THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : 10-05-2013

CORAM

HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS CHAKKALAYIL KURIAKOSE

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Review Pet.(C) No. 01 of 2013

1. M/s. Summit Online Trade
Solutions Private Limited,
A Private Limited Company
registered under the Companies Act, 1956,
having its registered office at
6 Rayla Towers, Ground Floor,
781-785 (New No.158) Anna Salai,
Chennai – 600 002
and Branch Office at
Baluwakhani, Gangtok, Sikkim.

2. Mr. Naresh Mangal,
Director,
M/s. Summit Online Trade Solutions
Private Limited.

3. Mr. Prem Kishore Parashar,
Officer In-Charge,
M/s. Summit Online Trade Solutions
Private Limited.

... Petitioners

Versus

1. Union of India
through its Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.

2. Commissioner of Service Tax, Siliguri,
C. R. Building,
Harendra Mukherjee Road,
Hakimpara Siliguri HO,
District : Darjeeling.

3. Superintendent of Central Excise,
Gangtok Range, Jeewan Theeng Marg,
Development Area, Gangtok,
Sikkim - 737 101.

4. The State of Sikkim
through the Chief Secretary,
Government of Sikkim,
Gangtok,
Sikkim - 737 101.

... **Respondents**

For Petitioners : Mr. A. K. Upadhyaya, Senior Advocate with Ms. Binita Chhetri and Ms. Dawa J. Sherpa, Advocates.

For Respondents No.1 to 3 : Mr. B. K. Gupta, Advocate.

For Respondent No.4 : Mr. J. B. Pradhan, Additional Advocate General with Mr. Karma Thinlay Namgyal, Senior Government Advocate and Mr. S. K. Chettri, Assistant Government Advocate.

Review Pet.(C) No. 02 of 2013

M/s. Future Gaming Solutions India
Private Limited,
A Private Limited Company
registered under the Companies Act, 1956,
having its registered office at
355-359, Daisy Plaza,
6th Street, Gandhipuram,
Coimbatore (Tamil Nadu)

and Branch Office at
Samdrupling Building,
Kazi Raod, Gangtok, Sikkim
through Mr. P. Ravichandran,
Manager, M/s. Future Gaming
Solutions Private Limited

... Petitioner

Versus

1. Union of India
through its Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.

2. Commissioner of Service Tax, Siliguri,
C. R. Building,
Harendra Mukherjee Road,
Hakimpara Siliguri HO,
District : Darjeeling.

3. Superintendent of Central Excise,
Gangtok Range,
Jeewan Theeng Marg,
Development Area,
Gangtok, Sikkim - 737 101.

4. The State of Sikkim
Through the Chief Secretary,
Government of Sikkim,
Gangtok,
Sikkim - 737 101.

... **Respondents**

For Petitioner : Mr. A. R. Madhav Rao, Advocate with Mrs. Laxmi Chakraborty, Mr. Tarun Jain and Mrs. Manju Rai, Advocates.

For Respondents No.1 to 3 : Mr. B. K. Gupta, Advocate.

For Respondent No.4 : Mr. J. B. Pradhan, Additional Advocate General with Mr. Karma Thinlay Namgyal, Senior Government Advocate and Mr. S. K. Chettri, Assistant Government Advocate.

O R D E R

Wangdi, J.

These two Review Petitions are taken up together as the Petitioners in both the cases seek to review the judgment of this Court dated 29-11-2012 by which the Writ Petitions being WP(C) Nos.23 of 2011 and 36 of 2011 were disposed of. It is relevant to note that one of us (Wangdi, J.) was a part of the Division Bench that rendered the judgment under review.

2. In those Writ Petitions, the Petitioners had challenged the constitutional validity of Sub-Clause (zzzzn) of Clause (105) of Section 65 of the Finance Act, 1994, as inserted by the Finance Act, 2010, on the ground, *inter alia*, that the Parliament lacked necessary legislative competence to levy tax on sale of lotteries as service in the light of Entry 34 of List II of the Seventh Schedule of the Constitution of India and that Entry 92C of List I of the Constitution of India has not yet been notified. For

convenience, we may reproduce the prayers sought for in WP(C) No.36 of 2011 *pari materia* the ones in WP(C) No.23 of 2011 and which are as follows:-

> **"**(i) to Declare that sale of lottery tickets is not a service and consequently not liable to service tax under clause (zzzzn) of Section 65(105) of the Finance Act, 1994 (as amended by Finance Act, 2010);
>
> (ii) to Declare that the clause (zzzzn) of Section 65(105) of the Finance Act, 1994 (as amended by Finance Act, 2010) with effect from 01.07.2010 is *ultra vires* the Constitution of India;
>
> (iii) issue a Writ of Mandamus directing the Respondents to refund forthwith the amount of service tax collected from the Petitioner under clause (zzzzn) of Section 65(105) of the Finance Act, 1994 (as amended by Finance Act, 2010) with effect from 01.07.2010;
>
> (iv) issue a Writ of Prohibition or such other appropriate writ order or restraining the Respondents from demanding any amounts by way of service tax on the activity of the Petitioner in relation to lottery tickets under clause (zzzzn) of Section 65(105) of the Finance Act, 1994;
>
> (v) award costs to the Petitioner;
>
> (vi) pass such other order / orders as may be deemed fit and proper in the facts and circumstances of the case.**"**

3. Upon hearing the parties at length, by our detailed judgment dated 29-11-2012, the Writ Petitions were allowed whereby we held as under:-

> **"**(i) In the backdrop of discussion on Ground (A) we have no hesitation to conclude that the activities of the lottery distributors i.e. the petitioners herein do not constitute a service and thus beyond the purview of "taxable service" as statutorily defined under clause

(zzzzn) of sub-section 105 of Section 65 of the Finance Act, 1994 as amended vide Finance Act, 2010.

(ii) The activity of promotion, marketing, organizing or in any other manner assisting in organizing game of chance including lottery is an activity included in the expression "betting and gambling" as incorporated under Entry 34 and 62 of List II to Seventh Schedule of Constitution of India.

(iii) The activity of promotion, marketing, organizing or in any other manner assisting in organizing game of chance including lottery being an activity of "betting and gambling" under Entry 62, List II to Seventh Schedule of Constitution of India, the State Legislature alone is competent to levy any tax on such activity under Entry 62.

(iv) The Parliament has the competence and jurisdiction to levy taxes on any subject matter including "service tax" under Entry 97, List I, read with Article 248 of the Constitution of India except where such powers are traceable to any of the entries in List II and III to Seventh Schedule of Constitution of India.

(v) Power to tax the activity of "betting and gambling" as explained above being within the exclusive domain of State Legislature under Entry 62, List II, the Parliament in exercise of its residuary power under Entry 97, List I to Seventh Schedule of Constitution of India lacks legislative competence to impose any tax including "service tax" on such activity.**"**

4. Upon our above findings, the impugned Sub-Clause (zzzzn) of Clause (105) of Section 65 of the Finance Act, 1994, as introduced by the Finance Act, 2010, and all consequent actions of the Respondents taken in pursuance thereto were struck down, *inter alia*,

as being *ultra vires* the Constitution of India being in contravention to Entry 97, List I to Seventh Schedule read with Article 248 of the Constitution of India. However, the judgment was held to be prospective in operation "since the petitioners secured registration and paid service tax under the impugned provision on their own". It is this portion of the judgment contained in paragraph 21 thereof that the Petitioners seek review in the present proceedings.

5. Since during the hearing of the original Writ Petitions substantive part of the argument had been advanced by Mr. A. R. Madhav Rao, Learned Advocate for the Petitioner, in WP(C) No.36 of 2011, in these proceedings also we requested him to address us first as both the cases involved identical issues leaving Mr. A. K. Upadhyaya, Learned Senior Advocate for the Petitioners in the other WP(C) No.23 of 2011, to supplement him.

6. It is submitted that the findings contained in paragraph 21 of the judgment are in conflict with and *dehors* the consideration of the Order dated 09-08-2011 read with Order dated 07-06-2011 in WP(C) No.23 of 2011, *inter alia*, directing that "any levy or payment made

under the Legislation under challenge shall be subject to the outcome of this writ petition". It is also the submission of the Petitioners that the impugned direction is contrary to the factual position on record in as much as it has been observed by us that the "petitioners secured registration and paid service tax under the impugned provision on their own" whereas they had intimated the Respondents that the payment under protest letters to which effect were already on record. In Review Pet.(C) No.1 of 2013 arising out of WP(C) No.23 of 2011, our attention was drawn to letters dated 18-08-2011 and 12-09-2011 filed as Annexures P3 (colly) and notices demanding justice dated 06-05-2011 and 28-05-2011 filed as Annexure P12 (colly) to the Writ Petition. Similarly, in Review Pet.(C) No.2 of 2013 arising out of WP(C) No.36 of 2011, reliance was placed upon letter dated 12-07-2011 filed as Annexure P4 which was Annexure 8 to the Writ Petition.

7. It is further submitted that in terms of Article 265 of the Constitution of India refund of tax will follow if the provision under which tax has been levied and collected is found to be unconstitutional.

8. It is also the case of the Petitioners that the Respondents in any case cannot be denied refund of the service tax paid by them even on the ground of unjust enrichment as being inapplicable in the case of the Petitioners on the very finding of this Court that –

(i) the Petitioners had not received any consideration whatsoever from the State Government;

(ii) no consideration whatsoever flowed from the Government of Sikkim towards service tax as it is only the Petitioners who are making payment to the State Government;

(iii) in the very judgment under review it has been noted that the Petitioners had paid service tax under Notification No.49/2010-ST under which service tax is paid on the bulk of lottery tickets printed by State Government irrespective of the fact that tickets may remain unsold by the Petitioners;

(iv) as held in ***State of Rajasthan and Others*** vs. ***Hindustan Copper Ltd.*** : ***(1998) 9 SCC 708*** when the prices are fixed by a State functionary then

by necessary implication it is to be accepted that the burden of tax is being borne by the party at its own expense thereby making the principle of unjust enrichment inapplicable; and

(v) when the levy is held to be unconstitutional and is not recovered from the client, then refund cannot be denied on the ground of unjust enrichment. On this, reliance was placed upon ***Deputy Commissioner, Andaman District, Port Blair*** vs. ***Consumer Cooperative Stores Ltd.*** : ***(1999) 1 SCC 507*** and ***Commissioner of Central Excise, Calcutta*** vs. ***Panihati Rubber Ltd.*** : ***(2006) 10 SCC 129***.

9. Before embarking upon the merits as contended in the Review Petitions and as urged before us by the Learned Counsels for the parties, the question for consideration by us at the threshold would be as to whether this Court has the necessary jurisdiction to review its own judgment. We may observe that there was no serious resistance to the Review Petitions on behalf of the Respondent-Union of India except to a limited extent to which we shall allude to at a later stage.

10. By drawing our attention to a decision of the Hon'ble Supreme Court in ***M. M. Thomas*** vs. ***State of Kerala and Another*** : ***(2000) 1 SCC 666***, Mr. Rao urged that as a Court of record under Article 215 of the Constitution of India, power and duty to review its own judgment are inherent in every High Court and in exercise of such power it can correct any error apparent on the face of the record. Emphasis was laid on the following portions:

> **"14.** The High Court as a court of record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In *Naresh Shridhar Mirajkar* v. *State of Maharashtra* a nine-Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a court of plenary jurisdiction being a court of record.
>
> **17.** If such power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record.**"**

11. We are inclined to agree with Mr. Rao that there is no embargo upon us in law in reviewing our decision as the power of review is inherent in us as a Writ Court. In any case, Rule 113 of the Sikkim High Court (Practice and Procedure) Rules, 2011 prescribes that "in all matters for which no provision is made by these rules, the provisions of the Code of Civil Procedure, 1908, shall apply mutatis mutandis, in so far as they are not inconsistent with these rules" thereby vesting this Court with the powers under Order XLVII of the Code of Civil Procedure, 1908.

12. Having held so on the question of jurisdiction, we may proceed to consider on the merit of the Review Petitions.

13. We find that the primary question for determination in these cases is as to whether there was an error committed by us in the judgment as contended which is apparent on the face of the record.

14. As alluded earlier, the error apparent on the face of the record as pointed out by Mr. Rao is limited only to paragraph 21 of the judgment, which as per him, would be evident from the pleadings, records of the case and what had been orally argued on behalf of the Petitioner.

15. It is pertinent to note that Mr. A. R. Madhav Rao, Learned Counsel, brought to our notice that in Review Pet.(C) No.2 of 2013 that the Respondent-Union of India has filed Petitions for Special Leave to Appeal (Civil) Nos.11842-11843/2013 against our judgment dated 29-11-2012 and, the Hon'ble Supreme Court has been pleased to grant leave. It was submitted that since there was no order of stay against our judgment impugned in the SLP there was no impediment for us to hear these Review Petitions. We have, therefore, proceeded to hear the matter which, needless to state, shall be subject to what the Hon'ble Supreme Court will finally hold in the Appeals.

16. Upon our careful and anxious consideration of the pleadings, the records and submissions made on behalf of the parties, we are inclined to agree with the submissions of Mr. Rao that there has arisen an error apparent on the face of the record in arriving at our finding contained in paragraph 21 of the impugned judgment for the reasons stated hereafter.

(i) As it appears from a reading of that paragraph it is apparent that the only basis for us to arrive at such

finding is that the Petitioners secured registration and paid service tax under the impugned provision on their own. This basis indeed appears to be in conflict with the specific pleading contained in paragraph 4 (xi) of WP(C) No.36 of 2011 which reads as under:-

> **"**(xi) That the Petitioner, under a mistaken and wrongful belief that the activity of sale and purchase undertaken by the Petitioner was covered now became taxable in view of the amendment to Finance Act, 1994 by Finance Act, 2010 with effect from 01.07.2010, got registered under the provisions of Finance Act 1994 on 14.02.2011 towards the taxable service under this clause (zzzzn) to Section 65(105) of the Finance Act, 1994. The Petitioner further paid service tax under protest on 11.07.2011. (A copy of the letter dated: 12.07.2011 written to the Respondents by the Petitioner intimating them of the payment under protest is filed herewith and marked as *Annexure-8*).**"**

(ii) In WP(C) No.23 of 2011 also we find the following averment in paragraph 8:-

> **"8**. That on 06.05.2011 and 28.5.2011 the Petitioner through his counsel, served "notice demanding justice" upon the Respondent No.1, to take appropriate steps to keep the implementation and enforcement of said Sub-Clause (zzzzn) of Clause (105) of Section 65 of Finance Act 1994 as inserted by the Finance Act 2010 in abeyance. A copy thereof was also sent to Respondent No. 2, 3 and 4 by a separate Notice. The aforesaid notice was duly received by the Respondent No. 1, 2, 3 and 4; but there is no response from the side of the Respondents till the filing of the present Writ Petition.
>
> Copies of the "notice demanding justice" dated 06.05.2011 and 28.5.2011 is annexed herewith and collectively marked as **ANNEXURE "P-12" (Colly)"**

(iii) It also appears that this Court had specifically noted this in paragraph 9 of the judgment dated 29-11-2012 in WP(C) Nos.36 of 2011 and 23 of 2011 which we may also reproduce:

> ***"9.*** The petitioners got themselves registered under the provision of the amended Act. It is alleged that this registration is under mistaken fact and they are paying service tax since then under protest. It is further alleged that now the petitioners have realised that no service tax is payable on the activity undertaken by them in terms of the amended clause (zzzzn) to Section 65(105) of the Finance Act, 1994 and have challenged the same in these petitions before us.**"**

(iv) In the letter dated 12-07-2011 filed as Annexure 8 to WP(C) No.36 of 2011 it had been conveyed by the Petitioner to the Respondent No.3 that the payment of service tax was being made under protest. We may also reproduce the letter below for convenience:

> **"Future Gaming** Kazi Road, Gangtok, Sikkim – 737 101
>
> Solutions India Private Ltd. Phone: 03592-209220 Fax: 03592-202053
>
> Ref. No.: FGSIPL/SK/0030/11-12 Tuesday, July 12, 2011
>
> To,
>
> The Superintendent,
> Central Excise and Service Tax,
> Gangtok Range,
> Gangtok
> Sir,
>
> **Sub: Payment of service tax under protest.**
>
> 1. Kindly refer to our application dated 10.12.2010 for registration under the provisions of service tax law under Finance Act, 1994 towards the service under Section 65(105)(zzzzn) notified with effect from 01.07.2010. In this respect please note that we are not engaged in the provision of service but are instead engaged in purchased (and then subsequent sale) of tickets organized by the various State Governments. Therefore no services are being rendered by us. However due to a mistaken

understanding we got our self registered and have also paid service tax.

2. We further submit that in our considered opinion they levy of service tax on the activity undertaken by us is subject to the challenge as to its constitutional validity in as much as *inter alia* the taxes on betting and gambling can be levied only by the State Government and Parliament is incompetent to levy a tax on lotteries.

3. Further, we have recently paid a sum of Rs. 2,47,20,026/- (vide challan no. 10002 dated 11.07.2011) and Rs.35,192/- vide challan no. 10003 dated 11.07.2011 towards service tax for the period 01.06.2011 to 30.06.2011 with interest upto 11.07.2011. Copies of the challan dated 11.07.2011 is enclosed herewith as **ANNEXURE – 1**. In view of the aforesaid we would like to point out that this amount should be treated as having been paid under protest. This payment is without prejudice to the challenge as to the jurisdiction of the service tax department on the activities undertaken by us as also the rights and remedies available under law to us to challenge the levy, as aforesaid.

4. This is for your information and necessary action, please.

Thanking you,

Yours faithfully,

For Future Gaming Solutions India Private Limited,

Sd/-

Authorised Signatory

Encl.: As above

Regd. Office : 54, Mettupalayam Road, G.N. Mills Post, Coimbatore-641 029

Phone: 0422-2649001 Fax: 0422-2649003 www.futuregaming.in"

(v) In WP(C) No.23 of 2011 wherein the very provision of the Finance Act, 1994, was under challenge as in WP(C) No.36 of 2011, an interim order in the following nature was passed:-

> "By this writ petition, the petitioners seek the challenge the constitutional validity of sub-clause (zzzzn) of Clause (105) of Section 65 of the Finance Act, 1994, as inserted by the Finance Act, 2010, on the ground that the Parliament does not posses the necessary legislative competence to pass such Legislation in view of Entry 92C of List I of the Constitution of India.
>
> Heard.
>
> Admit.

> No formal notices are necessary to be issued upon the respondents, as Mr. A. Moulik, learned Senior Counsel and Mr. J. B. Pradhan, learned Additional Advocate General, accept notices on behalf of the respondents no.1 & 2 and 3 & 4 respectively.
>
> Let counter-affidavits be filed by the respondents within 6 weeks and the petitioners may file their rejoinder, if any, 3 weeks thereafter.
>
> List on 09-08-2011 for final hearing.
>
> Needless to state that any levy or payments made under the Legislation under challenge shall be subject to the outcome of this writ petition.**"**

(vi) From the above Order, it is evident that this Court had made it clear that "any levy or payments made under the Legislation under challenge shall be subject to the outcome of this writ petition". In other words, the Respondents were aware that service tax collected by them under the impugned provision was subject to decision by this Court as to whether it was valid or *ultra vires*.

(vii) In ***Assistant Commissioner, Income Tax, Rajkot*** vs. ***Saurashtra Kutch Stock Exchange Limited*** : ***(2008) 14 SCC 171*** while dealing with the proposition "an error apparent on the face of the record" it was held as under:-

"26. …….

What is a "mistake apparent from the record"?

Now, a similar expression "error apparent on the face of the record" came up for consideration before courts while exercising certiorari jurisdiction under Articles 32 and 226 of the Constitution. In *T.S. Balaram* v. *Volkart Brothers* this Court held that: (SCC p.529, para 5)

> "*5.* ..... 'any mistake apparent from the record' is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an 'error apparent on the face of the record'."

It was, however, conceded in all leading cases that it is very difficult to define an "error apparent on the face of the record" precisely, scientifically and with certainty.

27. In the leading case of *Hari Vishnu Kamath* v. *Ahmad Ishaque* the Constitution Bench of this Court quoted the observations of Chagla, C.J. in *Batuk K. Vyas* v. *Surat Borough Municipality*, that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. The Court admitted that though the said test might apply in a majority of cases satisfactorily, it proceeded to comment that there might be cases in which it might not work inasmuch as an error of law might be considered by one Judge as apparent, patent and self-evident, but might not be so considered by another Judge. The Court, therefore, concluded that an error apparent on the face of the record cannot be defined exhaustively, there being an element of indefiniteness inherent in its very nature and must be left to be determined judicially on the facts of each case. The Court stated: (*Hari Vishnu case*, AIR p. 244, para 23)

> "*23.* It may therefore be taken as settled that a writ of 'certiorari' could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in

> the statement of the principle as in its application to the facts of a particular case. *When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.*" (emphasis supplied)

28. In *Satyanarayan Laxminarayan Hegde* v. *Mallikarjun Bhavanappa Tirumale* this Court referring to *Batuk K. Vyas* and *Hari Vishnu Kamath* stated as to what cannot be said to be an error apparent on the face of the record. The Court observed: (*Satyanarayan case*, AIR p. 141, para 17)

> "*17.* ..... An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

30. In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising certiorari jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. If the view accepted by the court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record.**"**

(viii) As revealed from the facts and circumstances set out above, indubitably the error is manifest and self-evident and requires no detailed examination or argument to establish it. It is also not of such a character that requires to be established by a long drawn process of reasoning on points where two opinions are conceivable. The error is obviously on the appreciation of the pleadings and the documents that are self-evident which appear to have been overlooked by us.

(ix) Contrary to what has been held by us in paragraph 21 of the judgment dated 29-11-2012, the Petitioners had secured registration under the impugned provision and paid service tax thereunder without prejudice to the rights and remedies available under law to the Petitioners to challenge the levy. This is evident from the letter dated 12-07-2011, Annexure P4 to the Review Pet.(C) No.02 of 2013 which is also Annexure P8 to WP(C) No.36 of 2011 and letters dated 18-08-2011 and 12-09-2011, Annexure P3 (colly) to the Review Pet.(C) No.01 of 2013.

(x) As already noticed above, we had also recorded in paragraph 9 of the judgment dated 29-11-2012 that it

was the case of the Petitioners that they had got themselves registered under mistaken fact and were paying the service tax since then under protest. These are purely matters of fact which are apparent and, therefore, self-evident requiring no detailed deliberations to adjudicate as to whether the findings in paragraph 21 of the judgment is “an error apparent on the face of the record” or not.

(xi) On the question of permissibility of refund of tax, one of the cardinal principles governing it is as to whether refund will result in unjust enrichment. The well-settled principle in deciding permissibility of refund of tax is that the incidence of such tax should not have been passed on to any other person. In ***Mafatlal Industries Ltd. and Others*** vs. ***Union of India and Others*** : ***(1997) 5 SCC 536*** after taking note of its earlier decisions, it has been held by the Hon’ble Supreme Court that in every case of refund of duty, even if the same is on the ground of the provisions under which such duty was collected, having been declared unconstitutional, the duty would be on the person claiming refund, to establish that the incidence of such duty was not passed to any other

person. We may refer to the following portion of the decision:

> **"108.** .....
>
> (*iii*) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (*i*) above or in a suit or writ petition in the situations contemplated by Proposition (*ii*) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.
>
> The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

(xii) In ***Ramesh Kumar Soni*** vs. ***State of Madhya Pradesh*** : ***2013 (3) Scale 51*** it was held as follows:-

> **"24.** In *Rajasthan State Road Transport Corporation and Anr.* v. *Bal Mukund Bairwa* (2009) 4 SCC 299, this Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures **The Nature of Judicial Process** – that "*in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld.*"

(xiii) In the case at hand, there is no dispute that the burden of tax has not been passed to any other person and that there is no incidence of the tax upon the State of Sikkim. For these reasons, the question of there being hardship caused to anyone, let alone the Union of India, would not arise at all. When we have held that the Legislation is bad for want of legislative competence, in the facts and circumstances, it has to be bad from its inception and all actions taken thereunder as indicated in our interim order dated 07-06-2011 have to be treated as *non est*, nugatory and erased.

(xiv) In ***State of H. P. and Others*** vs. ***Nurpur Private Bus Operators' Union and Others*** : ***(1999) 9 SCC 559*** in which it was held as under:

> **"10.** The High Court, in the judgment aforementioned, held that the levy and realisation of tax on the basis which had been held to be invalid by it "for the period between 1-4-1991 and 30-9-1992 shall not stand invalidated … We propose to direct that the declaration made by us today shall be applicable prospectively and with effect from 1-10-1992 alone." Some operators challenge the correctness of this. They are right, for the doctrine of prospective overruling cannot be utilised by the High Court. Once the High Court came to the conclusion, rightly, that the concerned provisions were invalid, it was obliged to so declare and, consequently, the collections made thereunder stood invalidated.**"** **[emphasis supplied]**

(xv) To lend support to his submissions of the Petitioner's entitlement for refund of the service tax paid under the impugned provision, Mr. A. R. Madhav Rao referred to paragraph 51 of the landmark decision of ***L. C. Golak Nath and Others*** vs. ***State of Punjab and Another*** : ***AIR 1967 SC 1643***, and urged that the doctrine of prospective overruling can be invoked only in matters arising under our Constitution and that it can only be applied by the highest Court of the country, i.e., the Supreme Court of India, as it has the Constitutional jurisdiction to declare law binding on all Courts in India. This, no doubt is a law laid down by the Hon'ble Supreme Court and would be binding upon us. However, we find that this proposition has been explained in ***Assistant Commissioner, Income Tax, Rajkot (supra)*** when their Lordships have opined as under:-

> **"37.** It is no doubt true that after a historic decision in *Golak Nath* v. *State of Punjab* this Court has accepted the doctrine of "prospective overruling". It is based on the philosophy:
>
> "The past cannot always be erased by a new judicial declaration."
>
> It may, however, be stated that this is an exception to the general rule of the doctrine of precedent.**"**

Therefore, in our view, the proposition placed by Mr. Rao is no more *res integra* and inapplicable in the facts and circumstances of the present case for the reasons already stated earlier.

(xvi) The other aspect that calls for our consideration is the question of delay on the part of the parties in seeking such relief being one of the factors that underlies exercise of its discretionary powers by a Court in directing refund. It has been held in the case of ***State of Madhya Pradesh and Another*** vs. ***Bhailal Bhai and Others*** : ***AIR 1964 SC 1006*** as follows:-

> **"**(17) At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy

> and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. ……..." **[emphasis supplied]**

(xvii) In the present case, we find from the facts noted above that the Petitioners had been prompt in approaching this Court after having given notice to the Respondents that the impugned provisions were *ultra vires* the Constitution and that compliance thereto were under protest. These are facts that have remained undisputed and, therefore, in our view, delay cannot be attributed to the Petitioners in approaching this Court to deny them the consequential relief of refund of the tax collected under a law held by us as *ultra* vires.

(xviii) The only contention raised rather feebly on behalf of the Respondent-Union of India represented by

Mr. B. K. Gupta, Learned Counsel, was that operation of the judgment holding Legislation *ultra vires* had to be prospective and, therefore, there was no reason for this Court to interfere with the judgment as sought for on behalf of the Petitioners. Reliance was placed by him in support of his contention to the following:-

(a) ***MRF Ltd., Kottayam*** vs. ***Asstt. Commissioner (Assessment) Sales Tax and Others*** : ***(2006) 8 SCC 702***

> **"27.** The provisions of the Act or notification are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect. This Court in *S.L. Srinivasa Jute Twine Mills (P) Ltd.* v. *Union of India* has held that it is a settled principle of interpretation that: (SCC p. 747, para 18)
>
> > "..... retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary."

(b) ***Union of India and Others*** vs. ***Martin Lottery Agencies Limited*** : ***(2009) 12 SCC 209***

> **"51.** Subject to the constitutionality of the Act, in view of the Explanation appended to this [*sic* Section 65(19)(*ii*) of the Finance Act, 1994], we are of the opinion that the service tax, if any, would be payable only with effect from May 2008 and not with retrospective effect. In a case of this nature, the Court must be satisfied that the Parliament did not intend to introduce a substantive change in the law.**"**

(xix) In our view, the above decisions quite apparently do not apply to the facts in the present case as those were rendered in the context of commencement of a provision of a Legislation having regard to the language used therein and the nature thereof. The issue before us is quite different on the facts already alluded to above which is as to whether effect of a judgment by which a law has been held to be *ultra vires* the Constitution would operate retrospectively from the date when the Legislation was introduced or from the date post the judgment. In any case, the contention appear to be inconsistent with the ratio laid down by the Apex Court thus far and, therefore, difficult for us to accept.

17. In our view if a manifest error has crept in on our part while rendering a judgment causing miscarriage of justice, it will be travesty to hold that such error cannot be rectified for the cause of justice. In the very case of ***Assistant Commissioner, Income Tax, Rajkot (supra)*** it has been held as under:-

> **"38.** Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality.
>
> **39.** In *S. Nagaraj v. State of Karnataka*, Sahai, J. stated: (SCC p. 618, para 18)

> *"18.* Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative law as in public law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the court. In Administrative Law, the scope is still wider. Technicalities apart if the court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order." **"**

18. We, therefore, have no hesitation to hold that paragraph 21 of the judgment calls for a review and is accordingly reviewed as being "an error apparent on the face of the record". Consequently, paragraph 21 of our judgment dated 29-11-2012 shall stand substituted as under:-

Since the Petitioners secured registration and paid service tax under the impugned provision under protest and that this Court by its Order dated 07-06-2011 in

WP(C) No.23 of 2011 had made clear “that any levy or payments made under the Legislation under challenge shall be subject to the outcome of this writ petition”, the Petitioners shall be entitled to refund of the amount of service tax paid by them under the impugned Clause with effect from 01-07-2010 as prayed for in paragraph (c) of WP(C) No.23 of 2011 and paragraph (iii) of WP(C) No.36 of 2011.

Save as above, the rest of the judgment shall remain unaltered.

19. In the result, the Review Petitions are allowed and our judgment dated 29-11-2012 stands reviewed to the extent indicated hereinabove.

20. No order as to costs.

Sd/-
(P. C. Kuriakose)
Chief Justice
10-05-2013

Sd/-
(S. P. Wangdi)
Judge
10-05-2013

Approved for reporting : Yes/~~No~~

ds Internet : Yes/~~No~~