to pay excise duty on the ground of inability to sell his products and failure to pass on the burden of the duty.
71. If the Central Excise Officer discovers that the duty of excise has not been levied or paid or has been short levied or short paid, he has a right to recover the duty from the manufacturer (Section 11A). The short levy may have been due to an oversight or mistake committed by the Excise Officer. It may be that the goods manufactured have already been sold off and it will not be possible for the manufacturer to recover the amount of duty from his customers. That is a post-duty situation with which the Excise Act is not concerned. The Central Excise Act is only concerned about collection of the duty levied by Section 3 on the manufacture of goods. In the scheme of the Act, the consumer who purchases the goods from the manufacturer and pays cum-duty price does not pay any tax either directly or through the manufacturer. If a manufacturing company goes into liquidation after

selling off all its products, the Excise Officer can in no way realise any short levy or under levy from the, consumer. A tax is a compulsory levy imposed by the statute which is something quite different from purchase-price. If a person having paid the tax increases the price of the goods, what the purchaser pays the tax-payer is not the tax but the price of the goods. The price usually comprises of costs, taxes and profits. But there is only one tax and one tax-payer who pays the tax. If there is short levy or under levy of excise duty due to any reason, the excise authority has no right to chase the consumers for the arrears of tax. In no sense of the term the consumer can be treated as the tax-payer under the Central Excise Act. Moreover, if the consumer is a businessman, the cum-duty price will be deductible from his income under the Income Tax Act.

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

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

10A. Residuary Powers for Recovery of Sums Due to Government. - (1) Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the Central Government under the Act or these rules, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice. (2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Asst. Collector of Central Excise may, in any particular case, allow.

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

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

Explanation. - Where any duty is paid provisionally under these rules on

the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.
(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by applicant should be refunded to him, he may make an order accordingly.
(3) Where, as a result of any order, passed in appeal or revision, under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.
(4) Save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained.
Explanation : For the purposes of these rule 'refund' includes rebate referred to in Rules 12 and 12A.
74. Rules 10A and 10B were in force till 1980. These two rules were substantially adopted in Section 11A and 11B of the Central Excises and Salt Act, 1944 by the Customs Central Excises and Salt Act and Central Boards of Revenue (Amendment) Act, 1978. The two sections came into force on 17.11.1980. It is well-settled that these two rules (Rules 10A and 10B) are complementary. Rule 10A invests the Government with the power to recover duty where any duty had not been levied or paid or had been short-levied or erroneously refunded or any duty assessed had not been paid in full. In such a case, the proper officer within six months could serve a notice on a person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice.
75. Likewise, Rule 10B enabled a person to claim "refund of any duty paid by him". This could be done by an application for refund of such duty to the Assistant Collector of Central Excise before expiry of six months from the date of payment of duty. Where any duty was paid provisionally under Rue 9B, the period of six months was to be computed from the date on which the duty was adjusted after final determination of the value. If as a result of any appellate or revisional order refund of duty is due to any person, the proper officer had to refund the amount to such person even without any application.
76. There is nothing in the Act which enables or enjoins the manufacturer to pass on the duty of excise to the purchaser nor is any duty cast on the purchaser to pay the excise duty. It is the manufacturer who has to pay the duty imposed by Section 3 by virtue of the provisions of Rule 7 and in the manner laid down in Rules 9A and 9B. He is the person against whom proceedings for recovery could be taken in case of non-levy or short-levy or erroneous refund of duty. Only a person who was under a legal obligation to pay duty under Section 3 read with Rule 7 and has actually paid duty in the manner laid down in Rule 9 (or any other rule), can claim refund of duty.
'Duty' has been defined by Rule 2(v) to mean "the duty payable under Section 3 of the Act". All these provisions go to show that there is only one duty payable under the Central Excise Act. It has to be paid by the manufacturer or producer of the excisable goods. In fact stringent provisions have been made to ensure that there is no evasion of duty by the manufacturer. Under Rule 43 the manufacturer is required to give notice before commencement of production. He has also to give a notice before stopping or resuming production of such goods. He has also to give particulars of the raw-materials used for production and if there is any change in the nature of the raw-material that has also to be conveyed to the Collector of Excise. Under Rule 49 duty has to be paid by a manufacturer only when the goods are removed from the factory premises or an approved place of storage. But a manufacturer has to pay on demand the duty leviable on any goods which cannot be accounted for or which are not shown to have been lost or destroyed by natural causes or by an unavoidable accident during handling or storage of such goods.
77. The procedure of clearance is contained in Rule 52. The manufacturer has to make an application in triplicate to proper officer in proper form at least twelve hours before the removal of the goods. The officer has to assess amount of duty on the goods on production of evidence that the sum has been paid into the treasury or the approved Bank as has been provided

in the Rules. This rule has also importance for our purpose. Duty of Central Excise is to be paid into the treasury or the Bank specified in Rule 52. Any payment made by any person by way of price has not been treated as payment of duty by the Central Excise Act. Rule 53 enjoins every manufacturer to make stock account of his goods. Monthly return has to be filed showing the quantity of goods manufactured, the quantity removed on payment of duty, the quantity removed for export without payment of duty and such other particulars as may be prescribed. Materials used for manufacturing of the goods have also to be accounted for under the provisions of Rule 55. It is not really necessary to examine the scope of procedure for the duty-paid materials or under MODVAT scheme. All these elaborate rules and procedures have been made for payment and collection of duty by and from the manufacturer.

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

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

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

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

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

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

82. The structure of the Excise Act has to be borne in mind. Duty is levied

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

The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd., this Court made a distinction between "levy" and "collection" as used in the Act and the rules before us. It said there with reference to Rule 10:

We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says: There shall be levied and collected in such a manner as may be prescribed the duty of excise....It is to be noted that Sub-section (i), uses both the expressions - 'levied and collected' and that clearly shows that the expression 'levy' has not been used in the Act or the Rules as meaning actual collection.

83. I fail to see how a person who has been subjected to levy of excise duty and from whom the duty has been collected cannot get the refund of the duty but only a person who has neither been charged any duty nor paid any duty under the Act can claim refund of the duty. This will be clearly against Article 265 of the Constitution.

REFUND

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

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) when any duty of excise has not been levied or paid or has been short- levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "Central Excise Officer," the words "Collector of Central Excise, " and for the words "six months", the words "five years" were substituted.

Explanation, - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under Sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section,

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(ii) "relevant date" means:
(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short levied or short-paid -
(A) Where under the rules made under this Act a monthly return, showing particulars of the duty paid on the excisable goods removed during the month to which the said return relates, is to be filed by a manufacturer or producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;
(B) where no monthly return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
(c) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder:
(b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;
(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.
11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:
Provided that the limitation of six months shall not apply where any duty has been paid under protest.
(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.
(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.
(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.
(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.
Explanation : For the purpose of this section:
(a) "refund" includes rebate of duty of excise on excisable rebate of duty India or on excisable materials used in the manufacture of goods which are exported out of India;
(b) "relevant date" means. -
(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -
(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or
(ii) if the goods are exported by land, the date on which such goods pass the frontier, or
(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid:
(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
(d) In a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by

notification in the Official Gazette in full discharge of his liability of the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
(e) in a case where duty of excise is paid provisionally under this Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof;
(f) In any other case, the date of payment of duty.
85. Section 11B before its amendment in 1991 provided by Sub-section (1) "Any person claiming refund of any of duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date". By Sub-section (2), the Assistant Collector was required to examine the application and if he was satisfied that "the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly". Sub-section (3) dealt with the consequence of an order passed in appeal or revision under the Act. It provided that if as a result of any appellate or revisional order, any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount. Sub-section (4) provided that no claim for refund for any duty of excise shall be entertained except as provided by or under this Act. Sub-section (5) laid down that the provisions of this Section will also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty.
86. In order to claim refund, a person has to establish that he has paid the duty. The duty is what is paid pursuant to the charge levied by Section 3 and quantified in the manner laid down in the rules. Rule 3(v) of the Central Excise Rules also says that "duty" means the duty payable under Section 3 of the Act. The time and manner of payment of duty will have to be in accordance with the provisions of Rules 9 and 9A (4). There is no other duty charged under the Central excise Act and there is no other way a duty can be paid under the Central Excise Act. It is the person who has paid the duty of central excise under the charge imposed by the Act and within the time and in the manner laid down by the Act, who can claim the refund of duty under Section 11B. "Any person claiming refund of any duty of excise" must be the person who has paid the aforesaid duty in the aforesaid manner. A consumer or buyer cannot say that he has paid any duty of excise. The duty is only on the manufacturer and not on the consumer. Under Sub-section (2), the Excise Officer has to be satisfied that whole or any part of the duty of excise should be refunded to the person who has paid the duty.
87. This is the law in respect of payment of duty as obtaining refund of duty paid in excess. The buyer or the consumer does not pay any "duty" and, therefore, he is precluded from making any application for refund under Section 11B. A person who has not paid any duty in law cannot claim a refund on the ground that he has borne the burden of duty.
88. The Excise officer is a creature of the statute. His powers and functions are circumscribed by the statute. He can realise tax strictly in accordance with the statute. He cannot realise tax beyond the charge imposed by Section 3 out of any extra-statutory considerations. If more tax than permissible under the charge imposed by Section 3 has been collected, it must be returned to the taxpayer. There is nothing in the Act which enables the Excise Officer to embark upon an inquiry to find out whether after payment of the duty, the manufacturer has sold his goods and if so, has included this amount in his price. It is not a ground on which the Excise officer can refuse to refund the excess amount of duty paid by the manufacturer in the mode and manner laid down by the Act. A taxation statute has to be construed strictly. The Excise Officer cannot insert a proviso to the Section and say that even if the levy is illegal and the manufacturer is otherwise entitled to refund of duty under Section 11B, he will not be given this refund if he has included the duty element in the price of the goods manufactured by him.
89. The Excise Officer has no discretionary power to refuse to pay refund

even when he was satisfied that excess payment of duty contrary to law has been collected or paid. Though Sub-section (2) of Section 11B or earlier Rule 11A used the language that the Central Excise Officer "may make an order of refund". The word 'may', in this context, has to be construed as 'must'. The section does not give the Central Excise Officer any discretion once he was satisfied that excess payment had been made. He cannot withhold payment on some extraneous reasons. This point was dealt with at length in the Australian case of Commissioner of State Revenue v. Royal Insurance (1995) 69 Australian Law Journal 51 by Dawson, J. There, Section 111(1) of the Stamps Act, provided:

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

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

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

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

...

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

It must be borne in mind that the occasion for the exercise of the authority conferred by Section 111(1) is the finding of an overpayment of stamp duty; that is to say, a finding that the comptroller received moneys to which she had no entitlement. The sub-section must be read either as requiring her to refund the overpayment or as conferring a discretion upon her to keep the moneys notwithstanding that she had no entitlement to receive them. The principle that a statute will not be read as authorising expropriation without compensation unless an intention to do so is clearly expressed has been described as a firmly established rule of law'.

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

93. In fact, this principle is very important to understand the problem

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

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

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

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

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

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

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

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

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

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

PRICE

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

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

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

produced by a manufacturer. Can it be said in such cases when a substantial portion of the goods are being sold at an undervalue and thus causing large erosion of profits, that the incidence of duty has been merrily passed on to the consumers'? The goods could not be sold except by reducing the price drastically. It is difficult to say that in such a case incidence of tax is being borne by the consumers and the loss by the producer. BSC Footwear's Case illustrates the predicament of an average manufacturer, A substantial quantity of tax-paid products cannot be disposed of as a matter of course and the manufacturer has to get rid of the unsold products by organising first sale at a discount thereafter at even lower prices.

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

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

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

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

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

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

(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be

equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and
(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.
(2) The provisions of Sub-section (1) apply to the following taxes, namely;
(a) any duty of customs or excise on goods;
(b) any tax on the sale or purchase of goods.
109. The English Law in this regard is the same.
110. Lord goddard's judgment goes to show that even if the duty element was separately shown in the invoice what the buyer pays is the price of the product and nothing else. The seller similarly gets only the price. Lord Goddard, J. also noted the fact in that case that the burden of the tax had been passed on. This according to Lord Goddard J., did not make any difference.
111. In the case of Paprika v. Board of Trade (1944) 1 KB 327, a person was called upon to pay penalty which was three times the price at which the articles were expected to be sold. The Divisional Court rejected the argument that the tax element in the price should be excluded because it was no price at all. It was an amount which would ultimately go to the Government. The Court recognised the fact that the price could be affected by the tax element but "it does not cease to be the price which buyer has to pay even if the price is expressed to be as X plus purchase tax."
112. This case was cited with approval by Lord Goddard, J. (as His Lordship then was) in the case of Love v. Norman Wright (Builders) Ltd. (1944) 1 All England Law Reports 618, the question before the Court of Appeal was whether the seller of goods under a contract made after the purchase tax had been imposed by law could call upon the purchaser to pay the tax exigible in respect of the sale in addition to the agreed price at which the goods were to be supplied. Goddard, J., pointed out that a seller quoted a price X plus purchase tax, the buyer must pay the tax as part of the purchase price. Conversely, if a seller agreed to supply goods for a certain sum, then he could not call on the buyer to pay anything extra for tax additionally, unless he was authorised by any statute to do so.
113. In George Oakes (Private) Ltd. v. State of Madras and Ors. this Court was called upon to consider whether a dealer can pass on his tax liability as such to his customer. In that decision while rejecting the contention that the tax liability as such can be transferred to the buyers, this Court referred to the observations of Lawrence. J. in Paprika Ltd. and Anr. v. Board of Trade (supra) and Goddard, L.J., in Love v. Norman Wright (Builders) Ltd. (supra).
114. In the former case, Lawrence, J. observed:
Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands it does not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax.
115. In love's Case, Goddard, LJ. observed:
Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax but on a sale there is only one consideration, though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.
116. In that decision, reference was also made to the decision of this Court in Tata Iron and Steel Co. Ltd. v. State of Bihar [1958] SCR 1355. Therein Das, C.J. who delivered the majority judgment of the court said:
The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the

registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. See Love v. Norman Wright (Builders), Ltd.

From all these observations, it is clear that when the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by the buyer and the distinction between the two amounts - tax and price - loses all significance.

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

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

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

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

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

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

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

123. In this case also we are not entitled to add any teleology to law. We

have to take the Central Excise Act as it stands. We may or may not like the law. But for that reason we cannot discard it or its language to bring out an abnormal meaning. If the meaning of 'price' as given in the Sale of Goods Act is borne in mind and its implications as explained in judgments referred to hereinabove are kept in view, then it can never be said that the seller has charged anything but the price of the goods from his buyer. He cannot by a contract call upon the buyer to pay any tax which is the prerogative of a taxing statute. Even if he quotes the price as x (Costs) + Y (Taxes) + Z (Profit), what the buyer will pay is the price of the goods and nothing else, neither the costs nor the taxes are passed on to the buyer.

UNJUST ENRICHMENT

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

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

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

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

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

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

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

127. It had the effect of refunding the duties of excise which had already been collected and declaring the duties of excise which had become payable (but would not have been payable if the notifications had been in force)

shall not be required to be paid. This Act was passed in recognition of the fact that high excise duty causes hardship to the manufacturers. They must be given relief even with retrospective effect.

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

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

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

131. Mason, C.J. also pointed out that the basis of restitutionary relief was not compensation for loss or damage sustained but restoration of the plaintiff of what has been taken or received from the plaintiff without justification. Mason, CJ in his judgment illustrated the proposition with a number of cases to show that the doctrine of "Passing on" was fraught with many difficulties. An American case was cited where the Supreme Court of U.S. had rejected the doctrine of "passing on" under anti- trust laws where plaintiff had passed on overpayments to their customers {Hanover Shoe Inc. v. United Shoe Machinery Corporation (1968) 392 US 481. Commenting on this, Mason, CJ. observed that though the context is different, the reasons given for the rejection were relevant for the present case. They include the difficulty of determining the economic impact upon the plaintiff's business of passing on the overpayment, the practical problems which availability of the defence would generate involving "massive evidence and complicated theories". Further the defence would probably apply all the way down the . chain of distribution to the ultimate consumer who would have little interest to sue. The U.S. Supreme Court also noted that economic theories rely upon the assumptions which do not operate in the real world, thereby making the proof of passing on extremely difficult. This view was also expressed in the opinion of Advocate General in Administration delle Finanze dello Stato v. San Giorgio SPA (1985) 2 CMLR 658.

132. Mason, C J. Concluded that:

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

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

134. Supposing, a manufacturer of pulp sells his product to a rayon manufacturer which uses the pulp to manufacture rayon it can be said that the burden of duty has been passed on to the rayon manufacturer. The rayon manufacturer, in his turn, includes the cum-duty price in his costs and includes it in his price when he sells his yarn to a cloth manufacturer.

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

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

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

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

138. In fact, the Schedule to the Central Excise Tariff Act has as many as 96 chapters and appears to contain more entries relating to goods which are used by trade and industry than common man in every day life like Base Metals, Iron and steel. Aluminium Metal (Chapter 72), Nuclear Reactors, Boilers, machineries, mechanical appliances; parts thereof, electric motors and generators, rotary converters, transformers, static converters, electro-magnets, etc. (Chapter 85). The Schedule also include Railway or tramway Locomotives, Rolling-Stock and parts thereof; Railway or Tramway Track Fixtures and Fittings and parts thereof; Mechanical Traffic Signalling Equipment of all kinds (Chapter 86). This Entry is followed by Vehicles other than Railway or tramway etc. (Chapter 87). This Entry includes motor cars, motor vehicles, tanks and other armoured fighting

vehicles and also parts and accessories of the motor cars and motor vehicles principally designed for transport of persons, motor vehicles for the transport of goods. Even here it should be noted that, having regard to the price of the motor cars and motor vehicles, it is not the weaker section of the population who uses these vehicles. In the name of benefitting the weaker section, unlawfully and illegally levied duty of excise on parts and accessories and various inputs manufactured by small manufacturers for use of the large manufacturers will not be returned to them but handed over to the large manufacturer or rich consumers who has the resource and ability to claim it.

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

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

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

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

143. There may also be situation when a manufacturer will not be able to certify that he has not passed on the duty even though he has borne it. Supposing a manufacturer is charging Rs. 100 per unit of good. The price of Rs. 100 is calculated on the basis of Rs. 80 as costs, Rs. 10 as profits and Rs. 10 as excise duty. The excise duty element is enhanced unlawfully by Rs. 5. In such a case, the manufacturer may either raise the price of the goods by Rs. 5 or he may decide to reduce his profit to Rs. 5 and sell the goods at the same price. In the second case when the manufacturer reduces the profit element to Rs. 5 "and sells the goods at Rs. 100, can it be said that he has passed on the burden of excise duty to his customers. The price is inclusive of the duty element. In a sense, the burden of duty borne by the manufacturer has been passed on. But then again, the manufacturer has suffered diminution of profit. Can it be said in such a case that if the manufacturer manages to get an order of refund of duty, it will be unethical for him to get the amount because this will be "unlawful enrichment"? The manufacturer in a case like this will not be in a position to certify that the burden of duty has not been included in the price of the goods but the fact remains that in order to maintain the price of goods at the optimum level the manufacturer had to suffer loss of profit. The

Central government has been empowered to exempt, generally or absolutely by notification, excisable goods from the whole or any part of the duty imposed thereon. Judicial notice must be taken that in very many cases, having regard to the hardship suffered by the industry and representations made by the industry, duties have been reduced or exempted by issuing appropriate notifications or even by legislation.

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

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

11B. Claim for refund of duty.

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

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

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

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

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

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

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

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

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

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

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

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

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

(4) Every Notification under Clause (f) of the first proviso to Sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification

should ceases to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.
(5) For the removal of doubts, it is hereby declared that any notification issued under Clause (f) of the first proviso to Sub-section (2), including any such notification approved or modified under Sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.
Explanation : For the purposes of this section, -
(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(b) "relevant date" means, -
(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable material used in the manufacture of such goods, -
(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves india, or
(ii) if the goods are exported by land, the date on which such goods pass the frontier, or
(iii) if the goods are exported by post, the date of despatch of goods by Post Office concerned to a place outside India;
(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purpose aforesaid;
(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;
(ea) in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 5A, the date of issue of such order;
(f) in any other case, the date of payment of duty.
...
11D. Duties of excise collected from the buyer to be deposited with the Central Government.
(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
(2) The amount paid to the credit of the Central Government under Sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by Assistant Commissioner of Central Excise.
...
12A. Price of goods to indicate the amount of duty paid thereon.
Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently

indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

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

12C. Consumer welfare fund.

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

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

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

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

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

12D, Utilisation of the fund.

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

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

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

146. The duty impose on and collected from manufacturer, if it is found to be in excess of the charge imposed by Section 3, has to be returned to manufacturer and nobody else, otherwise charging provision, rules for computation of charge and imposition and collection of duty will become meaningless. If any amount has been realised by the Excise Officer in excess of the charge imposed by the charging section, then such collection is beyond the competence of the Act and also violates Article 265 of the Constitution. It was pointed out in the case of Assistant Collector of

Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd., that Article 265 of the Constitution makes a distinction between levy and collection. Levy may include both imposition of a tax as well as assessment. 'Collection' will be recovery of tax. If it is found that a tax-payer has been levied more than the permissible limit imposed by the charging section read with Excise Tariff Act and the Rules, the levy is bad. The Collection pursuant to this levy is equally bad. Such levy and collection are dehors the provisions of the Excise Act. There is no way that the Central Excise Authority can retain the amount or use the amount. In any way it has to refund the amount to the person from whom it has been unlawfully collected by the Excise Officer. The Central Excise Act, as Hegde, J. pointed out in the case of Delhi Cloth and General Mills (supra), duty is imposed by a statute whereas the cum-duty price is paid by the j purchaser under a contract with the manufacturer. No portion of the cum-duty price in law can be treated as the duty of excise. Nothing which is not imposed by Section 3 and collected under the provisions of the Excise Act and Rules, can be called "duty of excise". In my view this is the basic principle of any tax law. If by any device any amount which is not leviable in law has been levied and collected from a tax- payer, then retention of such amount will be unlawful.

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

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

149. I shall now examine the other provisions of the newly added sections. Sub-section (1) of Section 11B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-section (3) merely lays down that no refund shall be made except as provided in Sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, Sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the Legislature cannot take

away the force and effect of that judgment, decree or order, . except by amending the law retrospectively on the basis of which the judgment was pronounced.

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

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

RULE 173G. Procedure to be followed by the assessee. - (1) Every assessee shall keep an account-current with the Commissioner separately for each excisable goods..., in such forms and manner as the Commissioner may require, of the duties payable on the excisable goods and in particular such account...shall be maintained in triplicate by using indelible pencil and double-sided carbon, and the assessee shall periodically make credit in such account-current, by cash payment into the treasury so as to keep the balance, in such account- current, sufficient to cover the duty due on the goods intended to be removed at any time; and every such assessee shall pay the duty determined by him for each consignment by debit to such account-current before removal of the goods:

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

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

borne the incidence of the duty in accordance with the provisions of Section 11B which means the ultimate consumer.

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

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

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

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

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

159. Unlike the Income Tax, Act, the assessee has not been given any option to show that he is not liable to pay the amount which is being taken away from his proceeds. He has no opportunity of getting a hearing on this issue. The Income Tax Act enables the assessee, in such circumstances, to dispute the estimation of advance tax made by the Income Tax Officer and file his own estimate (or course at his own peril). Here he has no option but to pay without any hearing.

160. I repeat that a manufacturer cannot be called upon to pay anything except the duty imposed by the charging provisions. Even if the final assessment has not been made, goods may be allowed to be cleared by paying the admitted amount of duty and furnishing the security for the disputed amount. The security may be keeping sufficient money in the Account Current with the Excise Department or even by furnishing a bond or a bank guarantee. This is provided by the Rules.

161. There is no legal or rational basis for a blanket provision to deposit whatever is included on account of excise duty in the price of the goods sold.

162. The position gets curio user after the deposit. After adjustment of the tax against the deposit, the surplus amount is not returned to the manufacturer. It has to be credited to the Fund or paid to the person who has borne the incidence of tax i.e., the ultimate consumer. In other words, the manufacturer will be robbed of a portion of his sale price for no rhyme or reason. This may also have the effect of nullifying the sale contract entered into by the manufacturer with the buyer. The buyer had agreed to pay an agreed price which may include the duty element. The seller agreed to sell the goods to the buyer at that price. Section 64A of the Sale of Goods Act protects the interests of both. How can a portion of that price be taken away and credited to a Fund or paid to the ultimate consumer? What will happen to the contract? The only effect of Section 11D is to rob the manufacturer of a portion of his legitimate dues. These provisions are not in aid of the charge on manufacture levied by the Central Excise Act, but are in excess of the charge and are confiscatory in nature and have to be struck down.

163. It appears to me that by these newly amended provisions, the Legislature has merely created a device or a cloak to confiscate the property of the tax-payer. In such a situation, a Bench of Five Judges of this Court in Raja Jagannath Baksh Singh v. State of Uttar Pradesh, said that the law has to be struck down as passed in colourable exercise of the power of taxation. It was observed by Gajendragadkar, J., speaking for the Bench:

... the conclusion that a taxing statute is colourable would not and cannot normally be raised merely on the finding that the tax imposed by it is unreasonably high or heavy, because the reasonableness of the extent of the levy is always a matter within the competence of the Legislature. Such a conclusion can be reached where in passing the Act, the Legislature has merely adopted a device and a cloak to confiscate the property of the citizen taxed. If, however, such a conclusion is reached on the consideration of all relevant facts, that is separate and independent ground for striking down the Act.

164. So far as Sections 12A and 12B are concerned, only thing that, has to be pointed out is that these two sections do not change the character of the price of the goods. Both these elements were taken into consideration by Lord Goddard, J. in the case of Love v. Norman Wright (Builders) Ltd. (supra). It was stated that even if the burden of duty was passed on and the price was expressed as Pound X plus duty, even then what the buyer paid was price of the goods and not the duty and the seller obtained the price and nothing else. This principle was reaffirmed time and again, as we have noted earlier in the judgment, in a number of cases by this Court.

165. Apart from what has been stated hereinabove, I find that the entire group of these sections is dehors the charging section of the Central Excise Act. The Central Excise Act imposes a duty on manufacture of goods. Various provisions have been made for computation and collection of that duty. Anything collected in excess of that charge is unlawful. If any provision is made for retention of duties collected without any authority of law, then such provision will be beyond the scope of the charge. It will amount to collecting and retaining something which is not at all duty payable under Section 3.

166. The Legislature has now authorised the Excise Department to retain the illegal levy. In my judgment, these provisions are ultra vires the charge levied by Section 3 and cannot be sustained in any way. In the language of Lord Mac Millan in Avrshire Employers Mutual Insurance Association Ltd. v. Commissioners of Inland Revenue 27 Tax Cases 331, 337, the legislature has

missed fire.
167. The scope of charge in a taxing Act is of the highest importance. Nothing can be realised under a taxing Act beyond that. The new provisions of the Excise Act are not in aid of the charge imposed by Section 3. These sections are designed to enable the Excise Department to retain what was collected over and above the charge. The amounts collected in excess of what is actually payable under the charging section is not excise duty at all. Nothing can be collected under a taxing Act which is not authorised by the charging section read with the machinery provisions.
168. The new provisions not only effectively bar recovery of unlawful levies by the tax-payer but have also taken away from him a portion of the price at which he has contracted to sell the goods to the purchasers. How can a portion of the sale price be taken away and retained by the Excise Officer or returned to the buyer in derogation of a contract of sale passes comprehension.
169. I have already noted earlier in the judgment the impossibility of finding out on whom the incidence of charge falls and also the various unworkable problems created by these ill-conceived amendments. In my view, the amended provisions must be struck down as violative of Article 265 and the guarantee contained in Article 19(1)(g) of the Constitution of India.
170. I am further of the view, the Legislature has merely adopted a device and a cloak to confiscate the property of the tax-payer by not only withholding repayment of unlawfully gathered tax but also taking away a portion of the sale price collected from the buyer without any lawful demand or excuse. Every person has a right to contract and bargain for the price. Section 11D places unreasonable fetter to the freedom to carry on trade and commerce and violates the guarantee given by Article 19(1)(g) of the Constitution.
171. Various other points were raised in these cases. I am not dealing with them separately, but I express my respectful concurrence with the views of my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the view expressed by him and the reasoning thereof on points E, F and G of the concluding part of his judgment.
172. In conclusion, I hold that the Government is permitted to levy and retain only that much of excise duty which can be lawfully levied and collected under the Central Excise Act read with the Central Excise Tariff Act, 1985 and the Central Excise Rules and various notifications issued from time to time. Anything collected beyond this is unlawful and cannot be retained by the Government under any pretext. The illegal levy and collection of duty violate not only the Central Excise Act and the Rules but also offends Article 265 of the Constitution of India.
173. I am of the view that the provisions of Section 11B is a device for denying the claim for refund of duty to a tax-payer and must be struck down as violative of Article 265 of the Constitution. It in effect tries to perpetuate an illegal levy without altering the basis of the law under which the levy was made in any way. It is also a colourable piece of legislation and must be struck down.
174. Section 11D imposes unreasonable restriction on the right to carry trade and violates Article 19(1)(g). Excise authority cannot deny the manufacturer the freedom to commerce and trade and take away a portion of the contract price even without raising any demand or giving any hearing. The Excise Officer cannot under any circumstance give the balance to the ultimate consumer or credit the amount to the Fund. Section 11D is arbitrary and is a colourable piece of legislation and is hereby struck down.
175. Section 12C and 12D are parts of a device to withhold refunds of unlawfully gathered tax. These provisions are also violative of Article 265 of the Constitution.
176. I express my respectful agreement with the views expressed by my learned Brother Paripoornan, J. that an action by way of a suit or writ petition will be maintainable, depending upon the facts and circumstances of the case. I am entirely in agreement with the views expressed by him and the reasoning on points 'E', 'F and 'G' of the concluding part of his

judgment. I also agree with my learned brother Paripoornan, J.’s holding on points ’H’ and T subject to my views that in view of Article 265 of the Constitution, the Excise Department is not entitled to withhold refund of any unlawfully collected duty of excise under any circumstances. Any provision to that effect will be ultra vires Article 265 of the Constitution. Such illegally collected duties must be returned to the person from whom it has been collected.
177. In my judgment, the appeal should be allowed and the writ petitions should succeed.
178. There will be no order as to costs.
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1. It is a matter of regret that inspite of this clear enunciation as far back as 1975, Parliament took no steps, until 1991, to make a law providing that where the payer passes on the burden of the tax to another, he cannot recover the same from the State.Sri F.S. Nariman naturally stressed this inaction and made it a basis for contending that any decision over-turning Kanhaiyalal must only have prospective effect.
2. Situation would be the same where he fights upto High Court and failing therein, he keeps quiet.
3 This discussion, we may reiterate, it also relevant on the nature of the constitutional right to refund or restitution as it is called - flowing from Article 265 referred to in Paras 71 to 73.
4. 48 This defence differs from that of change of position because with the latter the issue relates to the conduct of the payee. With the defence of passing on the issue relates to the conduct of the pay.
5. 49 This specifically dealt with by F.A. 1989, Section 24(5) discussed infra, which denies the repayment of VAT if it would unjustly enrich the recipient of the payment.
6. 50 In Moses v. Macferlan (1760) 2 Burr. 1005 at p. 1020 Lord Mansfield said that the payee "may defend himself by everything which shews that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or to any part of it." This principle suggest that a defence of passing on should exist, for simple reasons of justice.
7. 51 51. In Woolwich, supra, Lord Goff deferred the issue of the existence of a passing on defence, suggesting (at p. 178) that the availability to such a defence may depend on the nature of the tax. It is submitted that the only real relevance of the nature of the tax relates to the case of determining whether the burden of the tax really was passed on.