

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No. 28512 of 2013

Date of Order: 23rd March, 2015

M/s Idea Cellular Ltd.

..Petitioner

Versus

Union of India and others

..Respondents

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

**Present: Mr. K.L.Goyal, Sr. Advocate, with
Mr. Sandeep Goyal, Advocate,
for the petitioner.**

**Mr. Sunish Bindlish, Advocate,
for respondent nos.1, 4,5 and 6.**

**Ms. Mamta Singal Talwar, AAG, Haryana
for respondent nos.2,3, and 7.**

RAJIVE BHALLA, J.

The petitioner is before us praying for issuance of a writ of mandamus directing respondent No.2 and respondent No.3 to refund sales tax/VAT deposited by the petitioner, on the activation of SIM cards, for issuance of a writ of certiorari quashing assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C), passed by the Assessing Authority under the Haryana Value Added Tax Act, 2003 and for quashing order dated 15.10.2013 (Annexure P-9), dismissing the representation for refund of the amount of VAT illegally retained by the State of Haryana.

Counsel for the petitioner submits that the petitioner provides cellular services and for the said purpose, activates SIM cards. The State of Haryana collected VAT from the petitioner,

pursuant to assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C) on the premise that activation of SIM cards is a sale. The Supreme Court having held in **Bharat Sanchar Nigam Limited and another vs Union of India and others, (2006) 145 SCT 91** and in the case of the petitioner in **Idea Mobile Communication Ltd. v. C.C.E. & C., Cochin, 2011(43) VST 1 (SC)** that activation of SIM card is a service and not a sale, the petitioner approached the State of Haryana for refund of the amount of VAT but as no action was taken in the matter, filed CWP No. 25638 of 2012, which was disposed of directing the respondents to decide the petitioner's representation for refund. The representation was illegally dismissed, on 15.10.2013 (Annexure P-9) on entirely irrelevant considerations, namely, that the petitioner did not challenge its liability before the Assessing Authority, the petitioner did not file any appeal against the assessment orders and as the petitioner has charged value added tax from its customers, the amount cannot be refunded.

Counsel for the petitioner further submits that the Supreme Court having held that activation of SIM card is not a sale, the question before the authorities was not whether the petitioner did or did not challenge its liability to pay VAT or did or did not file an appeal but whether the State of Haryana could continue to retain the amount collected as VAT after the Supreme Court had held that the petitioner is not liable to pay VAT. Admittedly, the VAT paid by the petitioner and retained by the State of Haryana is not relatable to any statutory provision and, therefore, must be refunded to the petitioner.

In case, the State of Haryana does not refund this amount, the petitioner would be doubly taxed as the Service Tax Department of the Union of India, has raised a demand for deposit of service tax for the period for which the petitioner has deposited VAT. Counsel for the petitioner further submits that a declaration of law by the Supreme Court applies from the date of inception of a statute and therefore, does not confer any right upon the State of Haryana to charge, or retain VAT, without authority of law. Counsel for the petitioner further submits that there is no question of unjust enrichment as all that the petitioner asserts and prays for is that as assessment orders and tax collected are without authority of law, the assessment orders may be declared nonest and the tax collected by the State of Haryana may be forwarded to the Service Tax Department of the Union of India.

Counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court in **U.P. Pollution Control Board and others v. Kanoria Industrial Ltd. And another, (2001) 2 SCC 549** and a Division Bench judgment of this Court in **Fizz Drinks P. Ltd. v. State of Haryana and others, (2001) 123 STC 183** , to support of these arguments.

Counsel for the State of Haryana submits that the assessment orders have become final. The petitioner, therefore, cannot pray for issuance of a writ to quash the assessment orders and or direct refund of the amount voluntarily deposited by the petitioner. The petitioner deposited VAT in accordance with the interpretation of the law prevalent on the date of passing of the

assessment orders and in the absence of any plea raised at the time of assessment about its exigibility to tax, cannot seek quashing of assessment orders or refund. Counsel for the State of Haryana relies upon a judgment of the Supreme Court in **Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal and others, (2007) 8 SCC 418**. Counsel for the State of Haryana also submits that Section 20 of the VAT Act, which confers the power of refund does not apply to the present case and as the Haryana VAT Act does not contain any provision that allows the respondents to refund the amounts deposited by the petitioner, the writ petition may be dismissed.

Counsel for the State of Haryana further submits that the judgment in **Bharat Sanchar Nigam Limited** (supra) clearly indicates a prospective overruling of the Supreme Court's opinion in the **State of Uttar Pradesh v. Union of India (supra)** and, therefore, cannot enure to the benefit of the petitioner. It is also contended that in case the State of Haryana is directed to refund the amount to the petitioner, it would be a case of unjust enrichment, a course prohibited by law. Counsel for the State of Haryana relies upon a judgment in **M/s Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536** in support of this argument.

Counsel for the Union of India submits that in **Bharat Sanchar Nigam Limited** (supra), the Supreme Court has clarified that the gross total amount received by the operator, from the subscriber, for activation of SIM card, is exigible to service tax. The petitioner is obliged to deposit service tax and whether the assessee has paid VAT to the State of Haryana, for this period, is irrelevant.

Counsel for the Union of India further submits that the amount paid by the petitioner to the Haryana VAT Department may not be construed as a final determination of the petitioner's liability towards service tax or a discharge of the petitioner's liability.

We have heard counsel for the parties and perused the impugned orders.

The petitioner is a telecom service provider and as a part of its business, activates SIM cards. A dispute whether this business activity is a 'sale' exigible to sales tax or a 'service' exigible to service tax, came up for consideration and was decided by the Supreme Court in **State of UP and another** (supra), by holding that activation of SIM cards is a sale and exigible to VAT. The petitioner was, therefore, assessed to tax under the Haryana VAT Act, 2003 (hereinafter referred to as 'the Act'), by assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C) and deposited VAT.

The question whether activation of SIM cards is a service or a sale came up for consideration before a larger Bench of the Supreme Court in **Bharat Sanchar Nigam Limited and another** (supra) and was answered by holding that activation of SIM cards is a 'service' and not a 'sale'. The petitioner is, therefore, liable to pay service tax on the activation of SIM cards and not VAT. The Union of India has, consequently, raised a demand for service tax for the period during which the petitioner paid VAT.

The petitioner prayer to be precise is that as the State of Haryana has levied and collected VAT without authority of law, the

amount so levied and collected may be refunded to the petitioner or remitted to the Union of India. The State of Haryana, on the other hand, while not denying that it has no authority to levy VAT on the activation of SIM cards, contends that it has no statutory power, to refund this amount and as assessment orders Annexures P-3A, P-3B and P-3C have attained finality, a writ cannot be issued to set aside these orders or direct the State to refund this amount to the petitioner or remit it to the Union of India.

The first question that requires an answer is whether the State of Haryana has collected Value Added Tax on activation of SIM cards, without authority of law. The State of Haryana does not deny that in **Bharat Sanchar Nigam Limited** (supra), the Supreme Court has held that activation of SIM cards is a service and not a sale. The State of Haryana also does not deny that the collection of VAT on activation of SIM cards is not relatable to any statutory provision. As postulated by Article 265 of the Constitution of India a tax shall not be levied except by authority of law i.e., a tax shall be valid only if it is relatable to statutory power emanating from a statute. The collection of VAT on the sale of SIM cards, not being relatable to any statutory provision, must be held to be without authority of law and as a consequence non-est.

We have crossed the first hurdle, namely, that the State of Haryana has no statutory authority to levy VAT on the activation of SIM cards, with ease and now proceed to answer the second question, namely, whether the Haryana Value Added Tax Act contains any provision that empowers the State to refund the tax?

A bare perusal of Section 20 of the Haryana Value Added Tax Act, 2003, reveals that it does not provide for refund of tax in the scenario, obtaining in the present case. Thus, the question that remains is whether after having held that the State of Haryana is not statutorily empowered to collect and levy VAT on the activation of SIM cards and the VAT Act does not permit refund in a situation as obtaining in the present case, may a writ be issued to direct the State to refund the tax and or to quash assessment orders, or is this court devoid of power to adopt such a course?

As a general rule, a high prerogative writ, shall not issue where a statute prescribes a complete procedure for redressal of grievances. But this general rule must admit to certain exceptions, particularly where the collection of tax is without authority of law. A court, in such a situation, must rise above these inherent impediments and ensure that the State does not levy or appropriate tax without authority of law and if so collected is called upon to refund the amount or deposited. We draw support for our opinion from a judgment of the Supreme Court in **U.P. Pollution Control Board and others v. Kanoria Industrial Ltd. and another, (2001) 2 SCC, 549.** The controversy in **U.P. Pollution Control Board and others(supra)** was that the respondents were required to pay water cess under the Water(Prevention and Control of Pollution) Cess Act, 1977 (hereinafter referred to as 'the 1977 Act'). The respondents raised a protest that since sugar industries and distilleries are not industries covered by Entry 15 of Schedule I of the Act, they are not liable to file any return or make payment of water cess. The State

Government rejected their objections. The respondents paid the cess but some of them filed writ petitions challenging the levy of the cess, which were dismissed. Thereafter, the Supreme Court in **Saraswati Sugar Mills v. Haryana State Board, (1992)1 SCC 418,** reversed the decision of the High Court by holding that sugar manufacturing industries do not fall in Entry 15 of Schedule I of the Act. The respondents made a representation to the Board seeking refund of the amounts collected without authority of law and in support of their plea relied upon the judgment in **Saraswati Sugar Mills** (supra), but as the respondents did not receive a positive response, they filed a writ petition, which was contested on the ground that the respondents are not entitled to refund, as the amounts paid have already been deposited with the Government of India.

After considering the rival submissions, a writ was issued, directing the Board to refund the sums realised from the respondents, subject to verification of the amount stated to have been paid by them. The U.P. Pollution Control Board filed a special leave petition. After considering whether a writ can be issued to direct refund of a tax/cess collected without authority of law, the Supreme court held that where levy and collection of tax/cess is unconstitutional or without authority of law, a writ seeking refund of the tax/cess collected without authority of law is maintainable. A relevant extract from the judgment reads as follows:-

17. Again in AIR para 9, the Court held:

“We, therefore, hold that normally petitions

solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases be appropriately raised and considered in the exercise of writ jurisdiction.”

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax / cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a

reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.(Emphasis supplied)

Before recording the aforesaid opinion, the Supreme Court relied upon a judgment in **Solonah Tea Co. Ltd. v. Supdt. of Taxes, Nowgong, (1988) 1 SCC, 401** and referred to a relevant paragraph from the said judgment, which reads as follows:-

“6. The only question that falls for consideration here is whether in an application under Article 226 of the Constitution the Court should have directed refund. It is the case of the appellant that it was after the judgment in the case of Loong Soong Tea Estate the cause of action arose. That judgment was passed in July 1973. It appears thus that the High

Court was in error in coming to the conclusion that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1963, when the Act in question was declared ultra vires as mentioned hereinbefore. Thereafter the taxes were paid in 1968. Therefore the claim in November, 1973 was belated. We are unable to agree with this conclusion. As mentioned hereinbefore the question that arises in this case is whether the Court should direct refund of the amount in question. Courts have made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those where refund is sought as a consequential relief after striking down of the order of assessment etc. Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law." (emphasis supplied)

A reference was also made to a judgment in **Shree**

Baidyanath Ayurved Bhawan (P) Ltd. v. State of Bihar, (1996) 6**SCC, 86**, wherein it was held as follows:-

“10. The writ petition was not a run-of-the-mill case. It was a case where the respondent-State had not acted as this Court had expected a high constitutional authority to act, in furtherance of the order of this Court. That is something that this Court cannot accept. The respondent-State was obliged by this Courts order to refund to the writ petitioners, including the appellants, the amounts collected from them in the form of the levy that was held to be illegal. If there was good reason in law for rejecting the refund claim, it should have been stated. Not to have responded to the appellants refund claim for 11 years and then to have turned it down without reason is to have acted disrespectfully to this Court. Even assuming, therefore, that this was a writ petition only for money, the writ petition fell outside the ordinary stream of writ petitions and, acting upon it, the High Court should have ordered the refund.”

A considered appraisal of the ratio of the aforesaid judgments, leaves no ambiguity that the factual situation so permitting, particularly where the levy and collection of tax is without authority of law, Article 226 of the Constitution of India would come to the aid of an aggrieved party, even where the assessment order has

not been challenged by appeal or revision, to undo a collection of tax made without authority of law. As held by the Supreme Court, no State has the right to receive or retain taxes or monies realised from citizens without authority of law. To hold otherwise would, in our considered opinion, perpetuate an un-constitutional levy, an unconstitutional collection of a tax, and an unconstitutional retention of monies.

At this stage, we would also refer to a Division Bench judgment of this Court in **Fizz Dinks P. Ltd. v. State of Haryana and others, (2001) 123 STC 183 (P&H)**, wherein after considering a similar controversy, it was held as follows:-

“6. In our opinion, the objection raised by the respondents to the maintainability of the writ petition on the ground that finality attached to the orders dated May 25, 1993 and May 8, 1997 cannot be undone at this belated stage by applying the ratio of the decision rendered by the Supreme Court in the year 2000 deserves to be rejected in view of the law laid down by the Supreme Court in U.P. Pollution Control Board v. Kanoria Industrial Ltd. (2001)2 JT SC 103. One of the questions considered in that case was whether the declaration of law made by the Supreme court in a later decision can be made basis for reopening the orders which have become final. While answering the question in the affirmative, their Lordships of the Supreme court

observed as under:-

“Another reason to defeat the claim for refund put forth is that the respondents have filed writ petitions challenging unsuccessfully the validity of levy in question and those orders have become final inasmuch as no appeal against the same has been filed. The contention is put forth either on the basis of resjudicata or estoppel. It is no doubt true that these principles would be applicable when a decision of a Court has become final. But in matters arising under public law when the validity of a particular provision of levy is under challenge, this Court has explained the legal position in Shenoy and Co. v. Commercial Tax Officer, Circle II, Bangalore (1985) 60 STC 70 (SC); (1985) 2 SCC 512 that when the Supreme Court declares a law and holds either a particular levy as valid or invalid it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under article 141 of the Constitution. To

contend that the conclusion reached in such a case as to the validity of a levy would apply only to the parties before the court is to destroy the efficacy and integrity of the judgment and to make the mandate of article 141 illusory. When the main judgment of the High Court has been rendered ineffective, it would be applicable even in other cases, for exercise to bring those decisions in conformity with the decisions of the Supreme Court will be absolutely necessary. Viewed from that angle, we find this contention to be futile and deserves to be rejected.”

Our opinion as to the exercise of power under Article 226 of the Constitution of India having been fortified by judgments of the Supreme Court in **U.P. Pollution Control Board and others, Saraswati Sugar Mills, Solonah Tea Co. Ltd., Shree Baidyanath Ayurved (P) Ltd.** and by a Division Bench judgment in **Fizz Dinks P. Ltd. v. State of Haryana and others** (supra), we find no reason to accept the arguments addressed by the State of Haryana, that a writ cannot or should not issue to direct refund of a tax levied, collected and retained, without authority of law.

A point raised by the State of Haryana, that we must deal with is that as the assessment orders persist and the statute does not empower the State to order refund, a direction to that effect cannot be issued under Article 226 of the Constitution of India. The

submission disregards the fact that the levy, the collection and retention of VAT by the State of Haryana, is without authority of law. The levy and collection of tax, pursuant to assessment orders dated 22.2.2006, 26.3.2008 and 22.2.2006 (Annexures P-3A, P-3B and P-3C) not being relatable to a statutory power emanating from a Statute and, therefore, violative of Article 264 of the Constitution of India and a nullity. The mere fact that orders have been passed levying and collecting tax would not confer legitimacy, on the acts of the State of Haryana in seeking to retain the amount of tax collected and retained, without authority of law. The State of Haryana would have been justified in raising such a plea if the judgment in **Bharat Sanchar Nigam Limited** (supra) had been held to be prospective. A perusal of the aforesaid judgment reveals that the declaration of law is not prospective and like all general declarations of law, would be deemed to apply from the inception of the statute. The judgment having clearly held that VAT cannot be collected on activation of SIM cards, the assessment orders levying and collecting VAT, are from their inception a nullity and, therefore, the levy and collection of VAT is without authority of law and violative of Article 265 of the Constitution of India.

The argument that refund of this amount would amount to unjust enrichment of the petitioner is without foundation in fact or in law. The Union of India has raised a demand for service tax for the period for which the State of Haryana has levied and collected VAT. If the petitioner is called upon to pay VAT and service tax, it would be the case of double taxation. Even otherwise all that we propose to

do is to direct the State of Haryana to forward this amount to the Union of India.

Having held as above and taking into consideration that the transaction is subject to service tax, we allow the writ petition by holding that:-

- (a) the assessment orders dated 22.2.2006, 26.3.2008 and 22.2.2006 (Annexures P-3A, P-3B and P-3C) are a nullity;
- (b) the State of Haryana shall transfer the amount of VAT collected from the petitioner to the Service Tax Department of the Union of India;
- (c) the amount of VAT transferred by the State of Haryana to the Service Tax Department of Union of India shall not be deemed to be a full and final discharge of the petitioner's liability to pay service tax, which shall depend upon adjudication by the authority concerned.

(RAJIVE BHALLA)
JUDGE

23rd March, 2015
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(AMOL RATTAN SINGH)
JUDGE