FORTY-SIXTH REPORT

PUBLIC ACCOUNTS COMMITTEE (1980-81)

(SEVENTH LOK SABHA)

UNION EXCISE DUTIES—FORTUITOUS BENEFITS AND RUBBER PRODUCTS

MINISTRY OF FINANCE

(DEPARTMENT OF REVENUE)

Presented in Lok Sabha on.....
Laid in Rajya Sabha on.....

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Corrigenda to 46th Report of the Publ c Accounts Committee (Seventh Lok Sabha)

Page	Para	Line	For	Read
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76	Sl.No.1	3	Manufacturer	Manufacturers
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81	S.No.14	3	incrorporated	incorporated
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82	S.No.16	11	when	where
85	S.No.23	3	presumptious	presumptous
85	S.No.23	10	Add 'a' after 'with'	
85	S.No.23	14	is	in
85	S.No.24	2 from bottom	appraised	apprised
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*Not printed (One cyclostyled copy laid on the Table of the House and Five copies placed in Parliament Library).

PUBLIC ACCOUNTS COMMITTEE
(1980-81)

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2. Shri D. C. Pande—*Chief Financial Committee Officer*
3. Shri T. R. Ghai—*Senior Financial Committee Officer.*

INTRODUCTION

I, the Chairman of the Public Accounts Committee, as authorised by the Committee, do present on their behalf this Forty Sixth Report of the Public Accounts Committee (Seventh Lok Sabha) on Paragraphs 82 and 35 of the Report of the Comptroller and Auditor General of India for the year 1978-79, Union Government (Civil), Revenue Receipts, Volume I, Indirect Taxes relating to Fortuitous benefits and Rubber products respectively.

2. The Report of the Comptroller and Auditor General of India for the year 1978-79, Union Government (Civil), Revenue Receipts, Volume I, Indirect Taxes, was laid on the Table of the House on 1 July, 1980.

3. In Chapter I of this Report, the Committee have reiterated their earlier recommendation made in para 1.25 of their 95th Report (1969-70) (4th Lok Sabha) that a suitable enabling provision should be incorporated in the Central Excise Act on the lines of Section 37 of Bombay Sales Tax Act in order to ensure that a refund of excise duty does not result in an unjust enrichment of the assessee at the cost of the consumers.

4. In Chapter II of this Report, the Commitee have desired that the Central Board of Excise and Customs should improve the efficiency of the excise surveillance machinery to check evasion of duty effectively.

5. The Public Accounts Committee (1980-81) examined paragrap 82 at their sitting held on 8 January, 1981. Written information was obtained in respect of paragraph 35. The Committee considered and finalised this Report at their sitting held on 28 March, 1981 and 20 April, 1981. The Minutes of sittings of the Committee form Part II* of the Report.

6. A statement containing observations and recommendations of the Committee is appended to this Report (Appendix VI). For facility of reference these have been printed in thick type in the body of the Report.

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*Not printed (One cyclostyled copy laid on the Table of the House and Five copies placed in Parliament Library).

7. The Committee place on record their appreciation of the assistance rendered to them in the examination of this paragraph by the Office of the Comptroller and Auditor General of India.

8. The Committee would also like to express their thanks to the officers of the Ministry of Finance (Department of Revenue) for the cooperation extended by them in giving information to the Committee.

NEW DELHI;
April 23, 1981
Vaisakha 3, 1903 (*Saka*)

CHANDRAJIT YADAV,
Chairman
Public Accounts Committee.

CHAPTER I

FORTUITOUS BENEFITS

Audit Paragraph

1.1. Manufacturers of excisable goods may become entitled to refunds of duty paid, if such goods are subsequently:

(i) held to be non-excisable; or

(ii) found eligible to concessional rate of duty with reference to:

(a) production within the prescribed limits, or

(b) clearance during specified periods, or

(c) production in small scale units.

1.2. In such cases the refunds allowed to the manufacturers are retained by them and not returned to the buyers of the products in question from whom the duty element would have been collected at the time of sale.

1.3. Instances of such fortuitous benefits accruing to manufacturers were commented upon in various reports of the Comptroller and Auditor General of India on Revenue Receipts (Indirect Taxes); the latest being paragraph 87 of Audit Report 1977-78. The point engaged the attention of the Public Accounts Committee on a number of occasions. In Paragraph 1.25 of their 95th Report (Fourth Lok Sabha), the Public Accounts Committee recommended that Government may consider whether it would be possible to incorporate a suitable provision in the Central Excise Law on the lines of section 37(1) of Bombay Sales Tax Act, which permits forfeiture of the tax collected in excess by a dealer in contravention of the provisions of that Act.

1.4. Government did not find it feasible to modify the Central Excise Law on the said lines, as according to the Ministry of Law such provision was not incidental to the power of levying duty. The Committee in paragraph 11.37 (13th Report—Sixth Lok Sabha) reiterated their view that the Government should re-examine the matter so that the benefit of duty already recovered from the consumers is not fortuitously enjoyed by the producers due to deficiencies of Law, rules and regulations. Government again expressed their inability for the same reasons to amend the act on the lines suggested.

1.5. The aforesaid provisions of the Bombay Sales Tax Act came up before the Supreme Court in the Case of Sales Tax Officer Gujarat *vs.* Ajit Mills Limited and another. In upholding the provisions (August 1977) the Court observed, *inter alia*:

> "(i) A welfare state has with its logos and legend as social justice, a sacred duty while it exercises its power of taxation to police the operation of the law in such manner as to protect the public from any extra burden thrown on it by merchants under cover of the statute.
>
> (ii) All real punitive measures, including the dissuasive penalty of confiscating the excess collections, are valid, being within the range of ancillary powers of the legislature competent to exact a sales tax levy.
>
> (iii) In a developing country, with the mass of the people illiterate and below the poverty line and most of the commodities concerned constitute their daily requirements there is sufficient nexus between the vower to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality.
>
> (iv) The meaning of the expression 'shall be forfeited' should be limited to 'shall be liable to be forfeited'. The forfeiture should operate only to the extent, and not in excess of, the total collections less what has been returned to the purchasers."

1.6. Such cases of unintended/fortuitous benefits continue to occur and some instances noticed in audit are given below:

( ) A manufacturer of wires and cables got in January, 1978, a refund of Rs. 1,47,308 representing the duly paid during the period April, 1976 to March, 1977 on account of inclusion of transportation charges in the value of goods supplied to the customers including Government undertakings in different parts of the country on contract basis.

(ii) (a) Under a notification dated 13th December, 1973, chinaware and porcelainware cleared by a manufacturer for Home consumption upto a value of rupees three lakhs during the financial year were exempt.

A manufacturer of chinaware and porocelainware, initially collected duty of Rs. 66,234 from the dealers on the ground that the value of clearances would exceed the aforesaid limit and paid it to Government during the year 1974-75. As the actual clearances did not exceed the prescribed limit, the manufacturer got refund in August, 1976.

(b) Under another notification dated 1st March, 1975, chinaware and porocelainware upto a value of rupees one lakh cleared on or after the 1st April during a financial year were exempt from duty, provided the value of clearances made during the financial year did not exceed rupees five lakhs.

A factory manufacturing chinware and porocelainware did not avail of the concession during the year 1976-77 on the plea that the value of clearances would exceed rupees five lakhs. Subsequently, the unit got a refund of Rs. 30,000 in June, 1978 as the clearances during the year were actually within the prescribed limits.

(c) According to a notification dated 1st May, 1970, metal containers upto a value not exceeding rupees one lakh cleared during any financial year were exempt from duty, provided the total value of the clearances did not exceed rupees two lakhs. A Manufacturer paid duty on the entire clearances of Rs. 31,905 and Rs. 1,97,390 during the years 1974-75 and 1975-76 respectively, but later obtained refunds of Rs. 19,664 in respect of duty paid on clearances during these two years as clearances in each of these years did not exceed the said limits.

(iii) Under a notification dated 15th July, 1977, Government exempted steel ingots manufactured from duty paid unused melting scrap or old iron scrap and steel castings made from steel ingots cleared from the factory on payment of duty at the appropriate rate, from the whole of the duty leviable thereon.

Three manufacturers of steel ingots/steel castings, continued payment of duty on the goods cleared by them during the period 15th July, 1977 to 31st August, 1977. They subsequently got refunds of Rs. 39,318 on account of duty paid after 15th July, 1977.

[Paragraph 82 of the Report of the Comptroller and Auditor General of India for the year 1978-79 Union Government (Civil)—Revenue Receipts, Volume I, Indirect Taxes.]

1.7. The Audit has in the present paragraph pointed out certain cases of refunds of excise duty which had resulted in unintended/ fortuitous benefits to the manufacturers of excisable goods. They have also brought to the notice of the Committee several other cases involving such fortuitous benefits observed by them since the submission of the Audit Report under examination.

1.8. In this connection the Committee desired to be furnished with details of cases where refunds of excise duty amounting to Rs. 50,000 and above were allowed to the manufacturers during the years 1977-78, 1978-79 and 1979-80. According to a statement furnished by the Ministry of Finance such refunds were allowed in 808 cases in 25 Collectorates. The total refunds made during the three years ending 31st March, 1980 amounted to Rs. 46.05 crores. Out of these, the number of refund cases of Rs. 10 lakhs and above each was 68. (Appendix I) In five cases the refund exceeded rupees one crore each. The following table shows refunds of duty, Collectorate-wise:—

Statement

Table showing refunds of excise duty amounting to Rs. 50,000/- and above during the years 1977-78, 1978-79 and 1979-80

S. No.	Name of the Collectorate	No. of refunds	Total Amount
1	2	3	4
1	Chandigarh	3	1,98,060.14
2	Nagpur	4	13,62,717.45
3	Bombay—I	4	28,58,059.90
4	Bombay—II	116	6,40,54,438.93
5	Hyderabad	19	67,01,179.37
6	Madras	147	13,1[illegible],76,868.44
8	Pune	29	1,54,37,457.99

1	2	3	4
8	Ahmedabad	25	2,06,49,975·04
9	Guntur	9	58,47,728·34
10	Jaipur	37	2,39,17,359·51
11	Allahabad	22	67,07,664·32
12	Delhi	31	44,05,065·52
13	Meerut	12	20,61,613·94
14	Cochin	1	1,43,310·00
15	Madurai	14	2,39,45,874·82
16	Shillong	41	69,09,511·58
17	Kanpur	20	2,56,55,068·24
18	Orissa ((Bhubaneswar)	10	51,05,624·30
19	Patna	55	5,59,39,535·49
20	Baroda	97	1,84,83,104·06
21	West Bengal	1	98,004·10
22	Bangalore	21	59,01,011·85
23	Indore	86	3,15,88,326·24
24	Calcutta	4	7,37,470·61
25	Goa	Nil	Nil
	Total	808	46,05,76,030·18

1.9. Asked about the reasons for the large number of cases for refunds and the steps taken by Government to minimise such cases, the Ministry of Finance (Department of Revenue) have in a note stated:

> "In pursuance of the recommendations of the SRP Committee that exemption should be related not to the producer's performance in the current financial year but to preceding financial year, it was decided as a result of 1978 Budget proposals to rationalise the number of exemptions applicable to small manufacturers which were based to different criteria like number of workers, value of clearances, horse power etc., for the purpose of granting exemption

to small manufacturers. According to Notification No. 71/78-CE dated 1-3-1978, the eligibility of the small manufacturers for the exemption is now determined on the basis of the clearances during the preceding financial year....

(ii) Another cause which was largely responsible for a number of refund cases was the delay in receipt of notifications by the field formation. Effective steps have now been taken to ensure that the notifications reach the Divisional Office at the earliest. The Directorate of Publications which was recently formed has been entrusted with the job of ensuring that the notification reaches the field formations in the quickest possible time.

(iii) (a) Earlier under the old rule 11 in the type of cases not covered thereunder the Limitation Act was applicable, and in such cases the assessees could claim refunds for past three years and as a matter of fact the department was sanctioning such refunds also. In respect of cases covered by self-removal procedure the time limit even under rule 11 read with rule 173-J was one year. The said rule was amended in 1977 by Notification 267/77/CE dated 6th August, 1977. Now a refund claim as to be made under rule 11 under all kind of situations and the time limit prescribed is six months only. Thus the limitation Act has been excluded from the purview, thereby reducing the period during which a person can claim a refund having a fortuitous effect.

(b) Recently the Board has clarified that in the case of exemptions based on clearance in financial year the computation of the time limit for purposes of rule 11 will run from the date of payment of duty and not from the last day of the financial year. Thus the period for which the refund claim having a fortuitous benefit can be submitted is reduced."

1.10. The issue of accrual of fortuitous benefits to manufacturers of excisable goods arising out of refunds of duty and engaged the attention of the Public Accounts Committee on various earlier occasion also. In paragraph 2.90—2.92 of their 72nd Report (1968-69) (4th Lok Sabha), the Public Accounts Committee had observed:—

"The Committee also note that out of the amount of Rs. 54.939 collected by the manufacturers from customers in the

form of excise duty, only an amount of Rs. 6,717 had so far been refunded to the customers, leaving a balance of Rs. 43,211. The manufacturers had stated that it may not be possible to locate the customers to whom the balance of refund is due. It appears inequitable that while the burden of excise duty should have been borne by customers, the benefit of refund should accrue to manufacturers."

"The Committee would like to stress that every effort should be made by Government to assess excise duty as accurately as possible *ab initio*. The incidence of the duty ultimately devolves on the consumer and it may not be always possible to locate the consumer, if, following an over-assessment, Goernment decide to refund the amounts recovered in excess. In such cases a third party gets a fortuitous benefit out of the refund made."

"The Committee note that the Ministry of Finance are at present examining, in consultation with the Ministry of Law, the question whether excess collection of this nature should not more appropriately form part of the Government revenues. The Committee would like to be apprised of the results of the examination. If it is legally permissible to retain such excess collections, Government could with advantage consider making the funds available in this regard to a Government research organisation working for the benefit of Industry and the Public."

1.11. The Ministry of Finance had in their Action Taken Note stated as follows:—

'The Committee's observation that every effort should be made to assess excise duty as accurately as possible *ab initio* had also been noted and action has also been taken to make suitable administrative arrangements to ensure accurate assessments. In this connection, it may be pointed out that the work of initially determining the tariff classification and rate of duty, which was done earlier by officers of the rank of Inspectors and sub-inspectors of Central Excise, has now been entrusted to gazetted officers of the rank of Superintendent of Central Excise. All factories working under the self-removal procedure have to file a classification list before the Superintendent showing the description of the goods, their tariff classification and the rate of duty applicable. This list is scrutinised by the Superintendent and after his approval a copy

is given to the factory concerned for determination of duty on the goods removed in accordance with the approved list.

The Ministry agrees in principle with the Committee's observation that it is inequitable that while the burden of excise duty should have been borne by customers, the benefit of refund should accrue to manufacturers. The Ministry has examined the matter in consultation with the Ministry of Law in order to find whether this inequity could be removed. In this connection, the following two issues were referred to the Ministry of Law for advice:

(1) Whether it is possible to make a provision in the Customs and Central Excise Acts refusing the grant of refund arising out of wrong assessment unless the claimant ensures to the satisfaction of the department that the amount refunded would be passed on to the ultimate consumer of the goods in question.

(2) Keeping in view the administrative difficulties involved in refunding the amount collected in excess to the ultimate consumers or recovering from them the amounts short collected, whether it could be provided in law that where assessments have been made as a result of an established practice, there should be no refund of excess levy or recovery of short levy. The idea behind this suggestion was that the manufacturers should neither get an unintended benefit nor suffer an unintended hardship.

Ministry of Law have advised that:

(a) It is legally open to Parliament to make provision, somewhat on the lines of section 14-A of the Orissa Sales Tax Act, and Section 23-B of the Rajasthan Sales Tax Act, to the effect that refund of the excess collection can be claimed only by the person from whom the manufacturer/importer has actually realised it;

(b) It is not legally feasible to deny the refund of any amount collected in excess of what has been prescribed by law; any provision denying such refund on the ground of established practice is liable to be struck down as not only arbitrary but unreasonable.

A provision on the lines of section 14-A of the Orissa Sales Tax Act of section 23-B of Rajasthan Sales Tax Act would hardly meet the point which the PAC has in view. The manufacturer has transactions directly with the consumers only in limited types of cases

either in the case of producer goods which he sells directly to other processors or in the case of sales to Government bodies, DGS&D etc. In a large majority of cases, where the common man is concerned, the distributive trade intervenes between the manufacturer and the ultimate consumer. A provision like the one in Orissa and Rajasthan Sales Tax Acts would enable the selling agents, wholesalers or retailers to get the refund instead of the manufacturer getting it. It would be no consolation to the Government or to the common man if instead of the manufacturer the distributive trade makes a fortuitous profit.

Besides, there are formidable administrative difficulties in refunding the amounts to the actual consumers. It is not easy to locate the numerous ultimate consumers of the goods who have borne the incidence of the excise payment; apart from the practical difficulties of locating them, the administrative cost of refunding small amounts to each of the numerous consumers would be quite disproportionate to the amount of refund involved. Even the precise amount to be refunded to each consumer is difficult to work out. The situation in the case of excise duty is quite different from the one obtaining in the case of sales tax. In the case of sales tax, the transactions are as between the dealer and the consumer and the amount of sales tax paid is distinctly shown on the cash memo. In the case of excise duty, the goods after clearance from the factory may lose identity because of subsequent processing or may be traded in through a chain transaction. At the stage of sale to ultimate consumer, it may not be possible in a majority of the cases to separate the duty element from the consumer price.

There is yet another aspect to be considered. Assuming that we may make a provision in the law that the excess collection should be retained by the Government and made over to the reserach organisations the amount that could be so made available would gradually dwindle as no manufacturer would have any incentive for making and establishing a claim for refund. Where the research work is necessary, a better course would be that the Government should continue to provide for it from out of Consolidated Fund of India.

Finally, the Ministry has to reckon with the possibility that if the suggestion to refuse refunds to the manufacturers in respect of higher duties erroneously paid is accepted, it may put enormous powers in the hands of assessing officers at comparatively lower level which might lead to corruption and harassment of the assesses.

No assessee would like to pay higher duty in the first instance and then risk consequential refund being refused if at a later stage it is decided that lower rate of duty was actually payable.

Considering all the foregoing factors, the Ministry while appreciating and in principle agreeing with the Committee's observations that a third party should not get a fortuitous benefit out of the refunds made, has come to the tentative conclusion that it is administratively impracticable to insist on refunds of excise duty being passed on to the actual consumers and in default thereof to appropriate the refunds and spend it for industrial research. Since in any case the acceptance of the recommendation would involve a statutory change in the Central Excise Law and the Central Excise Bill is already before the select Committee of the Lok Sabha, the Ministry would like to place the Committee's suggestion before the Select Committee so that the latter can go into the matter further in consultation with the trade and industry and if necessary suggest a suitable provision for inclusion in the Bill."

1.12. After considering the views of the Government the Committee felt that reference to Section 14-A of Orissa Act and 23-B of Rajasthan Act was not germane to the Committee's suggestion which did not imply refund of excess collections to buyers, distributors or actual consumers. Reiterating their earlier suggestion the Committee, therefore, in paragraph 1.25 of their 95th Report (4th Lok Sabha) had recommended:—

> "The Committee would like Government to consider whether, as suggested by Audit, it would be possible to incorporate a suitable provision in Central Excise Bill on the lines of Section 37(1) of the Bombay Sales Tax Act, so that Trade does not get fortuitous benefit of excess collections of tax realised from the consumers."

1.13. The relevant provisions in the Bombay Sales Tax Act, 1959 read as follows:

> '37(1)(a) If any person not being a dealer liable to pay tax under this Act, collects any such sum by way of tax in excess of tax payable by him or otherwise collects tax in contravention of the provisions of Section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as follows:—
>
> (1) Where there has been a contravention referred to in clause (a), a penalty of an amount not exceeding two

thousand rupees.....and in addition, any sum collected by the persons by way of tax in contravention of Section 46 shall be forfeited to the State Government.

Section 46 (1)—No person shall collect any sum by way of tax in respect of sale of any goods on which by virtue of section 5 no tax is payable.

(2) No person who is not a registered dealer and liable to pay tax in respect of sale or purchase shall collect on the sale of any goods, any sum by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act."

1.14. The Government had then not found it feasible to modify the Central Excise law on the above lines as according to the opinion of the Ministry of Law such provision was not incidental to the power of levying duty. It is understood that for arriving at this opinion, the Ministry of Law had relied on the decisions of the Supreme Court in R. Abdul Quadir & Co. *Vs.* STO and Ashoka Marketing Ltd. *Vs.* the State of Bihar. In Abdul Quadir's case Section 11(2) of the Hyderabad General Sales Tax Act providing for the amounts collected by a dealer as sales-tax which were not actually excisable under the law being paid over to Government, was struck down as going beyond the legislative competence of the State legislature. In Ashoka Marketing certain parts of Section 20A of the Bihar Sales Tax Act, 1959, providing for the excess amounts of sales-tax being not refunded to the dealer, but being held by the State for the benefit of the persons from whom these were improperly collected, were struck down for the same reason.

1.15. Recalling their earlier suggestion, the Committee in paragraph 11.37 of their 13th Report (Sixth Lok Sabha) which was presented in December, 1977 had recommended:

"It would be recalled that the Committee in paragraph 1.25 of their 95th Report (Fourth Lok Sabha—1969-70) impressed upon the Government to consider whether "it would be possible to incorporate a suitable provision in the Central Excise Bill on the lines of Section 37(1) of the Bombay Sales Tax Act, so that Trade does not met fortuitous benefit of excess collections of tax realised from the consumers." Unfortunately, the Government

had then in consultation with the Ministry of Law not found it feasible to modify the Central Excise Law on these lines. The Committee would like Government to re-examine the position in the light of subsequent developments so that the benefit of excise duty already recovered from the consumers is not fortuitously misappropriated by the producers due to deficiencies in law, rules and regulations etc. etc."

1.16. In their Action Taken Note furnished on 12th December, 1978 the Ministry of Finance (Department of Revenue) had stated:

"The difficulties pointed by the Ministry of Law in their advice contained in their note dated 30th October, 1970 and 4th February, 1971, copies of which were forwarded as enclosure to this Ministry's Office Memorandum F. No. 11/34/70-CX-10 dated 26th June, 1971 sent in reply to the Recommendations contained in Para 1.25 of the 95th Report of the Committee are still valid. Since the position between 1971 and now has not changed materially it may not be possible to incorporate in the Central Excise Law, provisions analogous to Section 37 of the Bombay Sales Tax Act."

Decision of Supreme Court

1.17. The Committee, however, note from the instant Audit paragraph that the position, had in fact, undergone a material change during this period consequent upon the judgement of Supreme Court in the case of Sales Tax Officer Gujarat *vs.* Ajit Mills Ltd. and another upholding the validity of Section 37(1) of the Bombay Sales Tax Act. The Committee therefore, desired to know the details of the decision of the Suprem Court in the aforestated case. The Ministry of Finance have in a note stated as follows:—

"The Supreme Court has in the case of Sales Tax Officer *Vs.* Ajit Mills Ltd. and another upheld the validity of section 37(1) and section 46 of the Bombay Sales Tax Act as made applicable in the State of Gujarat. Section 46 of the Sales Tax Act prohibits a person other than a dealer to collect any tax payable under the said Act and a registered dealer from collecting any tax in excess of what is required under the Sales Tax Act.

Section 37(1) provided "that if any person not being a dealer liable to pay tax under this Act collects any sum by way of tax in excess of the tax payable by him or otherwise collects tax in contravention of the provision of Section 46 he shall be liable to pay in addition to any tax for which he may be liable a penalty as follows:

(i) Where there has been a contravention referred to in the clause (a) a penalty of an amount not exceeding 2,000 rupees ..... and in addition ..... any sum collected by the person by way of tax in contravention of section 46 shall be forfeited to the State Government.

Similarly, where a registered dealer collects any amount by way of tax in excess payable by him, section 37 provides for a penalty of an amount of these exceeding Rs. 2,000/- and in addition any sum collected by the person by way of tax in contravention of sub-section 2 of Section 15-A-I of Section 46 shall be forfeited to the State Government.

The assessee in the present case had challenged the constitutionality of Section 37(1) in particular and had referred to this provision as a colourable legislation which was beyond the competence of the State legislate.

The Supreme Court however upheld the constitutionality of the above legislation and allowed the appeals filed by the State Government."

1.18. The reasons given by the Supreme Court while upholding the validity of Section 37(1) of the Bombay Sales Tax Act as indicated by Ministry of Finance (Department of Revenue) in their note are as under:—

"The assessee had contended that the forfeiture of the amount referred to in Section 37 of the Bombay Sales Tax Act was a device by the State to secure the amount unauthorisedly collected by the assessees, though the amount so collected is not exigible as tax. They contended that the forfeiture was for the purpose of collecting the amount which is wrongly collected by the assessees and this was beyond the power of the legislature as the intention of the State was to secure the amount which has been collected by the assessees which is not exigible as a tax. It was further contended that the forfeiture

referred to in section 37 was not a penal provision and it was only a collection of tax unauthorisedly recovered by the dealers.

However, on behalf of the State Government it was argued that it was within the competence of the State legislature under List II, Entry 54 to impose any penalty including forfeiture of the sum unauthorisedly collected by the assessees for the purpose of proper enforcement of the Act and was within the ambit of ancillary or incidental power of the State to achieve the object of the Acts.

The Supreme Court after discussing a series of earlier decisions of the High Courts and Supreme Court, pointed out the the courts have time and again held that it was competent for the legislature to provide penalties for the contravention of the provision of the act for its better enforcement, and provision in an enactment levying such a penalty cannot be challenged. The Supreme Court, therefore, held that the only point for determination before them was whether the forfeiture provided under the Act was in the nature of penalty or not. Once it is held that the forfeiture was in the nature of penalty for achieving the objects of the Act the State is competent to legislate the same and it is within the ambit of incidental and ancillary power of the State to legislate on the subject. The fact that there was no 'mansrea' in this case is of no relevance as in the matter of economic crimes 'mansrea' is of no consequence. Further once it is held that the legislature is competent to enact an Act, the motive of the legislature is irrelevant to castigate an Act as a colourable advice.

The Honourable Court further held that the forfeiture provided for in the impugned Act was in the nature of a penal provision with a view to prohibit the dealers from charging any tax which is not payable under the Act or charging tax in excess of what is required under the Act. The Court therefore upheld the constitutionality of the Acts and allowed the appeal of the State."

1.19. Emphasising the need for consumer protection and the necessity for having deterrent provisions with a view to prohibiting the dealers from charging any tax which is not payable under the

Act or charging tax in excess of what is required under the Act, the Supreme Court in paragraphs 5, 12, 13 and 24 of the judgement had observed:—

5. We will now proceed to project preliminary the factual legal setting in order to appreciate whether the legicidal blow delivered by the High Court is merited or not. Fortunately, the facts are few and not in dispute and lend themselves to sharp focus on the legal screen. The respondent, a registered dealer under the Act, was, by implication of the provisions, eligible to pass on sales tax leviable from him to the purchaser but several commodities, especially the necessaries of life, were not liable to tax (S. 5). Other situations of non-exigibility also exist. Yet several dealers showed a tendency under the guise of sales tax levy, to collect from buyers such tax even in regard to tax free items or sums in excess of the tax payable by them or where the dealers were not even assessable. The likelihood of such abuse of the sales-tax law induced the legislature to protect the public from this burden by enacting a prohibition under S. 46 against such collection from customers. A mere prohibitory provision may remain a 'pious wish', unless to make it effective the statute puts teeth into it. Section 37(1)(a) and S. 63(1)(h) are the claws of S. 46 which go into action, departmentally or criminally, when there is violation. Even here we may read S. 46 (1) and (2):

"46 (1) No person shall collect any sum by way of tax in respect of sales of any goods on which by virtue of section 5 no tax is payable.

(2) No person, who is not a Registered dealer and liable to pay tax in respect of any sale or purchase shall collect on the sale of any goods any sum by way of tax from any other person and no Registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act....."

12. "He who runs and reads get the facts without difficulty since the Revenue has done nothing more than forfeit the sums recovered from customers by dealers in the teeth of Section 46, less refunded sums, if any. Even so, the

State, under our constitutional scheme, has limited legislative powers restricted to list II and List III of the Seventh Schedule. If S. 37(1)(a) spills over the entries in List II (Entries 54 and 64) and cannot be salvaged under the doctrine of ancillary power, the law must be bad, morally morality notwithstanding. The State has no divine right to rob the robber. The money, if illegally gathered either by mistake or by mendacity, must go back to whom it belongs, and not to the State. Nor is there any legislative entry which arms the State to sweep all illegal levies connected with sales from the merchant community into its coffers. This is the kernel of the submission which has appealed to the High Court. The counter argument which has been urged by Shri S. T. Desai, for the State, reinforced by added glosses by Shri Nariman, is that the State has the right not merely to impose tax on sales but to ensure that the sales tax law is not misused by the commercial community to f.o.b. off pseudofiscal burden upon the consumer community. It is elementary economic theory that while the legal burden of sales tax falls upon the dealer, the fiscal impact is eventually on the consumer. A welfare State, with its logos and legend as social justice, has a sacred duty while it exercises its power of taxation to police the operation of the law in such manner as to protect the public from any extra burden thrown on it by merchants under cover of statute."

"13. Bearing in mind the quant-essential aspects of the rival contentions, let us stop and take stock. The facts, of the case are plain. The professed objection of the law is clear. The motive of the legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interest against likely, albeit, unwitting or 'ex-abundanticautela' excesses in the working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare State. One potent prohibitory process for the consumption is to penalise the trader by casting a non-fault or absolute liability to 'cough up' to the State the total 'unjust' takings snapped up and retained by him, 'by way of tax' where tax is not so due from him, apart from other punitive impositions to deter and to sobar the merchants whose arts of dealing with customers

may include many a little makes mickle'. If these steps in reasoning have the necessary nexus with the power to tax under Entry 54 List II, it passes one's comprehension now the impugned legislation can be denounced as exceeding legislative competence or as a 'colourable device' or as 'supplementary, not complementary. But this is precisely what the High Court has done, calling to its aid passages culled from the rulings of this Court and curiously distinguishing an earlier Division Bench decision of that very Court a procedure, which, moderately expressed, does not accord with comity, discipline and the rule of law. The puzzle is now minds trained to objectify law can reach fiercely opposing conclusions."

"24. In a developing country, with the mass of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements we see sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality. Nor are we impressed with the contention turning on the dealer being an agent (or not) of the State vis-a-vis sales tax; and why should the State suspect when it obligates itself to return the moneys to the purchasers? We do not think it is more feasible for ordinary buyers to recover from the common run of dealers small sums than from government. We expect a sensitive government not to bluff but to hand back. So, we largely disagree with Ashoka (AIR 1971 SC 946) while we generally agree with Abdul Quader (AIR 1964 SC 922). We must mention that the question as to whether an amount which is illegally collected as sales tax can be forfeited did not arise for consideration in Ashoka."

Recommendation of the Jha Committee

1.20. The issue of accrual of unintended/fortutious benefits to the manufacturers of excisable goods as a result of refund of duty was also considered by the Indirect Taxes Enquiry Committee (Jha Committee). In paragraph 15.23 of their report; the Jha Committee had recommended:—

"15.23 Sometimes, the excise department revises the classification of a product with retrospective effect as a result

of which the manufacturer is called upon to pay a higher duty even for past clearances. Once the manufacturer has marketed his product, he cannot recover from his customer the higher duty. We are of the considered view that unless forgery, fraud or collusion is involved, a change in the classification of a product should have only prospective effect and the authorities should not demand a higher duty for the past period. There are also cases where due to a revision in classification the duty liability gets reduced and the manufacturer may get a fortutious benefit which cannot be passed on to his customer. It would, therefore, be legitimate to hold that no refund in respect of past clearances should be permissible to the manufacturer. A provision of this kind already exists in the sales tax law of Gujarat, the validity of which has been recently upheld by the Supreme Court. A similar provision should be made in the Central Excise Law."

1.21. The Committee wanted to know the action taken by Government on the recommendation of the Indirect Taxes Enquiry Committee (Jha Committee). In a note the Ministry of Finance (Department of Revenue) have stated:—

"The aforesaid recommendation was considered in consultation with the Ministry of Law. While the Ministry of Law has said that such provision will be constitutionally permissible, they have added that its feasibility will have to be examined by the Department in the light of the following factors.

(i) It might not be easy to disentangle the excise duty element from the price element.

(ii) Revision arising as a result of appeal/revision application would not mean the initial recovery of duty was illegal.

(iii) As refund will have to be passed by the manufacturers to the wholesale dealer which will merely result in shifting of the fortutious benefit from the former to the latter.

(iv) If it is decided not to accept the other part of the recommendation, viz., demanding duty for past period, then it will result in an inequitable status.

(v) Question of interest lost in respect of refundable amounts will also have to be taken into consideration.

The Board noted that there was a great force in the points raised by the Ministry of Law against the feasibility of such a provision. Apart from the said factors there may also be cases where a part of the duty liability has already been absorbed by the manufacturer. In such cases it would be difficult to ascertain the quantum of duty passed on to or actually recovered from the buyer. Moreover, the basis of levy of sales tax and excise duty are different and hence the analogy sought to be high lighted is not quite appropriate. On the sales tax side there is no formal approval of the rates as in the case of Central Excise. Consequently, on the Central Excise side where the initial approval is itself incorrect, the assessee can hardly be blamed and it cannot be said that he had acted illegally as to warrant invoking of the penal provision as in the Sales Tax Law.

The aforesaid decision of the Board has been accepted by the Government.

1.22. During evidence the Public Accounts Committee asked why the Government should not consider the question of not refunding excise duty to the manufacturer concerned as he is not entitled to receive it back either in terms of equity or law. The Chairman, Central Board of Excise and Customs stated:

> "Possibly, this has relation to a series of recommendations which have been made by this Hon'ble Committee and its predecessor Committees in the past. As I recall it, it was in the 1968-69 report. Since 1968 expressions of this sentiment in one form or other have been coming before Government. Up to now we have had hesitation in accepting this suggestion that legal steps should be taken to bar refunds in such cases. I would straightaway say that we do not have any sympathy with assessees who seek to exploit the consumers. Any such move which seeks to give protection to the consumer is welcome from the point of view of Government. Actually, such a stop would possibly be beneficial to the revenue, and it would have possibly meant less work to us. Purely from the revenue angle, it would be welcome.. We, however, had reasons partly legal, partly administrative which occurred to us. Now, so far as legal reservations are concerned, the Law

Ministry on a number of occasions felt that such a provisions may not be constitutionally feasible. Now, recently the Supreme Court has given the judgment in Ajit Mills case from which the conclusion may be inferred that between as in the case of Sales Tax and in the case of Excise such a provision is constitutionally feasible. It is not my province to give any views on this. The Law Ministry have given their views that such a provision may be feasible. So, that is the position, so far as the legal side is concerned. But we have had difficulties so far as the administrative aspect is concerned. And, Sir, I said, while I appreciate the reason for expressing the sentiment or the reasoning behind such a proposal, I would like to place them before this Hon'ble Committee so that in whatever final view they may take, they may be aware of these aspects. One thing, Sir, is this. That so far as the question of fortuitous gains is concerned, we have come up in the excise side a case where an assessee to begin with, submits a price list, as well as a classification list and gets it approved by the Department before actually using it. There may be some error in the classification or the valuation according to the view that may finally be taken in that case but Sir, the fact would remain that the procedure, prescribed by law is followed. Therefore, whether or not the realisation was under authority of Law is a question of opinion, where in the case may be one of an erroneous assessment. A similar distinction has been made between what is flately illegal and what is legal but may be erroneous, in the case of an official exercising his jurisdiction. We have to distinguish between what is incorrect according to law but in the exercise of jurisdiction which is legal and where some one is acting in excess of jurisdiction and without authority. There are cases where the assessee has passed on the burden to the consumer. Now it comes to a question of whether this should be appropriated. In the Supreme Court case, in the particular judgment referred to they have given certain views on it that if the provisions of law is a means of getting back a duty which should not have been collected, that would not be within the scope of the Entry. But if it was a penalty intended to be a penalty, to prevent the manufacturer from trading on his position, and from taking undue advantage, it should be taken as falling within the ancillary power of the legislature and

therefore, it would be valid. Therefore, they unheld the validity of this provision on the basis that it was essentially meant as penal and ancillary measure. There may be some difficulty if this is applied to an assessee on the Excise side who can very well say that he has assessed on the basis of an approval given by the Excise Officer, and why should he be subjected to a penalty. This will not be taken care of even if the law is amended. The other difficulty is, how can we say in which case the gain is fortuitous and in which case it is not fortuitous. In every case where a refund has been granted, it will not be possible for this refund to be ultimately passed on to the consumer because it must first be passed on to the whole saler and so on. Every case of refund will practically be a case of fortuitous gain to the manufacturer. Therefore, this is an important point to be considered in coming to a decision whether there is to be any refund at all. For every refund there must be a gain, since the refund cannot be passed on. Then, Sir, we have to get into the position that every assessment will almost become final. Even if officers have decided erroneously, that would be final and the assessee will not be able to get back the excess amount which he has paid and for this he would be put to a power of harassment or corruption in the hands of a large number of officers. We have been thinking whether such a hesitation should be allowed to prevail. Another aspect which has not come out is whether on the same reasoning that the benefit cannot be passed or will not be passed on by the assessee, a contrary argument can also be raised by the assessee in the case of a short levy that he is not in a position to get back from the purchaser what is being demanded from him. From the Court's point of view also, therefore, there may be some logic in it. He may contend that once the goods have been sold he cannot demand back from his buyer. So, he may as well as say that we should not demand it from him. If that is the effect of the proposal, it has a far reaching effect and we would request the Committee to kindly consider all this and whatever final view they may take, may be given."

1.23. Elaborating his point further, the witness stated:

", ...whatever we do, there is no possibiilty of the refund reaching the ultimate consumer, except in very few cases

like purchases by DGS&D where it is a direct purchaser. As I said, in a sense, any refund will be a fortuitous gain. If I understand the proposal as being that in no case should refund be given once the goods have been sold and the tax has been paid it become very sweeping where the point I mentioned about harrassment is very relevant. I am not clear about the other point, whether the converse will also follow, that we should not recover ... Even then these difficulties are there to distinguish between fortuitous and otherwise; It is hardly possible. It may mean denying all refunds."

1.24. Asked whether the Government would consider the incorporation of a suitable provision in the Central Excise Law analogous to Section 37 of the Bombay Sales Tax Act in view of the Supreme Court judgment in Ajit Mills case, the Chairman, Central Board of Excise and Customs stated:—

"The reasons why in the last few years we have been hesitant in accepting this are not one but two or three One was the legal difficulty which was anticipated and which has now been cleared by the Supreme Court's latest judgment and Law Ministry's advice based on it. We have other difficulties like placing more power in the hands of officers and increasing the possibilities of harrassment and corruption. So, we would still find difficulty in recommending this to the Government."

1.25. The witness further stated:

"...there will be difficulties in applying it straightaway and relying on the constitutionality of such a provision on the Central Excise Act, because the situations on the Sales Tax and on the Central Excise side are different. The whole basis of the judgment is that this is a power of punishing somebody for something which he should not have done. That argument is very difficult to apply on the Central Excise side."

1.26. One of the administrative difficulties put forward by Government in enacting provisions in the Central Excise Law on the lines of the Bombay Sales Tax Act is that it would be difficult to disentangle the excise duty element from the price element. The Committee, therefore, enquired how refunds were then quantified and

made at present. In a note, the Ministry of Finance (Department of Revenue) have stated:

> "Refunds are quantified with reference to the assessable value and the excise duty shown separately in the price-list, gate-passes and other documents submitted to the Department while sale price is relevant for quantifying the fortuitous benefits. For grant of refund relevant factors are the assessable value and the amount of duty."

1.27. To a question whether the assessable value of excisable goods as defined in the Law include the element of excise duty, the Ministry of Finance (Department of Revenue) have in their note replied in negative.

1.28. Asked how is it then correct to say that it would be difficult to disentangle the duty element from the price element, the Ministry of Finance have in their note stated:

> "While for the purpose of assessment of Excise Duty a manufacturer shows the assessable value and the excise duty separately in the Central Excise documents, he may not show them separately in his sale-invoice. The manufacturer may not pass on the entire excise duty paid to the Department, to the buyer and absorb part of it himself. For example, where a rate of duty has been increased, increase in the sale-price of the goods may not be to the corresponding extent of increase in the rate of duty. In such a situation it can be said that the manufacturer has absorbed part of excise duty and it would, therefore, be difficult to disentagle the duty element. A large number of manufacturers declare-*cum*-duty sale price and work backwards to determine the assessable value. In such a case also it will be difficult to say as to how much duty has been borne by the manufacturer and how much has been passed on to the consumer with reference to the sale-price charged by the manufacturer."

1.29. On enquiry the Ministry of Finance informed the Committee that under the existing practice, the duty element was shown separately in the gate passes. The Committee also learnt that a duplicate copy of the gate pass was submitted by the manufacturer to the Range Office monthly with RT 12 return.

1.30. On being asked whether the prices were not approved by Government, the Ministry of Finance (Department of Revenue) in their note have stated that the price submitted by the assessee was approved by the Department in terms of rule 173 C read with rule 173 CC.

1.31. The Committee asked whether it would not be correct to say that any refund arises solely because the initial collection was not in accordance with the law. The Ministry of Finance in their note have stated:—

> "The presumption that all refunds arise solely because of the initial collection not being in accordance with the law is not correct. A rebate of excise duty is given on goods exported even though the collection at the initial stage is in accordance with the Law. Moreover, refund can arise on account of "Mistake of Law" as well as "mistake of fact" which are two separate legal concepts."

1.32. While indicating the action taken on the recommendation of the Jha Committee to incorporate a provision in the Central Excise Law on the lines of Sales Tax Law of Gujarat to the effect that no refund in respect of past clearances should be permissible to the manufacturer, the Ministry of Finance had *inter-alia* stated that such a provision would merely result in shifting of the fortuitous benefit from the manufacturers to the wholesale traders. The Committee wanted to know how the suggestion involved such a shifting of fortuitous benefits. The Ministry of Finance (Department of Revenue) have in their note stated:—

> "The excisable goods are normally sold through a chain of a sole-distributors, distributors and dealers etc. and not directly to the consumer. Before the goods actually reach the ultimate consumer they pass through a number of hands. It is not possible for the Department to ascertain the ultimate consumer and verify that the benefit has actually been passed on by the manufacturer to the ultimate consumer before grant of refund. The Deptt. can, at the most, be concerned with the first buyer of the goods. If a manufacturer produces an evidence that he has passed on the benefit to the first buyer, who may be a sole-distributor, distributory whole-sale dealers, etc. the Deptt. will not be justified in withholding the refund. In such a case the fortuitous benefit will merely shift from the manufacturer to the first buyer."

Decision of Madras High Court:

1.33. The issue of fortuitous benefit to manufacturers of excisable goods as a result of refund of duty has also been decided recently (on 27 November, 1979) by the Madras High Court in a case to which the Government was also a party. The Committee desired to know the facts of the case. The Ministry of Finance (Department of Revenue) have in a note stated:—

> "Messrs. Madras Aluminium Company Limited, Mettur Dam, Salem District are manufacturing C.E. Grade aluminium wire rods of 3''-8'' diameter popularly known as propersi rods. The process of manufacture is briefly mas below: Liquid aluminium produced in electrolytic pots after degasification and fluxing, is fed through a cast iron tube into a rotating water cooled copper wheel. The cast is approximately triangular in shape and is continuous and is fed into a series of rollers having reduced diameters. The cross section of the emerging rod has a diameter 3-8". This is then wound into a cell—
>
> This item was initially classified as extruded shapes under item 27(d) of the Central Excise Tariff. Subsequently it was felt, on receipt of representation from the Company that propersi rods as such are not covered by the tariff 27(d) and that as the aluminium in crude form which comes into existence is utilised for the production of these rods, it should bear the duty under Tariff item 27(a). Hence duty was levied on the aluminium content of these rods under tariff item 27(a) of the Central Excise Tariff. However, in the budget for 1969, a separate sub-item 27(aa) was introduced in the Finance Act, 1969 to include items-wire rods, wire bars and castings N.O.S. but bearing the same duty as under Tariff item 27(a). In March, 1972, the Gujarat High Court in the case of Prem Conductors P. Ltd., Vs. The Asstt. Collector of Customs had held that electrolytic aluminium rods other than extruded ones were not dutiable under the Central Excise Tariff and hence they were not under section 2A of the Indian Tariff Act citing this decision. Messrs. Malco accordingly addressed the Asstt. Collector, Salem and requested him to refund the duty paid on these propersi rods. Thereafter a refund claim in proper form was prepared and filed by the company on 24-11-1972 for the period prior to 1-3-1969.

The Assistant Collector Salem, issued a show cause notice and after taking into consideration the submissions made by the company issued an order on 24-2-1975 rejecting the refund claim as time-barred under rule 11 of the Central Excise Rules, 1944. The Asstt. Collector, Salem did not go into the merits of the levy on the crude content of aluminium in the rods manufactured by them. Against this order of the Assistant Collector, the Company filed an appeal before the Appellate Collector of Central Excise, Madras.

In the appeal two specific points were raised:

(i) that the time-limit under the Limitation Act should run from the date on which it had come to their knowledge that the aluminium propersi rods were not covered by any of the sub-items of item 27 of the Central Excise Tariff in terms of the Gujarat High Court Judgment referred to supra and that they came to know of this decision only in August, 1972 and therefore, the three years limitation should run from August, 1972 only.

(ii) and that the aluminium propersi rods were not covered by any of the sub-items of item 27 of the Central Excise Tariff and, therefore, the duty paid on the same should be refunded upto the period of Feb. 1969. The Appellate Collector in his order-in-appeal dated 20-1-1977 accepted the contention of the Company with regard to the time limit and held that the claim for refund filed by them in Nov. 1972 was in time. In respect of point (ii) the Appellate Collector had held that the aluminium propersi rods manufactured by the appellants upto the period 1-3-1969 were liable to duty on the crude aluminium content of the rods and had accordingly rejected their appeal.

Against the said order of the Appellate Collector the Company filed a revision petition to the Government of India. Earlier they had also filed a writ petition challenging the Asstt. Collector's order in the Madras High Court, but in the meanwhile their appeal was rejected on merits by the Appellate Collector while the writ petition was still pending before the High Court. The High Court therefore, directed that the revision application of the petitioners be

decided by the Government of India on 15-3-1978 before the High Court passes any orders on the writ petition. In connection with the revision application Shri Subramaniam the advocate for the company was heard on 27-2-78. At the time of personal hearing Shri Subramaniam had urged that under section 3 of the Central Excises and Salt Act, 1944 duty is leviable on excisable goods produced and manufactured at the rates set forth in the first schedule. Accordingly, since in this case the final produce is aluminium 'propersi rods' the levy under section 3 of the Central Excises and Salt Act, 1944 could only be on such 'aluminium propersi rods' and since during the relevant period i.e. prior to 1-3-69 aluminium propersi rods did not stand included in the Central Excise Tariff item 27 or in the First Schedule there could be no such 'propersi rods'. He further urged that since as per the Central Excise Tariff item 27(a) duty is leviable on crude aluminium which is produced and marketed as such and in this case what is manufactured and cleared is 'aluminium rod' and not 'crude aluminium'. Further, since 'aluminium rod' was not in the Central Excise Tariff it cannot be assessed as such either and hence the decison of the Appellate Collector was wrong.

The Government of India carefully considered the submission made by the company in their revision application and the points urged by the Advocate at the time of personal hearing and observed as follows:—

While on the question of classification the Government of India agree with the contention of the company that aluminium propersi rods 'perse' fall outside the tariff description of item 27(a) of the Central Excise Tariff as held by the Gujarat High Court Judgment while deciding the question of leviability of imported aluminium propersi rods to countervailing duty under section 2(a) of the Indian Tariff, the Government of India nevertheless cannot fail to appreciate the argument put forth by the Appellate Collector that in the process of manufacture of propersi rods, a stage is reached when molten aluminium is obtained but retained in the plant for captive consumption for the manufacture of propersi rods. This molten aluminium being aluminium

in crude form attracts duty under item 27(a) of the Central Excise Tariff as soon as it is produced and before it is removed for casting into propersi rods. But since strict application of the requirement of law in a case like this where the process of manufacture is continuous and aluminium propersi rods are produced without first storing and accounting for the crude aluminium for purpose of payment of duty at the stage at which crude aluminium is obtained in the plant, all that was done by the Central Excise officers in this case was to collect duty on the excisable molten aluminium namely, aluminium in crude form as represented by the end-product, namely aluminium propersi rods so as to save serious inconvenience to the manufacture which would have been caused by insisting on payment of duty at the stage at which crude aluminium came into existence. Naturally the manufacturer would not have found it feasible to account for and to pay duty on crude aluminium at that stage before the manufacture of propersi rods. To other words it was a case of postponement of duty from the stage of manufacture of crude aluminium to stage of manufacture of propersi rods so as to suit the convenience of the company as well as the administration without any injury to either the revenue or the assessee from the point of view of equity.

Having decided in the affirmative on the question of leviability of duty in this case the Government of India also observed that the provisions of Limitation Act could not prevail *vis-a-vis* the provisions of rule 11 of the Central Excise Rules which are more specific in this case on the question of time-limit for claiming refund. The Government of India further observed that the company did not take up this question even when item 27(aa) was inserted in the tariff as pointed by the Asstt. Collector, Salem after considering all aspect the Government rejected the claim of the company both on merits as well as on limitation under rule 11 of the Central Excise Rules, 1944.

The decision of revision authority was questioned by the assessee in the writ petition filed by it before the Madras High Court."

1.34. Asked about the stand taken by Government before the High Court, the Ministry of Finance in their note have stated:—

"It was contended on behalf of the Department—

(i) that the propersi rods manufactured by the assessee were excisable under item 27(a) of the Central Excise Tariff. It was stated that though Aluminium propersi rods 'per se' fell outside the tariff description of item 27(a), molten aluminium produced by Madras Aluminium Company during the process of manufacture of propersi rod was liable to duty under item 27(a) as molten aluminium is aluminium in a crude form. After molten aluminium is cooled and is made to take a solid form that could definitely be aluminium in crude form. The fact that the manufacturing process is a continuing one and that molten removed from the machine or that the molten aluminium is not stored separately will not mean that there is no actual production of crude aluminium. Thus though the end-product manufactured by Madras Aluminium Company is aluminium propersi rods, at the intermediate stage, aluminium is produced in molten form, the same can be subjected to duty at that stage. In other words, if in the process of manufacture of dutiable goods another dutiable product is brought in existence at the intermediate stage, the same is liable to duty, even though the same is not sold or manufactured in that form at that stage.

(ii) It was also informed that the refund claim filed by the assessee was time-barred under rule 11 read with rule 173-J of the Central Excise Rules, 1944 as the claim was not filed within one year from the date of payment of duty. It was further pleaded that the provisions of the Limitation Act could not prevail *vis-a-vis* the provision of rule 11 of the Central Excise Rules which are more specific in this case on the question of time-limit for claiming refund.

(iii) It was further contended that the excise duty paid by the assessee had been charged from the customers and so the assessees cannot be allowed to have the refund as the same will result in unjust enrichment of the assessee."

1.35. The High Court held in the aforestated case that even though the claim for refund of exicise duty paid was valid it should be refused on the grounds that such refund would result in unjust

enrichment of the assessee manufacturer. In a note about the judgement furnished at the Committee's instance, the Ministry of Finance (Department of Revenue) have stated as under:—

"The honourable High Court has upheld the decision of the revision authority so far as the excisability of the crude aluminium content of the propersi rods was concerned, but at the same time the High Court has held that the assessees were entitled to refund of duty paid by them during the period 1st January, 1967 to 11th July, 1967, when the propersi rods were classified under item 27(d). The Honourable High Court further held that the refund can be ordered by it in exercise of its writ jurisdiction under Article 226 of the Constitution of India or the assessee can claim it in a civil court. Since the claim in the civil court would have been time-barred, the High Court observed that such a claim can be made by invoking the writ jurisdiction of the High Court. The Honourable High Court however held that since the powers exercised by them under Article 226 of the Constitution of India directing the Government to refund the amount to the assessee were discretionary they had to see to another aspect of the issue that this refund does not result in unjust enrichment of the assessee at the cost of actual consumers to whom the refund is actually due. The High Court observed that since the excise duty was ultimately paid by the consumers who had in fact borne the excise duty, the court refused to direct the refund of the central excise duty to the petitioners but held that the amount can be retained by the State for payment to the ultimate consumers as and when the claims are made and established by them."

1.36. The Committee have been informed that an appeal has been filed by Messrs Madras Aluminium Company Limited in the Supreme Court against the decision of the Madras High Court.

1.37. The Committee enquired whether any part of the amount and duty in the aforesaid case has been refunded to the manufacturers|consumers. In a note the Ministry of Finance have stated:

"The manufacturers have not been given any refund out of the amounts covered by the writ petitions. The consumers as referred to below have claimed refund.

(1) Messrs. Madras Electrical Conductors (P) Ltd.	1,38,819.62
(2) Pran Conductors (P) Ltd., Ahmedabad	58,756.89
(3) Pran Cables (P) Ltd., Rajasthan	1,23,961.05

But so far no refund has been granted."

Ex-gratia measure to waive the recovery of differential duty

1.38. The Committee learnt from Audit that in the case of Messrs Garware Plastics and Polyester (P) Ltd., whose product was decided to be falling under Central Excise Tariff item No. 15(A) (2) Government waived, as an ex-gratia measure, recovery of duty amounting to Rs. 20.47 lakhs relating to the period from 11-11-1976 to 17-6-1977 on the ground that the manufacturer had not taken any precaution to recover the amount of duty from the customers during the said period when the tariff classification of the product was in dispute. Explaining the facts of the case, the Ministry of Finance (Department of Revenue) have in a note stated:—

"The Government of India decided on 1-3-1978, as an ex-gratia measure, to waive the recovery of differential duty amounting to Rs. 20,47,352.44 from Messrs Garware Plastics and Polyester P. Ltd., being the difference between the duty correctly leviable on polyester films under item 15A(2) of the Central Excise Tariff and the duty actually paid by them under Item 68 *ibid* from 11-11-1976 to 17-6-1977.

2. The wording of the relevant entries under Item 15A during the material period, i.e. from 1-3-1964, when it was first introduced and prior to its amendment from 18-6-1977, was as follows:

15A. ARTIFICIAL OR SYNTHETIC RESINS AND PLASTICS MATERIALS AND ARTICLES THEREOF.

1. Artificial or synthetic resins and plastic materials in any form whether solid, liquid or pasty, or as powder granules or flakes, or in the form of moulding powders, the following namely

(i) Condensation, Poly-condensation and polyaddition products, whether or not modified or polymerised, including Phenoplasts, Aminoplasts, Alkyds, Polyamides, Polyurethane, Polyallyl Esters and other unsaturated polyesters;

2. Articles made of plastirs, all sorts, including tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, including lay flat tubings and polyvinyl chloride sheets not otherwise specified.

Explanation—For the purpose of sub-item (2), 'Flastics' means the various artificial or synthetic resins or plastic materials included in sub-item (1).

The scope of item 15-A(1) was confined according to a clarification given by the Law Ministry sometime before 17th February, 1965, to the articles mentioned precisely under the sub-item (i), (ii) and (iii).

3. On 11-11-1976, the Superintendent of Central Excise having jurisdiction over the Aurangabad factory of Messrs Garware Plastics and Polyestors (P) Ltd., approved the classification of polyester film/sheets manufactured at that factory under Item No. 68 of the Central Excise Tariff. This was on the ground that as the polyester film/sheets were manufactured from saturated polyester polymer chips not falling under any of the sub-items of tariff Item 15A(1), they fell outside the scope of tariff item 15A(2) in view of the explanatory note thereto. This classification was in the light of the test report dated 2-11-1976 of National Test House, Alipore, Calcutta, to effect that samples of polyester polymer chips were saturated polyester polymer and that the polyester film was rigid plastic.

4. The Collector of Central Excise, Poona, who entertained doubts regarding the correctness of the aforesaid classification, advised the jurisdictional Assistant Collector to make provisional assessment of the subject goods. He also solicited the opinion of the National Chemical Laboratory, Poona, who on 29-12-1976, stated that the polyester polymer chips fell under the category of "saturated polyester and were a polymerised product. The matter was also referred to the Deputy Chief Chemist, Bombay, and on 28th January, 1977, the Deputy Chief Chemist clarified that saturated polyester resins were covered under Item 15A(1)(i) of the Central Excise Tariff.

5. The Collector, Central Excise, Poona had also sought a clarification from the Board whether saturated polyester polymer was covered under Item 15A(1) or not. Meanwhile on 1-12-1976, Messrs. Garware Plastics (P) Ltd. represented to Government and the Board that the polyester film manufactured by them had been classified under item 15A of the Central Excise Tariff by the Assistant Collector, Central Excise, Bombay, with reference to polyester film produced by them in their Bombay factory, and that this order had been upheld by the Appellate Collector; Central Excise Bombay. They, therefore, requested

Government to determine the final classification of the product and also requested an exemption from Central Excise duty leviable under Item 15A (if the product was so classifiable, to enable them to compete with imported films.

6. The question regarding the classification of the subject goods was examined in the light of the advice given by the Ministry of Law on the scope of Item 15A(1). In their opinion dated 22-12-1976, the Ministry of Law had clarified that if an item could be said to be otherwise (i.e. irrespective of the enumeration) covered under the expression 'condensation, poly-condensation and poly-addition products whether or not modified or polymerised', it would be included in the item. Thus, in view of the Law Ministry's opinion, the saturated polyester were covered by sub-item 15A(1)(i) and polyester films made therefrom were covered by sub-item 15A(2).

7. The question now arose regarding assessments for the past period. The two assessees affected by this issue were Messrs. Rexor India Ltd., and Messrs. Garware Plastics and Polyesters (P) Ltd. Messrs. Rexor India Limited, who had been importing polyester films had been paying countervailing duty on the basis of classification under Item 15A(2). They wanted a clarification to issue that prior to the change in the tariff description in Item 15A (1)(i) from 18-6-1977, polyester films were not assessable, so that refunds of the countervailing duty paid by them could be granted. Messrs. Garware Plastics and Polyesters (P) Ltd. had been manufacturing polyesters films out of saturated polyester chips. Roughly from December, 1976 onwards, their goods had been provisionally assessed to Central Excise duty to cover the difference between the duty under Item 68 CET and Item 15A(2). They represented that the Item 15A(1)(i) prior to the change with effect from 13-6-1977, as also according to the practice of the Department, "covered only those saturated polyesters such as alkyds which was (sic) specifically mentioned in the description and not other saturated polyesters which were not mentioned."

8. The aforesaid representations were considered by the Government. The request of Messrs. Rexor India Limited was found acceptable since they had been assessed even in the

first instance to the higher duty on the basis of the correct classification. In the case of Messrs. Garware Plastics & Polyesters (P) Ltd., it was observed that the local Superintendent had specifically classified their product under Item No. 68 CET. Subsequently, when this assessment was made provisional, Messrs. Garware Plastics and Polyesters (P) Limited had taken any precaution to safeguard their interests for recovery of differential duty, that is, the difference between the duty actually paid under Item No. 68 and the duty payable under Item 15A CET. A decision was accordingly taken with the approval of the Finance Minister to waive, as an *ex gratia* measure, the recovery of the differential duty amounting to Rs. 20,47,352.44 leviable on polyester films under Item 15A(2) of the Central Excise Tariff cleared by them on the basis of lower assessment under Item 68 *ibid* during the period from 11-11-1976 to 17-6-1977."

1.39. The Committee wanted to know whether similar waivers have been allowed in any other cases. The Ministry of Finance have furnished a list of specific cases of waiver of excise duty on *ex gratia* basis (Appendix II).

Refunds under Notification No. 198/76.

1.40. According to the information furnished by the Ministry of Finance showing refunds of duty amounting to Rs. 50,000/- and above made during the three years ending 31st March, 1980, 189 out of 808 refunds involving an amount of Rs. 10.71 crores in total were effected due to a notification No. 198/76-CE dated 16th June, 1976. Under the aforesaid notification a scheme of duty relief to encourage higher production was introduced w.e.f. 1st July, 1976. It remained in force till 31st March, 1979. Initially, the scheme applied to 43 commodities. Subsequently, as a result of additions to/deletions from the list it operated in respect of 51 items. The scheme envisaged exemption of 25 per cent from duty on the specified goods cleared in excess of clearance made during the base period. In this connection the Ministry of Finance, in a press note dated 19 February, 1977 *inter alia* clarified that it was for the manufacturer to decide whether the benefit of duty exemption earned by him should be retained by him or not. However, in the event of the manufacturer got pass-on the benefit in whole or in part to the buyer the assessable value and the amount of duty will be adjusted on the basis of a formula. The Committee wanted to know whether the assessments were

completed on the basis of the formula given in the press-note and refund allowed in all the 189 cases. The Chairman, Central Board of Excise and Customs stated during evidence:

> "So far as this particular scheme is concerned, I would expect that the Collectors would have followed this method, except where they were restrained by court cases or otherwise."

1.41. In a subsequent note furnished to the Committee, the Ministry of Finance have stated:

> "References have been made to the Collectors to intimate if the assessments have been completed on the basis of the formula given in the press-note dated 19-2-1977 and refund allowed in all the 189 cases.... The concerned Collectors have reported that the instructions contained in the press note dated 19-2-1977 have been followed and assessments completed in most of the cases."

Scrutiny of refund orders

1.42. At the instance of the Committee, the Ministry of Finance (Department of Revenue) have furnished a statement (Appendix-III) classifying the refunds involving Rs. 50,000/- and above made during the years 1977-78, 1978-79 and 1979-80 into those ordered by Supreme Court, High Court, Appellate Collector, revisional authorities etc.

1.43. The Committee desired to know whether there was any standing practice in the Board whereby in respect of any refund allowed by any Appellate Collector or any other authority, at least in cases of refunds of more than Rs. 1 lakh, the Board or the Government should review those orders. During evidence, the Chairman, Central Board of Excise and Customs stated:—

> "There is one small problem here. In many of these cases where appeals are made in assessment matters, the amount is not quantified. What is decided is whether a particular item should be classified under one item of classification or another or valuation should be under one principle or not and even the appellate authority does not normally quantify the amount. He says only the assessment should be on this basis and it is left to the lower authority to work out the amount which just by looking at the order, it may not be possible to say the exact

amount. But we do have a system whereby the Executive Collectors do refer to us those cases where it appears to them that the order passed by the Appellate Collector was not legal or proper or correct, in which case the Government can intervene and, in many cases proceedings are initiated."

1.44. In this context the witness added:

"We have taken note of your observations. In fact such a system does work but, in a slightly different way. They do make reference to the cases which have high revenue implication and where it appears that there is a possibility of the Appellate Authority having gone wrong, we get references and we do go into them."

1.45. Supplementing further on the procedure in vogue in the Department in this behalf, the Member, Central Board of Excise and Customs stated during evidence:

".....Whenever any decision is taken by the Appellate Collector, a copy of the order does go to the adjudicating Officer and the Collector also is involved with the review of the appellate decision and there is a machinery. The Collector scrutinises these orders passed by the Appellate Collector to see as to whether the matter should be taken up in the revision or not. This is irrespective of the amount of the duty. But with regard to the question of principle as to whether the decision is correct in law, correct or proper or legal there is a machinery in the Collectorate to see, irrespective of the amount, whether the appellate order has to be got reviewed or not. In my quasi-judicial capacity I have had many an occasion to review the decisions of the Appellate Collectors in different parts of the country and revise their orders."

1.46. Asked whether there was any mechanism in the Department to scrutinize an order of refund of excise duty passed by the High Court for examining if it was fit case to go in for appeal in the Supreme Court particularly where the amount of refund involved was quite substantial. The Member, Central Board of Excise and Customs stated during evidence:—

"In regard to High Court decision, there is a machinery of scrutinising the judgement even at my level and where a decision is taken in consultation with the Ministry of

Law to see whether it is a fit case to go to Supreme Court. Invariably if the advice is to go in appeal, we do take it up to the Supreme Court."

1.47. Enquired whether there was any rule that the Collector should bring all cases of refunds ordered by High Courts involving huge amounts of duty to the notice of the Board, the Chairman Central Board of Excise and Customs stated during evidence:

"The procedure is that whenever there is an adverse High Court judgement, it is reported to the Board. If there is an adverse judgement we take legal advice."

1.48. The witness further stated in this regard:

"Every High Court judgement has got its own importance. Therefore, all such judgement are expected to be reported to the Board."

1.49. In this connection the Committee wanted to know the details of the cases regarding duty on insulators where the Madras High Court had ordered refund of duty to certain parties. In a note Ministry of Finance (Department of Revenue) have stated:

"M/s. Seshasayee Industries, Vadalur have filed a writ petition No. 1854 of 1974 in the Madras High Court challenging the classification of insulators made of Porcelain with or without metal parts manufactured by them under tariff item 23B(4). This writ petition along with another writ petition was allowed on 28th March 1977 by a single judge following an earlier judgement dated 12th February, 1975 rendered by a Divisional Bench consisting of Judges of same High Court in respect of writ petition No. 343 of 1974 filed by the English Electric Company. In that case the High Court has held that merely because porcelain forms part of the finished article, viz. fuse links, it will not be porcelainware falling under Tariff Item 23B.

A writ appeal No. 600/78 was preferred against this judgement dated 28th March, 1977 before a Divisional Bench and the same was dismissed on 12th June, 1978. Meanwhile the SLP No. 317 of 1977 filed by the department before the Supreme Court against the Bench judgement of the Madras High Court dated 12th February, 1975

relating to English Electric Company referred to above was disposed of on 8th September, 1977 resulting in dismissal.

In view of the above developments, the Additional Legal Advisor, Ministry of Law, Justice and Company Affairs' Branch Sectt. Madras was consulted regarding the feasibility of final S.L.P. before the Supreme Court on 27th September, 1978 against judgement relating to M/s. Seshasayee Industries, Vadalur. The Law Ministry in their opinion dated 29th September, 1978 expressed the view that in the light of the Supreme Court decision rendered in S.L.P. 317/77 involving identical issues, no useful purpose will be served in the department preferring a S.L. P. In these circumstances no further appeal was considered necessary against the dismissal of the writ appeals. The refunds were therefore sanctioned to M/s. Seshasayee Industries Vadalur consequent on the judgement of Madras High Court in favour of the assassee."

1.50. On further enquiry, the Ministry of Finance (Department of Revenue) have informed the Committee that refunds of excise duty were sanctioned by the department in the following cases consequent to the judgement of the Madras High Court:

S. No.	Name of the Unit	Amo nt Sanctioned
1.	M/s Seshasayee Industries	Rs. 4,61,298.22
2.	-do-	Rs. 16.69.275.14
3.	-do-	Rs. 15,47,883.81
4.	-do-	Rs. 5,20,356.21
5.	-do-	Rs. 4,01,452.53
6.	-do-	Rs 8,02,737.11
7.	M/s Madras Rubber Factory, India Tyres and M/s Dunlop	Rs. 7,23,86,000.00
8.	Madura Coats Limited Madurai	Rs. 2,00,161,63.20

Pendency of cases:

1.51. The Committee desired to know the total number of cases relating to the Excise Department pending in the Supreme Court and in the High Courts. The Chairman, Central Board of Excise and Customs stated:

"At the moment we are not equipped for this. In fact, some time ago, we did have a committee of senior officers

which went into this matter; and they felt there was a need to have a legal cell which could effectively follow all such cases."

1.52. Asked whether the Department would consider setting up a Directorate of Prosecution in order to monitor the cases and defend the Government considering the large revenue potential of the Department and in view of the enormous amounts of money being spent on litigation, the Finance Secretary stated:

"We shall have the suggestion examined."

Intimation of refunds of excise duty of Income-tax authorities:

1.53. The Central Board of Excise and Customs *vide* their F. No. 223/72/72-cx.6 dated 2nd August, 1972 decided and issued instructions that whenever refunds exceeding. Rs. one lakh are granted to Central Excise assessees, particulars of such refunds should invariably be intimated to Income-tax authorities concerned by the Central Excise authorities. Subsequently, in 1975 these instructions were reviewed and revised confidential intsructions issued reducing the refund limit to Rs. 50,000 and above for the purpose of intimating Income-tax authorities. It was also decided that a quarterly statement of such refunds should be sent to the respective Commissioners of Income-tax to enable them to keep a watch over the utilisation of the information so furnished.

1.54. The Committee desired to know whether the Income-tax authorities were informed of the refunds granted to manufacturers of excisable goods involving an amount of Rs. 50,000 and above during the period of 3 years from 1977-78 to 1979-80. According to the information furnished by the Ministry of Finance, in 193 such cases involving an amount of Rs. 5.32 crores in total, the Excise Department had not intimated the Income-tax authorities of the refunds. The amount of refund exceeded Rs. one lakh each in 110 cases involving a total duty of Rs. 4.66 crores.

1.55. Asked why the instructions were not complied with in such a large number of cases during a period of 3 years, the Member, Central Board of Excise and Customs stated during evidence:

1.56. Offering his views on the non-compliance, of the specific been lapses....."

1.56. Offering his views on the non-compliance of the specific instructions of the Board, the Finance Secretary deposed:

"I agree that, in terms of the instructions issued by the Board, the Collectors concerned ought to have sent the

intimation to the income-tax authorities. If they had not done, we would take up the matter with them now.....I certainly agree with you that, where clear instructions have been issued that intimation should be sent to the Income-tax Department, the Collectors concerned ought to have been alert and sent the information to the Income-tax Department in time."

1.57. The Committee wanted to know whether the Department have since ascertained the reasons for not intimating the Income-tax authorities or have called for an explanation from the concerned officials for not having complied with the instructions issued by the Government in this behalf. The Member, Central Board of Excise and Customs stated:

"We have written to all the Collectors that, in all such cases, intimation to the income-tax authorities should be sent immediately. As soon as the question was raised by the Committee we told the Collectors that this intimation must be sent to the income-tax authorities immediately, if not already done."

1.58. In a subsequent note furnished to the Committee after the evidence before the Committee, the Ministry of Finance (Department of Revenue) have stated:

"All cases of refunds as listed in Annexure A of our reply to point No. 2 of the list of points on advance information have now been reported to the Income-tax authorities."

Treatment of refund of duty in the Income-tax:

1.59. The Committee enquired how the refund of duty is dealt with in the Income-tax Act. The Ministry of Finance (Department of Revenue) have in a note stated:—

"Section 41(1) provides that where an allowance or deduction is granted in any year in respect of any loss expenditure or trading liability and subsequently during any previous year the assessee receives, whether in cash or in any other manner, whatsoever any amount in respect of said loss or expenditure, or the assessee is benefited by the remission or cessation of the trading liability, the

amount received or the amount of liability which is extinguished is chargeable as business profits of that previous year. In view of these provisions where an allowance of excise duty is made under section 37(1) in any year is a business liability or expenditure, and in a subsequent year the amount of excise duty is refunded by the Government or the liability is remitted, any amount in respect of such refund received or the amount of liability which is so remitted or extinguished, would be chargeable as business profit of that subsequent previous year. In other words, the excise duty refund would be assessed under section 41(1), whereunder any trading liability recouped by way of remission or cessation, shall be treated to be business income in the year in such remission or cessation takes place."

1.60. Asked whether any deduction/allowance is admissible to the assessee in respect of excise duty, the Ministry of Finance have in their note stated:

"Under the provision of section 145 of the Income-tax Act the choice of method of accounting is left to the assessee who, if he follows the mercantile method of accounting, is entitled to claim deduction of any liability that has accrued or become payable during the relevant previous year, even though such liability may be in dispute. A duty, tax or other levy, e.g., sales-tax or excise, which is payable by these assessee does not become contingent merely because the assessee disputes the liability in further proceedings; it may be still allowed as an ascertained liability under mercantile system of accounting. In Kedarnath Jute Mfg. Co. *Vs.* CIT (82 ITR 363) the Supreme Court held that the liability to sales tax which arose on sales made by the assessee during the relevant previous year did not cease to be a liability because the assessee had taken proceedings before higher authorities for getting it reduced or wiped out, so long as the contention of the assessee did not prevail. The assessee was held to be entitled to deduct from the profits and gains of its business such disputed liability to sales tax under section 10(2)(xv) of 1922 Act [corresponding to section 37(1) of 1961 Act]. The rationale of the said decision was applied by the Allahabad High Court in CIT *Vs.* Poonam Chand Trilok Chand (105 ITR 618) to hold that an assessee who

follows the mercantile system of accounting is entitled to claim a deduction even though the expenditure is not actually incurred and it is enough if the liability for such expenditure accrues. The fact that the assessee did not pay, the amount to the Government in the relevant accounting year did not alter the position. The Court held that the assessee is entitled to a deduction under section 37(1) when the liability accrues and the liability accrues as soon as a transaction of sale or purchase takes place. If the assessee should succeed in appeal action could be taken under section 41 of the I.T. Act. Some other decisions of the High Court are also to the same effect 105 ITR 669, 108 ITR 136, 110 ITR 385 and 115 ITR 58."

Taxation of refunds:

1.61. The Committee wanted to know whether the refunds of excise duty made to the manufacturers of excisable goods were taken into account while assessing the income for tax purpose during the relevant assessment years. The Finance Secretary stated during evidence:

"... we will certainly pursue the matter with them. Since these payments were made by a Government department and by cheques, there is no risk of these amounts not being brought to book. Even so, by way of abundant caution and in view of the fact that a specific question has been raised by the Hon. Member in respect of these cases, I will alert them, the Central Board of Direct Taxes and ask them to check whether the parties concerned have shown these figures in their returns."

In this connection, he further added:

"...Even in the other cases where intimation has been sent I will ask them to check with the assessees concerned."

1.62. In a note furnished to the Committee, after evidence the Ministry of Finance have stated:

"Central Board of Direct Taxes have written to the Commissioners having jurisdiction over the assessees to whom refunds of excise duty have been issued, as per the details furnished by the CBE&C to the Public Accounts Committee, requiring the Commissioner to verify in the cases

of assessees in their charges whether the amount refunded to these assessees have been brought to account for the purpose of income tax u/s of the Income Tax Act. The Commissioners have been instructed to send a compliance report on or before 30-4-1981. Besides, a separate instruction has also been issued to the Commissioners, to arrange to collect *suo motu*, the particulars of such refunds exceeding Rs. 50000/- without waiting for statements to be sent to them by the officers of the CBE&C. (copy each of the Instruction No. 1376 dated 22-1-81 and Instructions No. 1376A dated 2-2-81 is enclosed) (Appendix IV and V)."

Case of J. K. Synthetics Ltd.:

1.63. In this connection, the Committee drew attention to their recommendation in para 6.51 of their 8th Report (Sixth Lok Sabha):

"The Committee also note that J.K. Synthetics Ltd., got a fortutious benefit of Rs. 1.37 crores by way of refund as the duty paid at the higher rates had already been passed on by the manufacturers to the consumers. The Committee understand from Audit that the Company has not returned the sum of Rs. 1.37 crores as income in the Income Tax Return. This is a serious default, and the Committee wish that the matter is immediately investigated by the Government. Action taken against the company to recover the taxes due and impose penalty should be intimated to the Committee within three months.

The Committee would also like to know why Government could not recover the amount from the balance lying in credit in the Personal Ledger Account as well as from securities furnished by the J.K. Synthetics Ltd. If this was done at least part of the amount in arrears could have been recovered.

1.64. At the instance of the Committee, the Ministry of Finance have furnished a note indicating the position on the above recommendations as under:

"In this connection it may be stated that the Public Accounts Committee had already made recommendation in their 187th Report (1975-76) at para 4.29 while considering C&AG's Report 1972-73 relating to Direct Taxes. This recommendation was as under:

"The Committee had also had occasion to examine separately the grant of a large refund of Central Excise duty amounting to Rs. 1.37 crores, on revision to J.K. Synthetics Ltd. The Committee have been informed by the Central Board of Direct Taxes that the Commissioner of Income Tax had been instructed on 7th May, 1974, to look into this matter and verify that the refund had been fully accounted for in the books and the returns of income. A long time has passed since then, and the Committee would like to be apprised immediately of the results of verification.

The Honourable Committee had already been informed in the action taken note on the above recommendations *vide* F. No. 236/335/73-A&PAC-II, dated the 28th June, 1976, as follows:

"The assessee company had received a sum of Rs. 1,36,78,459 as refund of Central Excise Duty during September/December, 1972. A further sum of Rs. 68,84,365 became due to the company but was not paid by the Central Excise Department. These amounts were neither shown in the P&L a/c nor in the returns of income. The entire question of assessing these refunds to Income Tax is under examination in detail during the course of pending assessment proceedings for the assessment years 1973-74."

In fact, the above reply has also been considered by the PAC in their 51st Report (1977-78) and they have made further recommendation at para 1.44, which is reproduced below:

"The Committee are surprised that a large sum of Rs. 1.37 crores received by J.K. Synthetics Ltd. as refund of Central Excise duty during September/December 1972 as well as a further sum of Rs. 68.84 lakhs which became due to the company on this account had not been disclosed either in their profit and loss account or in the returns of income. The Committee expect that while examining in detail the question of assessing these refunds to Income Tax during the course of pending assessment proceedings for the assessment year 1973-74, the question whether there has been deliberate concealment of income will also be gone into."

It may thus be seen that the point raised by the Committee in para 6.51 of their 8th Report has been covered by their recommendation at para 1.44 of 51st Report. Action taken note on this para has also been sent to the PAC *vide* C.II-F. No. 241|1|78-A&PAC-II dated 18-5-1978— reproduced below:

"It is true that the sum of Rs. 1,36,78,459/- was not shown in the profit and loss accounts nor was it shown in the return of income. In the Balance-sheet, however, it was included in 'current liabilities and provisions", in this respect the auditors of the company made the following observations in their notes:

"15-other liabilities Rs. 8,52,68,657 include Rs. 1,36,78.459 being refund of excise duty in 1972 previously assessed in excess and kept in suspense A/C."

The taxability of the two sums representing refund of excise duty on crimped yarn receivable by the assessee company has been examined. The assessee company had received a sum of Rs. 1,36,78.459 in September/December, 1972, but the further amount of Rs. 68,84,385 was not received by it during the calendar year 1972. In the course of assessment proceedings, the assessee company raised the following contentions to argue that the two amounts were not taxable:

(i) that the provisions of section 41(1) of the Income-tax Act, 1961 are not attracted;

(ii) that the Central Excise Department has again issued notices saying that the excise duty was chargeable; and

(iii) that in any case the assessee had a liability to refund the amount to the customers.

The Income Tax Officer has dealt with all the contentions and made a detailed analysis of the legal issues involved and the facts giving rise to the refunds. But the order could not be issued because of the stay granted by the Supreme Court. The CIT has already directed the ITO to examine the case from concealment angle."

1.65. Intimating the latest position of the case of J.K. Synthetics, the Ministry of Finance (Department of Revenue) have in a note stated:

"It has now been further ascertained, after sending the Action taken Note, that J.K. Synthetics Ltd. had made a provision of Rs. 2,08,29,436 in respect of its liability for Excise Duty for the previous year relevant to the assessment year 1972-73. The Company filed a writ petition in the Delhi High Court challenging the claim for Excise Duty on polymer chips and this petition was allowed by a single judge on August 28, 1980. On the basis of this judgement, the Income Tax Officer disallowed the deduction claimed in respect of the current liability and treated the sum of Rs. 2,87, 60,108 on account of past liability is income u/s 41 of the Act. The Allahabad High Court in its decision reported in 105 ITR 864 held that section 41(1) of the Act was not attracted to levy tax on Rs. 2,81,60,109. It also held that same was the position regarding the current liability of Rs. 2,08,29,486.

The Income Tax Department has not accepted the above judgement of the Allahabad High Court and has moved the Supreme Court in a Special Leave Petition which is now numbered as Civil Appeal No. 1111 The judgement of the Supreme Court is awaited."

1.66. During the tour of Study Group of the Committee to Ahmedabad on 16 January 1981, the point with regard to the refund of Central Excise duty to Messrs. J.K. Synthetics Ltd. was also discussed with the Income Tax Authorities. After discussion the Study Group desired that a note on the subject as also covering other similar situations might be furnished to them later. A note dated 17-1-1981, in this regard from the Competent Authority, Gujarat, Ahmedabad is reproduced below:

Likely situations for which tax deductions are to be provided:—

(1) Where the Customs or Central Excise Authorities have levied and recovered duties or impositions then such amounts are deductible under the Income Tax Act. Later on when such amounts are refunded as a result of appeal decision or revisionary action then if the refunds are paid off by such authorities then there may be time-lag between such payments and recovery

of income tax on such payments. In some cases the repayments may not at all be subject to income-tax because of several reasons;

(2) Similar situations where a fine or ad hoc levy is recovered by the Customs, Central Excise or Enforcement Authority;

(3) Where interest on excess payments of direct taxes are paid and such interest will be liable to tax in a subsequent assessment year;

(4) Increased compensation payable on lands or other assets acquired by such authorities and additional compensation ordered by revisionary or by Appellate Authorities.

Remedies suggested:

It is suggested that suitable provisions should be made in the Income Tax Act for deduction of tax at source of such payments. This is already covered by the general provisions u/s 190 of the Income-tax Act in Chapter XVII. There is not likely to be any hardship to the persons concerned because such parties are free to approach the Income Tax Officer for a suitable certificate for deduction of tax at source, at a lower rate or at Nil rate.

Proposed amendment will be in the form of a sub-section u/s 195 of the Income-tax Act. A rough draft of the proposal will be as follows:

"Any person responsible for paying to a person any amount which are likely to be liable for assessment under the Income Tax Act shall, at the time of such payment, deduct tax at the rate of 60 per cent on such payments."

A suitable modification in sub-section (3) of section 195 may also be made to enable the Income Tax Officer to issue certificates for deduction of tax at a lower rate or at Nil rate.

Consequential modifications in Section 197 may also be necessary."

1.67. Under the Central Excise Law excise duty is to be paid before excisable goods are removed from the factories. The assessees realise from their customers a price which is inclusive of such

duties paid by them. Manufacturers of excisable goods may become entitled to refunds of duty paid, if such goods are subsequently held to be non-excisable or found eligible to concessional rate of duty. In such cases, the refunds allowed to the manufacturers are retained by them and not returned to the buyers from whom the duty element has been collected at the time of sale. These refunds thus constitute unintended/fortuitous benefits to the manufacturers.

1.68. The Audit has in the present paragraph highlighted a number of cases of fortuitous benefits having accrued to the manufacturers. They have informed the Committee that several other cases of fortuitous benefits were also noticed by them after the submission of the Audit Report under examination.

1.69. During the course of examination of the issue of fortuitous benefits the Committee desired to be furnished with details of cases of refund of excise duty involving Rs. 50,000 and above made during the years 1977-78 to 1979-80. From the figures furnished by the Ministry of Finance, the Committee find that refunds of duty amounting to Rs. 50,000 and above were allowed in 808 cases involving a total amount of Rs. 46.05 crores during the above period.

1.70. The accrual of fortuitous benefits to the manufacturers arising out of refund of excise duty had engaged the attention of the Public Accounts Committee on several earlier occasions. The Committee recall their observation in paragraphs 2.90 to 2.91 of their 72nd Report (1968-69) (4th Lok Sabha). "It appears inequitable that while the burden of excise duty should have been borne by customers, the benefit of refund should accrue to manufacturers .....every effort should be made by Government to assess excise duty as accurately as possible.....The incidence of the duty ultimately devolves on the consumer and it may not be always possible to locate the consumer, if, following an over-assessment Government decide to refund the amounts recovered in excess. In such cases a third party gets a fortuitous benefit out of the refund made." The Committee in paragraph 2.92 of the aforesaid Report had further recommended that the Government should examine the feasibility of retaining such excess collections so that Government could with advantage consider making the refunds available in this regard to a Government research organisation working for the benefit of Industry and the public.

1.71. Government had in their reply while agreeing in principle that "it is inequitable that while the burden of excise duty should

have been borne by the customer the benefit of refund should accrue to manufacturers" had pointed out certain legal and administrative difficulties. The Committee did not agree with the reply and wanted the Government to consider whether it would be possible to incorporate a suitable provision in the Central Excise Law on the lines of Section 37(1) of the Bombay Sales Tax Act which permitted forfeiture of the tax collected in excess by a dealer in contravention of the provisions of that Act so that trade does not get fortuitous benefit of excess collections of tax realised from the consumers.

1.72. Later in paragraph 11.37 of their 13th Report (Sixth Lok Sabha) which was presented to the Parliament in December, 1977 the Committee again recommended that the Government might re-examine the question of amending the Central Excise Law on the lines of Section 37(1) of Bombay Sales Tax Act in the light of the subsequent developments. The Ministry of Finance had in their action taken note dated 12th December, 1978 stated that since the position between 1971 and then had not changed materially it might not be possible to incorporate such a provision in the Central Excise Law.

1.73. The Committee are constrained to point out that while furnishing the action taken reply in December 1978 the Ministry of Finance had overlooked an important decision of the Supreme Court in August 1977 given in the case of Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd. where the Supreme Court has held that the provisions of Sections 37 and 46 of the Bombay Sales Tax Act which contemplated imposition of a penalty (equal to the amount of excess tax collected) were valid and within the legislative competence of the State Legislature.

1.74. During evidence the Chairman, Central Board of Excise and Customs admitted that the question of constitutional validity which stood in the way of enacting a provision in the Central Excise law analogous to Section 37 of the Bombay Sales Tax Act has now been cleared by the Supreme Court by its decision in Ajit Mills case. The Ministry of Law have also given their view that such a provision would now be legally feasible. The Chairman, Central Board of Excise and Customs further stated that they did not have any sympathy with assessees who seek to exploit the consumers and "any such move which seeks to give protection to the consumer is welcome from the point of view of Government". However, the Board was still reluctant in recommending such a proposal to the Government mainly due to certain administrative difficulties.

1.75. One of the administrative difficulties put forward by the Board of Indirect Taxes in enacting a provision in the Central Excise law on the lines of Section 37 of the Bombay Sales Tax Act is that it would be difficult to disentangle the excise duty element from the price element. The Committee are of the view that it should not be difficult to disentangle the excise duty element because under Section 4(4)(d)(ii) of the Central Excise Act the assessable value of exciseable goods does not include the amount of excise duty payable on such goods and the excise duty has to be shown separately in the gate pass a duplicate copy of which is submitted by the manufacturer to the Excise Officer monthly with the prescribed returns. Thus it is possible to know precisely the element of excise duty in any price.

1.76. Another argument adduced by the Government is that the suggested amendment would merely result in shifting of the fortuitous benefit from the manufacturers to the wholesale dealers in most cases. The Committee would like to point out that the suggestion of the Committee in paragraph 1.25 of their 95th Report (4th Lok Sabha) was for the forfeiture of excess collections and therefore the question of accrual of fortuitous benefits to another set of intermediaries does not arise at all.

1.77. The Government have also contended that the basis of levy of sales tax and excise duty are different and hence the analogy of incorporating a suitable provision (amounting to penalty) in the Central Excise Act on the lines of Section 37 of Bombay Sales Tax Act is not quite appropriate. The Ministry have stated that on the Sales tax side there is no formal approval of the rates as in the case of Central Excise. Therefore, on the Central Excise side where the initial approval is itself incorrect, the assessee can hardly be blamed and it cannot be said that he had acted illegally to warrant invoking of the penal provision as in the Sales Tax Law. The Committee would like to point out that it is the consumer who has ultimately to bear the incidence of levy in both the cases. Therefore, the basic issue involved is whether a manufacturer, who has collected certain amounts on account of excise duty should be allowed to retain for himself such of these amounts as are not ultimately found chargeable under the existing provisions of the Central Excise Law.

1.78. The Committee note that the issue of accrual of fortuitous benefits to the manufacturers of exisable goods was also considered by the Indirect Taxes Enquiry Committee (Jha Committee) which had recommended that no refund in respect of past clearances should

be permissible to the manufacturer. The Jha Committee had in this connection referred to the judgement of the Supreme Court (quoted in the present report) upholding the relevant provision of the sales tax law of Gujarat and had recommended that a similar provision should be made in the Central Excise Law.

1.79. The Committee also note that in a recent decision in November, 1979 under the Central Excise and Salt Act itself in the case of Madras Aluminium Co. Ltd. Madras and M/s. International Aluminium Co. Ltd. Madras Vs. The Union of India, the Madras High Court held a claim for refund of excise duty as valid but nevertheless refused to grant the refund to the assessee on the ground that such refund would result in an unjust enrichment of the assessee manufacturer. Basing on the decisions of various High Courts and the Supreme Court, the Madras High Court came to the conclusion that while exercising the court's power it has to see that the refund does not result in unjust enrichment of the assessee at the cost of actual consumers to whom the refund is due.

1.80. Keeping in view the decision of the Supreme Court in the Ajit Mills case the Committee feel that in the prevailing conditions of a sellers' market in our country, as a measure of consumer protection, it is imperative to make a suitable provision in the Central Excise Act to ensure that a refund of duty does not result in an unjust enrichment of the assessee at the cost of the consumers. The Committee are of the view that the administrative difficulties apprehended by the Government are not insurmountable. They, therefore, reiterate their earlier recommendation made in para 1.25 of their 95th Report (1969-70) (4th Lok Sabha) that a suitable enabling provision should be incorporated in the Central Excise Act on the lines of Section 37 of Bombay Sales Tax Act.

1.81. The Committee note that 189 out of the 808 cases of refunds of excise duty involving a total of Rs. 10.71 crores were effected due to a notification No. 198/76-CE dated 16th June, 1976. Under this notification a scheme of duty relief to encourage higher production was introduced with effect from 1st July, 1976 which remained in force till 31st March, 1979. The scheme envisaged exemption of 25 per cent from duty on the specified goods cleared in excess of clearances made during the base period. In this connection, the Ministry of Finance in a press note dated 19th February, 1977 inter alia clarified that it was for the manufacturer to decide whether the benefit of duty exemption earned by him should be retained by him or not. However, in the event of the manufacturer not passing on the benefit in whole or in part to the buyer the

assessable value and the duty was to be adjusted on the basis of a formula outlined in the aforestated press note. The Committee wanted to be informed whether the assessments were completed on the basis of the formula given in the press note and refund allowed in all the 189 cases. The Ministry of Finance in their note furnished after evidence have merely stated that the instructions contained in the press note were followed and assessments completed in most of the cases. The Committee would like to know precisely the details of cases where the formula outlined in the Press Note was not adhered to and refunds were allowed.

1.82. The Committee were informed during evidence that the Collectors did refer to the Board cases with high revenue implication if it appeared that there was a possibility of the Appellate Authority having gone wrong. The Committee were also informed that there was a machinery in the Board to examine refund orders passed by High Court to see whether the case is fit to go in appeal to the Supreme Court. From the statement of refunds of large amounts given to the Committee it appeared however that many refund cases did not fall in either of the above two categories. These are cases where refunds are allowed by the Collectors themselves such as on subsequent fulfilment of the conditions of certain exemption notifications. The Committee recommend that in all such cases also a system should be evolved whereby refund orders exceeding a certain amount say Rs. 1 lakh in each case, should be reported by the Collectors to the Central Board of Excise and Customs with necessary details. This would enable the Board to scrutinise such cases and the administration of the Excise Law and the exemption notifications in a coordinated manner on an All India basis. The Committee would also recommend the setting up of a legal cell in the Board to monitor and scrutinise cases pending in Courts in the country and also to see when appeals against decision of High Courts need be filed. Considering the stakes involved in excise cases in litigation such a co-ordinated central examination is necessary.

1.83. According to the instructions issued by the Central Board of Excise and Customs in August, 1972 whenever refunds of excise duty exceeding Rs. one lakh were granted to assessees, particulars of such refunds were invariably required to be intimated to the Income-tax authorities. Subsequently, these instructions were revised in 1975 reducing this limit to Rs. 50,000. The Committee are concerned to note that these instructions were not complied within as many as 193 cases during a period of 3 years from

1977-78 to 1979-80 involving an amount of Rs. 5.32 crores of refund of duty in total. During evidence the Finance Secretary admitted that the Collectors concerned ought to have been alert in sending the information to the Income-tax Department in time. The Committee have been informed subsequently that the requisite details have since been initimated to the Income-tax authorities. The fact that action to intimate Income-tax authorities in respect of refund of duty in 193 cases during a period of 3 years was initiated only at the instance of the Committee would seem to indicate that a large number of cases might have gone unreported during the earlier years too. The Committee regret to note that the departmental machinery was not alert in ensuring proper compliance of the instructions issued by the Board in this behalf. They desire that the Board should take necessary action to galvanise their machinery in order to ensure that the instructions issued are scrupulously complied with in future by the collectorates.

1.84. **The Committee note that now the Central Board of Direct Taxes have issued instructions on 22 January 1981 and 2 February, 1981 to all Commissioners of Income-tax directing them to arrange to collect suo-motu particulars of such refunds exceeding Rs. 50,000 without waiting for statements to be sent to them by the Officers of the Central Excise Department. Since the amendment of the Central Excise Law recommended by the Committee to enable the forfeiture of the refunds is bound to take some time the Committee recommend that the Central Board of Direct Taxes should vigorously pursue the implementation of the instruction issued by them.**

1.85. **The Committee find that refund of duty is assessable under Section 41(1) of the Income-tax Act whereunder any trading liability recouped by way of remission or recession shall be treated as business income in the year in which such remission or cessation takes place. Since the failure on the part of Central Excise authorities to send intimations to the incometax department could result in assessees escaping the tax net, the Committee recommend that the Government should consider the amendment of the Income Tax Act to provide for deduction of tax at source in such cases.**

CHAPTER II

RUBBER PRODUCTS

Audit Paragraph

2.1. The Central Excise Rules provide that excisable goods shall not be removed from the place of manufacture, unless duty has been paid and gate passes for the delivery of goods issued. Under the self removal procedure, the inspection groups of the department are required to carry out once every half year, a detailed scrutiny of assessee's accounts to ensure that all excisable goods produced have been duly accounted for and appropriate duty has been paid on all such goods removed from the factory.

2.2. It was noticed during three successive audits conducted in July 1974, August 1975 and September 1976 that a Government owned unit in one collectorate, engaged in the manufacture of rubber products and parts of footwear falling under tariff items 16A and 36 respectively removed goods produced by it in contravention of these rules. Several specific instances of removals without payment of duty and belated payment of duty were pointed out. The department, however, did not conduct detailed investigation of the transactions of the company excepting those pointed out by Audit. The department became aware of the seriousness of the irregularity when they seized a lorry load of tread rubber and camel back weighing 10,029.100 kilograms and valued at Rs. 98,786.64 transported by the unit without proper gate passes on 1st December, 1976. Subsequently, detailed investigation conducted by the department in respect of entire transactions of the unit for the period 1st April, 1971 to 30th November, 1976 disclosed unaccounted stock of 54.631.9000 kilograms of tread rubber and camel back and incriminating documents revealing removal of goods without payment of duty. The total evasion on unauthorised removals during the period 1st April 1974 to 1st December 1976 was worked out by the department at Rs. 28,27, 414 out of which Rs. 26,81,028 were remitted by the unit. The case registered against the unit was adjudicated by the Collector forfeiting the security deposits of Rs. 15,000 and Rs. 1,000 in lieu of confiscation of the goods seized and the lorry used for transporting the goods and demanding balance of Rs. 1,46,386 on account of duty and Rs. 1,00,000 as penalty which are pending realisation.

2.3. The Ministry of Finance have confirmed the facts (September 1979).

[Paragraph 35 of the Report of the Comptroller and Auditor General of India for the year 1978-79 Union Government (Civil), Revenue Receipts Vol. I Indirect Taxes].

2.4. According to Rule 9(1) of the Central Excise Rules 1944 read with Rule 173G(1) *ibid* no excisable goods shall be removed from any place where they are produced or manufactured or any premises appurtenant thereto, until the excise duty leviable thereon has been paid by debit in the personal ledger account maintained by the assessee. Under Rule 52A read with Rule 173G(2) *ibid*, no excisable goods shall be delivered from a factory except under a gate pass in the proper form signed by the owner of the factory, indicating the rate and amount of duty paid on such goods and the time of actual removal of the goods from the factory.

2.5. In order to ensure proper accounting of the production of excisable goods and payment of appropriate duty on all such goods removed from the factory Central Excise Rules provide various checks. One of such checks under the self removal procedure requires the inspection groups of the Excise Department to carry out a detailed scrutiny of assessees accounts once every half year.

2.6. The Committee learnt from Audit that the unit referred to in the para which indulged in clandestine removal of excisable goods was Trivandrum Rubber Works, a Kerala Government undertaking in the Cochin Collectorate, engaged in the manufacture of rubber products and parts of footwear falling under Central Excise Tariff items 16A and 36 respectively.

2.7. The Committee desired to know whether the Inspection Groups of the Excise Department had carried out the prescribed half yearly checks in the case under examination. The Ministry of Finance, (Department of Revenue) have in a note stated:

"The Inspection Group, Trivandrum visited M/s. Trivandrum Rubber Works on 3-7-1972, 8-5-1973, 3-12-1973, 25-6-1974, 23-12-1974, 27-10-1975 and 20-12-1976 for inspection."

2.8. According to Audit instances of malpractices indulged in by the assessee to evade excise duty were detected during three successive audits conducted in July, 1974, August, 1975 and September 1976 and were brought to the notice of the Department during local

audits. The Committee wanted to know the specific defects pointed out by Audit from time to time. The Ministry of Finance (Department of Revenue) have in their note stated:

> "The Audit of the unit by C.E.R.A. Party in June 1974 *vide* Inspection Report No. CERA/2—776 pointed out clearance of insignificant quantity of excisable goods without payment of duty and instance of belated payment of duty after clearance of goods. In paras III and VI of Inspection Report No. CERA/2—927 for 6/74 to 6/75 also two relatively minor instances of the despatch of excisable goods of which the relevant Central Excise GPIs were not available to cover the clearance of excisable goods were pointed out by CERA. In para VII of Inspection Report No. CERA/2—1110 also it may be observed CERA has only pointed out the clearance without accounting in R.G. 1 and excise records."

2.9. Asked why the defects pointed out by Audit could not be noticed by the Inspection Groups of the department, the Ministry of Finance (Department of Revenue) have stated:

> "The irregularities pointed out by the Accountant General's Audit Party did not at all indicate the type of fraud which was detected by Departmental Officers in December, 1970. The case was detected by Departmental Officers based on the intelligence gathered.
>
> The type of irregularity committed by the unit was capable of being detected by preventive checks and gathering of intelligence and the fraud was detected subsequently through collection of intelligence and preventive checks only."

2.10. The Committee noticed that no detailed investigation of the transactions of the unit excepting those specific irregularities pointed out by the Audit was conducted by the Departmental upto December, 1976 although these were brought to the notice of the Department as far back as July, 1974. They desired to know why such a detailed investigation was not undertaken immediately after the irregularities were brought to the notice of the department. The Ministry of Finance (Department of Revenue) have in a note stated:

> "The Inspection Report 2—776/415 dated 16-10-1974 had pointed out the clearance of excisable goods without proper accounting, of which the amount involved was only Rs. 229.16 and the department took penal action against

the unit on 21-3-1975 and the amount was realised on 19-6-1976.

In para III and VI of IR—927 also the audit has pointed out two cases where the duty amount involved amounting to Rs. 154.82 and Rs. 214.67 and Rs. 83.23, and IR 2—1110 also the duty amount pointed out by the audit party was Rs. 73.33 and Rs. 168/- only. Hence from the above it is clear that no large scale evasion of Central Excise duty was brought to notice by audit in respect of goods removed without payment of duty or proper accounting. The irregularity pointed out by the I.A. party were only of technical nature and hence no meticulous investigations into matter were carried out."

2.11. On being asked about the reasons for the Excise Department ultimately having conducted a special investigation, the Ministry of Finance (Department of Revenue) stated as follows:

"The intelligence work done by the Departmental staff led to the detection of clandestine removal of excisable goods (*viz.*, Camel back and tread rubber) by the unit without payment of duty and proper accounting, and a case was registered against the unit on 1-12-1976. A special investigation cell was constituted by the Asstt. Collector and the matter was probed into to ascertain the magnitude of the irregularities committed by the assessee. The cell has brought to light many irregularities including the one mentioned in the Audit note."

2.12. In this connection, the Ministry of Finance (Department of Revenue) have further added:

"As a result of the intelligence gathered and by maintaining a constant vigil over the removals of excisable goods from the factory the clandestine removal of 10029.100 kgs. of tread rubber and camel back was detected."

2.13. Asked what were the irregularities noticed as a result of special investigation, the Ministry of Finance (Department of Revenue) in their note have stated as follows:—

"The investigation brought to light many irregularities including the one mentioned in the audit note. It was seen that the unit used to issue a consolidated gate pass for many items issued under a number of sale notes/invoices. All

the irregularities were detected and included in the investigation report which revealed a clearance of excisable goods without payment of duty and belated payment of duty amounting to Rs. 28,27,414.21 and an offence case was booked against the unit for violation of Central Excise Rules 1944."

2.14. The Committee wanted to know whether the irregularities were due to some lacunae in the Central Excise Rules/Procedure or due to laxity of control or negligence. The Ministry of Finance (Department of Revenue) in a note have stated:

"It cannot be said that the irregularities were due to any lacuna in Central Excise Rules or procedure. It is also not correct to say that there was blatant/culpable negligence on the part of any officer. Although the case was detected by the end of 1976, only subsequent investigations revealed that the assessee was indulging in this irregularity from 1974."

2.15. When enquired about the latest position of the case, the Ministry of Finance (Department of Revenue) have informed the Committee as follows:

"As per Board's Order No. 500 dated 14-8-1980 the appeal preferred by the party has been disposed of by confirming the penalty imposed and the case remanded back to the Collector for review of double payment of duty as contended by the party to the extent of Rs. 1,46,386.22."

2.16. When asked to indicate the steps taken by the Department to check recurrence of such cases in future, the Ministry of Finance (Department of Revenue) have stated as under:

"After the introduction of PBC regular checks on production are being made."

2.17. The Committee desired to know the reasons for the modification of Self Removal Procedure to Record Based Control/Production Based Control made applicable to specified commodities. The Ministry of Finance (Department of Revenue) have in their note stated as follows:

"The Record Based Control and Production Based Control, the former being made applicable to specified commodities, was introduced in February, 1978 on the basis of the recommendations made by the Central Excise (SRP)

Review Committee. The said Committee had suggested a system of selective controls made up a distinct procedures adopted to different needs. They had after undertaking a study said, the pattern of controls should be based on (1) accounts (2) production and (3) clearance, which for the convenience of reference were designed as ABC, PBC and CBC.

The recommendations of the Committee in this regard were accepted and these patterns of controls introduced. ABC was, however, introduced by changing the term to Records Based Control (RBC). The simplified procedure in lieu of the Clearance Based Control introduced in March 1976 was, however, subsequently withdrawn in April 1979 as it was found that assessees were not opting for it. Clearance Based Control is the same as the old Physical Control and covers only a few commodities at present.

Under Record Based Control and Production Based Control the basic principle of SRP *i.e.*, clearance of the goods by the assessee without interference by the Departmental Officer has been retained. The Record Based Control is the liberalised version of SRP applicable to commodities manufactured in the organised sector and where the system of maintenance of accounts and audit is sufficiently detailed. For commodities not covered under Record Based Control, the Production Based pattern of control applied which though not deviating from the essence of SRP incorporates certain modifications with a view to bringing about a more efficient operation of the tax system. Under this the Central Excise Officers are required to pay frequent visits to units to ensure proper accountal of goods in all their aspects."

2.18. The Committee desired to konw the checks prescribed under Record Based Control/Production Based Control as a safeguard against unauthorised removal of excisable goods. The Ministry of Finance (Deptt. of Revenue) have in their note stated:

"Under Production Based Control, which is applicable to most of the commodities, there is greater excise control and the Central Excise Officers are required to visit the units more frequently to ensure proper recording of production in all its aspects. This goes a long way in ensuring proper accountal of production and consequently of

clearance of goods on payment of duty only. Moreover the hours of removal of goods have been limited as referred to above and statutory provision has also been made for pre-authenticating records/gate pass to ensure that duplicate sets are not maintained."

2.19. The Committee wanted to know whether the Department had noticed any other similar cases of clandestine removal of excisable goods without payment of duty. The Ministry of Finance (Department of Revenue) have furnished a statement showing details of similar cases of evasion noticed by the Department during the years 1977-78 to 1979-80 involving duty of Rs. 10,000 or more. According to the information furnished there had been 241 cases of similar nature in 20 out of 25 Collectorates involving duty of Rs. 5.77 crores in total. Out of these 241 cases the action taken to demand duty in 47 cases was not intimated by the department and the realisation of duty was tending in 182 cases. Information relating to 5 collectorates was not furnished. The amount of duty involved exceeded Rs. 1 lakh each in 62 cases out of which in 6 cases the duty exceeded Rs. 10 lakhs each. In one case, namely that of M/s. Dalhousie Jute Co. Ltd. in the West Bengal Collectorate the value of goods removed clandestinely is stated to be Rs. 18.83 crores involving a duty of Rs. 1.69 crores.

2.20. According to Central Excise Rules excisable goods shall not be removed from the place of manufacture, unless duty has been paid and gate passes for the delivery of goods issued. The Committee note that in contravention of these rules, a public sector undertaking under Cochin Collectorate engaged in the manufacture of rubber products and parts of footwear falling under Central Excise Tariff items 16A and 36 respectively, resorted to clearance of excisable goods without payment of duty and belated payment of duty during the period from 1st April, 1974 to 1st December, 1976 to the extent of Rs. 28.27 lakhs.

2.21. In order to ensure proper accounting of the production of excisable goods and payment of appropriate duty on all such goods removed from the factory the checks prescribed under the self removal procedure required the Inspection Groups of the Excise Department to carry out a detailed scrutiny of assessees' accounts half yearly. The Committee find that in the instant case the Inspection Groups visited the unit twice during each of the years 1973 and 1974 but only once during each of the years 1975 and 1976.

Thus the Inspection Groups failed to carry out half yearly checks during the years 1975 and 1976.

2.22. It is pertinent to point out in this connection that certain instances of malpractices indulged in by the assessee were successively brought to the notice of the Department by the Audit in July, 1974, August, 1975 and September 1976. Yet the Department instead of proceeding with a detailed investigation of the transactions of the assessee confined their action only to the specific cases of irregularities pointed out by Audit. The Department could realise the magnitude of evasion of duty only when a lorry load of tread rubber and camel back transported by the assessee without proper gate passes was seized on 1st December, 1976. The Department thereafter made investigations which revealed large scale clearance of excisable goods without payment of duty and belated payment of duty by the assessee. Explaining the reasons for not carrying out a detailed investigation immediately after certain irregularities were brought to the notice of the Department by the Audit in 1974, the Ministry of Finance have stated that since the irregularities pointed out by Audit were only of technical nature, no meticulous investigation was carried out. Another reason adduced by the Ministry is that the Audit revelation involved no large scale evasion of duty. According to the Department goods cleared without payment of duty in those cases were of 'insignificant quantity' and the instances of irregularities pointed out by Audit were 'relatively minor'.

2.23. The Committee are astonished at the reply of the Ministry seeking to justify such patent lapses of their excise surveillance machinery in this case. On the basis of test audit results it was rather presumptuous on the part of the Department to have concluded that the evasion of duty by the assessee was confined only to smaller limits. Moreover, that the Audit revelation did not involve any large scale evasion of duty should not have been a factor to have precluded the Department from ascertaining the correct position of production and proper accounting by the assessee. The Department, therefore, had woefully failed to visualise the scope of evasion of duty by the assessee. Had the Department proceeded timely with a detailed investigation of all the transactions of the unit and taken adequate action, the assessee could not have continued such malpractices during the period from 1974 to 1976. The Committee cannot but infer from the foregoing that there has been

negligence on the part of the Department is not effectively carrying out the checks prescribed in the Central Excise Rules and in delaying investigation of the transactions of the assessee. The Committee, therefore desire that responsibility for the lapses should be fixed at the appropriate levels.

2.24. The Committee note that the amount due from the assessee has been realised excepting Rs. 1.46 lakhs towards balance of duty payable and Rs. one lakh being penalty imposed. The Committee have been informed that the appeal filed by the assessee against the orders of the Collector before the Board has been disposed of and the case remanded back to the Collector for review of double payment of duty as contended by the assessee to the extent of Rs. 1.46 lakhs. The Committee would like to be apprised of the final outcome of the case.

2.25. What has deeply concerned the Committee is that this case of evasion of excise duty by resorting to clandestine removal of goods without payment of duty does not appear to be an isolated one. At the instance of the Committee the Ministry of Finance have compiled and furnished a statement showing similar cases of evasion involving excise duty of Rs. 10,000 or more during the last three years ending 31st March, 1980. The Committee are perturbed to note that there had been 241 cases of similar nature in 20 out of 25 Collectorates involving an amount of Rs. 5.77 crores of duty in total. The Ministry of Finance appears to be complacent while assuring the Committee that with the introduction of Production Based Control, a modified form of Self Removal Procedure, recurrence of cases of evasion of duty by resorting to removal of goods without payment of duty could be effectively checked. The Committee note that the system of Production Based Control which is applicable to most of the commodities, requires frequent visits by Central Excise Officers to ensure proper accountal of production and consequential clearance of goods on payment of duty. The successful operation of the system depends on the efficacy of the

departmental checks. After having examined a glaring instance of the dismal performance of the departmental control, the Committee are not inclined to share the complacence of the Ministry over the present level of efficiency of the department in coping with recurrences of evasion of duty. The Committee would therefore like the Central Board of Excise and Customs to improve the level of efficiency of the excise surveillance machinery. In addition the Committee would like to know about the action taken by the Department to demand duty in 47 cases as also further developments in regard to realisation of duty in 182 cases out of 241 cases and the number of cases of evasion in the remaining 5 collectorates.

NEW DELHI;
April 23, 1981.
Vaisakha 3, 1903 (*S*).

CHANDRAJIT YADAV,
Chairman,
Public Accounts Committee.

APPENDIX I

(*Vide* para 1.8)

Statement showing details of the cases where the refund of excise duty amounting to Rs. 10 lakhs and above to the assessee was allowed during the year 1977-78, 1978-79 and 1979-80.

Sl. No.	Name of the assessee	Amount refunded
1	2	3
	Bombay collectorate (I)	
1.	M/s Colgate Palmolive (P) Ltd., Bombay	17,03,134.99
	Bombay Collectorate (II)	
2.	M/s Universal Luggage	11,96,730.43
3.	M/s Godrej Soaps Ltd.	22,14,576.39
4.	M/s Godrej & Boyce	52,68,311.28
5.	M/s Bhaguri Textiles	10,81,745.30
6.	M/s Blue Star	8,70,984.45
		26,91,358.88
7.	M/s Voltas	32,76,009.35
8.	M/s Hindustan Petroleum Corpn.	10,55,190.41
9.	Do.	94,95,989.52
10.	M/s H.P.C.	15,36,141.73
11.	Do.	85,47,951.55
12.	M/s Indian Oil Corporation	27,45,052.56
	Hyderabad Collectorate	
13.	M/s Panyam Cements and Mineral Industries Kurnool	10,31,267.23
14.	M/s Sirpur Paper Mills	14,55,020.63

1	2	3
	Madras Collectorate	
15.	M/s Neyveli Lignite Corporation, Neyveli	48,48,876.66
16.	M/s Seshasayee Industries, Vadalur. .	16,69,275.14
17.	M/s Aruna Sugars, Pennadam . . .	28,60,326.97
18.	M/s Nevyeli Lignite Corporation Ltd., Neyveli . . .	28,56,136.90
19.	M/s Seshasayee Industries, Vadalur .	15,49,883.81
20.	M/s Neyveli Lignite Corporation Ltd., Neyveli . . .	12,57,284.59
21.	M/s Sri Ram Fibres Ltd. Madras . . .	13,10,381.49
22.	Hindustan Motors Ltd., Tiruvellore . .	14,01,400.00
23.	Hindustan Motors Ltd., Tirvellore . .	14,27,791.25
24.	N.L.C. Ltd., Neyveli .	57,25,846.32
25.	Ashok Leyland Ltd., Madras .	11,94,533.68
26.	Ashok Leyland, Madras	22,81,593.50
27.	M.R.F. Ltd., Madras .	2,88,00,000.00
28.	Do.	30,41,000.00
29.	India Tyres, Madras .	28,65,000.00
30.	Dunlop India Ltd., Madras . .	3,70,00,000.00
31.	Madras Fertilisers, Madras	8,42,61,405.51
32.	Do.	40,99,900.09
	Pune Collectorate	
33.	Hindustan Antibiotics Ltd. Pune-II . .	12,21,455.50
34.	Associated Bearing Co. Ltd. Chinchwad .	16,12,535.72

1	2	3	4
35.	Tulsifine Chm. Co. Ltd. Bhosari . . .	88,03,545·76	
	Ahmedabad Collectorate		
36.	M/s Indian Oil Corpn. Ltd., Kharirchar (Kutch) . .	21,36,714·96	
37.	M/s Bharat Petroleum Corpn. Ltd. Khari-rohar (Kutch) .	10,15,245·24	
38.	M/s Indian Sugar Export Corpn. Ltd., Bombay . . .	82,52,193·32	
39.	M/s IFFCO Ltd., Kandla (Kutch) . .	66,58,398·18	
	Guntur Collectorate		
40.	M/s Vijayawada Bottling Co. Ltd., Vijaywada.	12,29,203·08	
41.	M/s Caltex Oil Refinery (India) Ltd., Visakhapatnam . .	11,13,628·64 11,64,195·77	
42.	M/s Indian Oil Corporation Ltd., Visakhapatnam . .	17,43,628·64	
	Jaipur Collectorate		
43.	Alcobex Metals (P) Ltd., Jodhpur . .	26,91,252·76	
44.	Shriram Fertilizer and Chemicals. Industries, Kota . . .	21,72,895·84	
45.	Hindustan Zinc Ltd., Debari . . .	48,27,317·54	
46.	Hindustan Zinc Ltd., Debri . . .	39,19,075·00	
47.	Do. .	27,89,652·29	
	Allahabad Collectorate		
48.	M/s Fertilizer Corporation of India, Gorakhpur . . .	19,70,364·04	
49.	Do. .	12,94,322·53	

1	2	3	4
	Madurai Collectorate		
50.	M/s Madura Coats Ltd., Madurai . . .	2,04,57,461.20	
51.	M/s Southern Petro-Chemical Industries Ltd., Tuticorin .	10,27,524.45	
	Kanpur Collectorate		
52.	M/s Hind Lamps Ltd., Sikohabad, Distt. Mainpuri . .	85,06,847.78	
53.	M/s Kisan Sakhari Mills Ltd., Kaimganj .	64,39,721.12	
54.	M/s Indian Oil Corporation, Kanpur .	37,41,379.02	
55.	Indian Explosive Ltd., Kanpur . .	37,98,988.45	
56.	Do.	13,84,050.37	
	Patna Collectorate		
57.	M/s Tata Locomotive & Engineering Co. Jamshedpur . .	43,04,175.62	
58.	M/s B. S. Plant (Steel Authority of India) B. S. City, Dhanbad.	1,17,42,170.34	
59.	Do.	38,86,746.00	
60.	M/s B. S. Plant B. S. City, Dhanbad. . .	2,58,93,190.63	
	Baroda Collectorate		
61.	Indian Oil Corporation, Gujarat Refinery, Baroda . . .	14,61,473.88	
	Bangalore Collectorate		
62.	M/s Gwalior Rayon Silk Manufacturing Co., Ltd., Kumarapattnam.	10,06,335.18	
63.	M/s Southern Asbestos Cement Ltd., Karur.	11,81,312.52	
	Indore Collectorate		
64.	B. S. P. Bhilai . .	11,04,498.50	
65.	Do. . .	12,06,975.00	
66.	Do. . .	16,22,400.50	
67.	Satna Cement Works, Satna . . .	10,24,983.16	
68.	B.S.P., Bhilai . .	10,12,652.40	

APPENDIX—II

(vide para 1.39)

Statement showing details of cases where waivers of excise duty were allowed

Sl. No.	Name (s) of the party	File No.	Amount waived.	Reasons for waiver
1	2	3	4	5
1	(i) M/s. G.S.F.C. Baroda	83/32/76-CX-3 dt. 7-10-76	6,46,010·13	Vide Notification No. 192/75-CE dated 30-8-75 concessional rate of duty was granted on raw naptha when used in the manufacture of ammonia. This notification expired on 29-2-76 and was re-issued only on 11-3-76. The recovery of duty for the inter regnum from 1-3-76 to 11-3-76 was waived as the Government had no intention to collect duty at the effective rate of raw naphtha used in the manufacture of ammonia during the said period. Also, the higher incidence of duty was not passed on by the manufactures of ammonia to consumers.
	(ii) M/s. F.C.I. Bombay		12,13,006·94	
	(iii) IFFCO . .		61,733·63	
2	Barauni Refinery .	86/1/72—CX-3 dt. 5·8·73	92.69	Barauni Refinery of Indian Oil Corporation had been producing Low Sulphur Fuel Oil (LSFO) a kind of Furnace Oil for use by the iron and steel industry. The product however, did not meet the viscosity specifications of Furnace Oil. However, at the instance of the Ministry of Petroleum and Chemicals, it was decided to keep the duty on LSFO at par with that on Furnace Oil. Accordingly, between November, 1965 and December, 1971, a number of notifications were issued prescribing certain specifications for the L.S.F.O. produced by the said refinery.

1	2	3	4	5
				During the said period, certain consignments of L.S.F.O. did not conform to the relaxed specifications and demands were therefore raised on such consignments. However, these demands were waived on ex-gratia basis for the following reasons :— (i) It was at the instance of the Ministry of Petroleum and Chemicals that Barauni Refinery was producing L.S.F.O. for the iron and steel industry. (ii) The product was produced, cleared, marketed and utilised as Furnance Oil. (iii) It was not possible for Indian Oil Corporation to recover the higher incidence of duty from the ultimate consumers.
3	Hindustan Photo Films Manufacturing Co. Ltd.	93/4/75—CX-3 dt. 8-8-78	5,27,66,792·00	Vide Tariff Advice No. 13/76 dated 1-4-76, it was clarified that cellulose triacetate base film is excisable under item 15A (2) C.E.I. Prior to issue of the Tariff advice, the product was treated as non-excisable. However, to keep in line with Government's decision to relieve excise duties raw materials as intermediates in manufacture of cine films, Notification No. 134/76-CE dated 1-4-76 was issued to exempt such cellulose triacetate base films. As the recovery of duty on past clearances would have caused considerable financial hardships it was decided to waive the recovery of the amount on *ex-gratia* basis.

APPENDIX-III

(*Vide* para 1·42)

Statement showing classification of refunds of Excise Duty involving Rs. 50,000 and above made during the years 1977-78, 1978-79 and 1979-80 into those ordered by Supreme Court, High Court, Appellate collector, revisional authorities etc.

Sl. No.	Collectorate	Amount involved Rs.
1	2	3
	A. Refunds ordered by Supreme Court	
1.	Pune	7,49,274·00
2.	Jaipur	5,47,538·00
	B Refunds ordered by High Courts	
1.	Bombay I	17,03,134·99
2.	Bombay II	67,558·37
3.	Madras.	4,61,298·22
	Do.	56,526·70 16,69,275·14 15,49,883·81
	Do.	4,69,190·83 75,000·00
	Do	5,20,356·21 4,01,452·53 8,02,737·11
4.	Jaipur	60,735·78 2,02,719·99
5.	Madurai	204,57,461·20
6.	Patna	43,04,175·62
7.	Baroda	69,277·89 1,24,142·12
	C. Refunds ordered by Appellate Collectors	
1.	Nagpur	61,250·00
2.	Bombay	8,15,821·97

1	2		3
	C. Refunds ordered by Appellate Collectors—contd.)		
3.	Bombay II		2,05,383.63
			64,195.35
			1,25,452.67
			61,095.00
			74,634.00
			26,91,358.88
			94,95,898.52
4.	Hyderabad	(1978-79)	1,89,500.00
		(Do)	99,798.86
5.	Madras		95,932.60
			4,69,231.37
6.	Pune		61,998.08
			1,08,280.20
			62,745.25
			1,44,817.32
			64,080.04
			88,03,545.72
			1,22,461.24
7.	Ahmedabad		1,76,880.00
			58,189.22
			54,27,913.88
			12,30,484.30
8.	Jaipur		1,18,000.00
			1,88,681.44
			54,913.23
9.	Allahabad		2,02,477.99
10.	Delhi		57,302.00
11.	Meerut		59,151.24
12.	Orissa (Bhubaneshwar		59,363.94
			1,34,609.06
13.	Patna		4,81,811.60
14.	Baroda		2,35,772.80
			1,25,459.53
15.	Indore		54,081.05
			1,25,396.73
			5,61,814.65
			10,12,652.40
	D. Refund ordered in appeal by the Board		
1.	Kanpur		1,40,000.00
2.	Madurai		9,30,905.64

1	2	3
	E. Refund ordered in revision by Govt.	
1.	Bombay II	10,81,745·30 52,339·97 1,82,398·39
2.	Madras	1,54,599·00
3.	Ahmedabad	1,86,729·25 52,511·23 52,201·68 1,70,910·65 65,041·73
4.	Jaipur	26,91,252·76 1,29,997·18
5.	Delhi	1,33,812·00 1,87,663·26 1,94,321·55
6.	Madurai	3,59,668·87
7.	Patna	74,333·00
8.	Baroda	2,04,802·20 4,35,655·24 43,154·55 91,672·78 43,154·55 1,07,726·78 32,397·55 25,095·44 36,492·99 1,83,574·32
9.	Indore	50,350·93

APPENDIX-IV

(*vide* para 1.62)

Instruction No. 1376.

F. No. 414/6/81-I.T. (Inv)

MINISTRY OF FINANCE

Central Board of Direct Taxes

New Delhi, the 22nd Jan. 1981.

To

Commissioner of Income-Tax,

SUBJECT:—Refunde of Excise Duty as result of orders passed in Appeal or otherfise—information relating—utilisation of—verification of—refund regarding—

Sir,

Recently, the Public Accounts Committee had occasion to consider an Audit Para, relating to Central Board of Excise and Customs, regarding refund of amounts paid by them by way of Excise Duty as a result of orders passed in appeal or otherwise. The Committee was also supplied with information in respect of cases where refund of Excise Duty amounting to Rs. 50,000/- and above was allowed during the three years ending 31-3-1980. Though the Central Board of Excise and Customs have issued Instructions to its field formations asking them to report invariably such refunds to the Income-tax Department, it may happen that all such refunds are not reported to the I. T. authorities.

2. Details relating to refunds allowed to assessees assessed in your Charge are enclosed. The Board desire that you should verify in the case of each assessee in your Charge whether the amount or amounts refunded to them have been brought to account for the purposes of Income-tox u/s 41 of the Income-tax. A compliance report may please be sent positively on or before 30-4-1981.

3. The Board also desire that you should arrange to collect *suo-motu* particulars of such refunds exceeding Rs. 50,000 without waiting for statements to be sent to you by the Officers of the Central Excise Department and the Board may be informed of the steps taken in this direction.

Yours faithfully,

Sd/-

(R. K. BAQAYA)

Under Secretary, Central Board of Direct Taxes.

APPENDIX-V

(*vide* para 1.62)

Instruction No. 1276-*A*

F. No. 414/6/81-I.T.(INV)

MINISTRY OF FINANCE

CENTRAL BOARD OF DIRECT TAXES

New Delhi, the 2nd Feb. 1981.

To

Commissioner of Income-Tax,

SUBJECT:—*Refund of Excise Duty as a result of orders passed in Appeal or otherwise—information relating utilisation of—verification of—refund regarding—*

Sir,

Recently, the Public Accounts Committee had occasion to consider an Audit Para, relating to Central Board of Excise and Customs, regarding refund of amounts paid by them by way of Excise Duty as a result of orders passed in appeal or otherwise. The Committee was also supplied with information in respect of cases where refund of Excise Duty amounting to Rs. 50,000/- and above was allowed during the three years ending 31-3-1980. Though the Central Board of Excise and Customs have issued Instructions to its field formations asking them to report invariably such refunds to the Income-tax Department, it may happen that all such refunds are not reported to the I. T. authorities.

2. The Board desire that you should arrange to collect *suo-motu* particulars of such refunds exceeding Rs. 50,000 without waiting for statements to be sent to you by the Officers of the Central Exise Department and the Board may be informed of the steps taken in this direction.

Yours faithfully,

Sd/-

(R. K. BAQAYA)

Under Secretary, Central Board of Direct Taxes.

APPENDIX—VI

Conclusions/Recommendations

Sl. No.	Para No.	Ministry/Deptt. Concerned	Recommendations
1	2	3	4
1	1.67	Ministry of Finance (Department of Revenue)	Under the Central Excise Law excise duty is to be paid before excisable goods are removed from the factories. The assessees realise from their customers a price which is inclusive of such duties paid by them. Manufacturer of excisable goods may become entitled to refunds of duty paid, if such goods are subsequently held to be non-excisable or found eligible to concessional rate of duty. In such cases, the refunds allowed to the manufacturers are retained by them and not returned to the buyers from whom the duty element has been collected at the time of sale. These refunds thus constitute unintended/fortuitous benefits to the manufacturers.
2	1.68	—do—	The audit has in the present paragraph highlighted a number of cases of fortuitous benefits having accrued to the manufacturers. They have informed the Committee that several other cases of fortuitous benefits were also noticed by them after the submission of the Audit Report under examination.
3	1.69	—do—	During the course of examination of the issue of fortuitous benefits the Committee desired to be furnished with details of cases of refund of excise duty involving Rs, 50,000 and above made during the years 1977-78 to 1979-80.

			From the figures furnished by the Ministry of Finance, the Committee find that refunds of duty amounting to Rs. 50,000 and above were allowed in 808 cases involving a total amount of Rs. 46.05 crores during the above period.
4	1.70	—Do—	The accrual of fortuitous benefits to the manufacturers arising out of refund of excise duty had engaged the attention of the public Accounts Committee on several earlier occasions. The Committee recall their observation in paragraphs 2.90-2.91 of their 72nd Report (1968-69) (4th Lok Sabha). "It appears inequitable that while the burden of excise duty should have been borne by customers, the benefit of refund should accrue to manufacturers.... every effort should be made by Government to assess excise duty as accurately as possible.....The incidence of the duty ultimately develves on the consumer and it may not be always possible to locate the consumer, if follwing an over-assessment Government decide to refund the amounts recovered in excess. In such cases a third party gets a fortuitous benefit out of the the refund made." The Committee in paragraph 2.92 of the aforesaid Report had further recommended that the Government should examine the feasibility of retaining such excess collections so that Government could with advantage consider making the refunds available in this regard to a Government research organisation working for the benefit of Industry and the public.
5	1.71	—do—	Government had in their reply while agreeing in principle that "it is inequitable that while the burden of excise duty should have been borne by the customer, the benefit of refund should accrue to manufactures" had pointed out certain legal and administrative difficulties. The Committee did not agree with the reply and wanted the Government to consider whether it would be possible to incorporate a suitable provision in the Central Excise Law on the lines of Section 37 (1) of the Bombay Sales Tax Act which permitted forfeiture of the tax collected in excess by a dealer in contravention of the provisions of that Act so that trade does not get fortuitous benefit of excess collections of tax realised from the consumers.

1	2	3	4
6	1.72	Ministry of Finance (Department of Revenue)	Later in paragraph 11.37 of their 13th Report (Sixth Lok Sabha) which was presented to the Parliament in December, 1977 the Committee again recommded that the Government might re-examine the question of amending the Central Excise law on the lines of Section 37 (1) of Bombay Sales Tax Act in the light of the subsequent developments. The Ministry of Finance had in their action taken note dated 12 December 1978 stated that since the position between 1971 and then had not changed materially it might not be possible to incorporate such a provision in the Central Excise law.
7	1.73	—do—	The Committee are constrained to point out that while furnishing the action taken reply in December 1978 the Ministry of Finance had overlooked an important decision of the Supreme Court in August 1977 given in the case of Sales Tax Officer, Gujarat *Vs.* Ajit Mills Ltd. where the Supreme Court has held that the provisions of Sections 37 and 46 of the Bombay Sales Tax Act which contemplated imposition of a penalty (equal to the amount of excess tax collected) were valid and within the legislative competence of the State Legislature.
8	1.74	—do—	During evidence the Chairman, Central Board of Excise and Customs admitted that the question of constitutional validity which stood in the way of enacting a provision in the Central Excise law analogous to Section 37 of the Bombay Sales Tax Act has now been cleared by the Supreme Court by its decision in Ajit Mills case. The Ministry of Law have also given their view that such a provision would now be legally feasible. The Chairman, Central Board of Excise and Customs further stated that they did not have any sympathy with assessees who seek to exploit the consumers and "any such move which seeks to give protection to the consumer is welcome from the point of view of Government." However, the Board was still reluctant in recommending such a proposal to the Government mainly due to certain administrative difficulties.

9	1.75	—do—	One of the administrative difficulties put forward by the Board of Indirect Taxes in enacting a provision in the Central Excise law on the lines of section 37 of the Bombay Sales Tax Act is that it would be difficult to disentangle excise duty element from the price element. The Committee are of the view that it should not be difficult to disentangle the excise duty element because under Section 4 (4) (d) (ii) of the Central Excise Act the assessable value of excisable goods does not include the amount of excise duty payable on such goods and the excise duty has to be shown separately in the gate pass a duplicate copy of which is submitted by the manufacturer to the Excise Officer monthly with the prescribed returns. Thus it is possible to know precisely the element of excise duty in any price.
10	1.76	—do—	Another argument adduced by the Government is that the suggested amendment would merely result in shifting of the fortuitous benefit from the manufacturers to the wholesale dealers in most cases. The Committee would like to point out that the suggestion of the Committee in paragraph 1.25 of their 95th Report (4th Lok Sabha) was for the forfeiture of excess collections and therefore the question of accrual of fortuitous benefits to another set of intermediaries does not arise at all.
11	1.77	—do—	The Government have also contended that the basis of levy of sales tax and excise duty are different and hence the analogy of incorporating a suitable provision (amounting to penalty) in the Central Excise Act on the lines of Section 37 of Bombay Sales Tax Act is not quite appropriate. The Ministry have stated that on the Sales tax side there is no formal approval of the rates as in the case of Central Excise. Therefore, on the Central Excise side where the initial approval is itself incorrect, the assessee can hardly be blamed and it cannot be said that he had acted illegally to warrant invoking of the penal provision as in the Sales Tax Law. The Committee would like to point out that it is the consumer who has ultimately to bear the incidence of levy in both the cases. Therefore, the basic issue involved is whether a manufacturer, who has collected certain amounts on account of excise duty should be allowed to retain for himself such of these amounts as are not ultimately found chargeable under the existing provisions of the Central Excise Law.

1	2	3	4
12	1·78	Ministry of Finance (Department of Revenue)	The Committee note that the issue of accrual of fortuitous benefits to the manufactureres of excisable goods was also considered by the Indirect Taxes Enquiry Committee (Jha Committee) which had recommended that no refund in respect of past clearances should be permissible to the manufacturer. The Jha Committee had in this connection referred to the judgement of the Supreme Court (quoted in the present report) upholding the relevant provision of the sales tax law of Gujarat and had recommended that a similar provision should be made in the Central Excise Law.
13	1.79	Do.	The Committee also note that in a recent decision in November, 1979 under the Central Excise and Salt Act itself in the case of Madras Aluminium Co. Ltd. Madras and M/s. International Aluminium Co. Ltd. Madras Vs. The Union of India, the Madras High Court held a claim for refund of excise duty as valid but nevertheless refused to grant the refund to the assessee on the ground that such refund would result in an unjust enrichment of the assessee manufacturer. Basing on the decisions of various High Courts and the Surpreme Court, the Madras High Court came to the conclusion that while exercising the court's power it has to see that the refund does not result in unjust enrichment of the assessee at the cost of actual consumers to whom the refund is due.
14	1·80	Do.	Keeping in view the decision of the Supreme Court in the Ajit Mills case the Committee feel that in the prevailing conditions of a sellers market in our country, as a measure of consumer protection, it is imperative to make a suitable provision in the Central Excise Act to ensure that a refund of duty does not result in an unjust enrichment of the assessee at the cost of the consumers. The Committee are of the view that the administrative difficulties apprehended by the Government are not insurmountable. They, therefore

			reiterate their earlier recommendation made in para 1·25 of their 95th Report (1969-70) (4th Lok Sabha) that a suitable enabling provisions should be incrorporated in the Central Excise Act on the lines of Section 37 of Bombay Sales Tax Act.
15	1.81	Do.	The Committee note that 189 out of the 808 cases of refunds of excise duty involving a total of Rs. 10.71 crores were effected due to a notification No. 198/78—CE dated 16 June, 1976. Under this notification a scheme of duty relief to encourage higher production was introduced with effect from 1 July 1976 which remained in force till 31 March 1979. The scheme envisaged exemption of 25% from duty on the specified goods cleared in excess of clearances made during the base period. In this connection, the Ministry of Finance in a press note dated 19 February, 1977 *inter alia* clarified that it was for the manufacturer to decide whether the benefit of duty exemption earned by him should be retained by him or not. However, in the event of the manufacturer not passing on the benefit in whole or in part to the buyer the assessable value and the duty was to be adjusted on the basis of a formula outlined in the aforestated press note. The Committee wanted to be informed whether the assessments were completed on the basis of the formula given in the press note and refund allowed in all the 189 cases. The Ministry of Finance in their note furnished after evidence have merely stated that the instructions contained in the press note were followed and assessments completed in most of the cases. The Committee would like to know precisely the details of cases where the formula outlined in the Press note was not adhered to and refunds were allowed.
16	1·82	Do	The Committee were informed during evidence that the collector did refer to the Board cases with high revenue implication if it appeared that there was a possibility of the Appellate Authority having gone wrong. The Committee were also informed that there was a machinery in the Board to examine refund orders passed by High Court to see whether the case is fit to go in appeal to the Supreme Court. From the statement of refunds of large amounts given to the Committee it appeared however that many refund cases did not

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			fall in either of the above two categories. These are cases where refunds are allowed by the Collectors themselves such as on subsequent fulfilment of the conditions of certain exemption notifications. The Committee recommend that in all such cases also a system should be evolved where by refund orders exceeding a certain amount say Rs. 1 lakh in each case, should be reported by the Collectors to the Central Board of Excise and Customs with necessary details. This would enable the Board to scrutinise such cases and the administration of the Excise Law and the exemption notifications in a coordinated manner on an All India basis. The Committee would also recommend the setting up of a legal cell in the Board to monitor and scrutinise cases pending in Courts in the Country and also to see when appeals against decision of High Courts need be filed. Considering the stakes involved in excise case in litigation such a co-ordinated central examination is necessary.
17	1·83	Ministry of Finance (Department of Revenue)	According to the instructions issued by the Central Board of Excise aud Customs in August, 1972 whenever refunds of excise duty exceeding Rs. one lakh were granted to assessees, particulars of such refunds were invariably required to be intimated to the Income-tax authorities. Subsequently, these instructions were revised in 1975 reducing this limit to Rs. 50,000. The Committee are concerned to note that these instructions were not complied with in as many as 193 cases during a period of 3 years from 1977-78 to 1979-80 involving an amount of Rs. 5.32 crores of refund of duty in total. During evidence the Finance Secretary admitted that the Collectors concerned ought to have been alert in sending the information to the Income-tax Department in time. The Committee have been informed subsequently that the requisite details have since been intimated to the Income-tax authorities. The fact that action to intimate Income-tax authorities in respect