* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 01.09.2017
Pronounced on: 07.12.2017

\+ **W.P.(C) 6589/2016, C.M. APPL.27058/2016**
M/S. ULTRATECH CEMENT LIMITED …. Petitioner

Through: Sh. Hujefa. A. Ahmadi, Sr. Advocate with Ms. Maneesha Dhir, Ms. Nina. R. Nariman, Ms. Varsha Banerjee and Sh. Kunal Godhwani, Advocates.

versus

STATE OF GUJARAT AND ORS. .... Respondents

Through: Sh. Preetesh Kapur, Sh. Satya Brata Panda, Ms. Hemantika Wahi and Ms. Puja Singh, Advocates, for State of Gujarat.

Ms. Rama Ahluwalia, Advocate, for Respondent No.6.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. The present Writ Petition challenges an order of the Appellate Authority for Industrial and Financial Reconstruction ("AAIFR") constituted under provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, (hereafter referred to as "SICA") dated 22.01.2016 where the petitioner company's claim for refund of Value Added Tax and Sales Tax (collectively called "VAT") as well as Electricity duty (hereafter called "duties") from the Government of Maharashtra (second respondent, hereafter "GOM") and Government of Gujarat (first respondent, hereafter "Gujarat") was dismissed.

2. The facts of the case are that the Board for Industrial and Financial Reconstruction ("BIFR"- set up under SICA) sanctioned a scheme for revival of the sick company, Narmada Cement Company Ltd. ("NCCL") known as SS-06 by its order dated 15.05.2006. The revival scheme, *inter alia*, provided merger of NCCL with a healthy company namely Ultratech Cement Ltd ("UCL"), i.e. the appellant with effect from 01.10.2005. Accumulated losses of NCCL were erased a result of the merger. The petitioner's net worth, positive prior to the merger, remained so after the merger and continued to be so during the entire period of the scheme. In other words, the sick company lost its identity and ceased to exist w.e.f the date of its merger; the merged entity UCL remained a healthy company before and after the said merger. Accordingly the BIFR discharged the sick company from the purview of SICA by its order dated 19.12.2007.

3. The sanctioned scheme was in force for 7 years, i.e. upto 30.09.2012; it provided certain reliefs and concessions from Gujarat and GOM, in terms of paras 12.1 and 12.2. The relevant part of these paragraphs pertaining to exemption from payment of VAT duties which are the subject matter of this appeal are as follows-

> ***"12.1 From the State Govt of Gujarat***
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> *b) To exempt the Transferred Units from payments of VAT/Sales Tax payable for a period of seven years from the appointed date.*
>
> *……*
>
> *d) To exempt the transferred unit from payment of "Electricity Duty", Cess and any other levy on the power generated/purchases and consumed by the said units for a period of seven years from the appointed date.*

12.2. From the State Govt. of Maharashtra

b) To exempt the Transferred Units from payments of VAT/Sales Tax payable for a period of seven years from the appointed date.

……

d) To exempt the transferred unit from payment of "Electricity Duty", Cess and any other levy on the power generated/purchases and consumed by the said units for a period of seven years from the appointed date."

4. Despite the above reliefs and concessions granted to it, the petitioner, continued to pay VAT and duties to the concerned State Governments for the entire period of the scheme. The scheme period ended and the petitioner was also discharged from the purview of SICA. The petitioner filed a miscellaneous application (M.A. No 122) before BIFR on 23.03.2012 seeking directions, for the refund of ₹ 233.30 crores and ₹ 38.71 crores collected towards VAT and Electricity Duty respectively for the period October 2005 to March 2011 as it was exempted from payment of such tax and duty from 01.10.2005 to 30.08.2012 under the Sanctioned scheme along with interest @ 15% per annum, from Gujarat. An application was filed seeking from the Government of Maharashtra to refund the amount ₹ 91.90 and ₹ 2.52 Crores to the petitioner towards VAT and Electricity Duty respectively for the period October 2005 to March 2011 as it was exempted from payment of such tax and duty under the sanctioned scheme along with interest @ 15 % per annum. Further directions were sought against both governments not to charge/claim VAT and Electricity Duty from the applicant till 30.09.2012, i.e. till the expiry of the period of 7 years from the appointed date.

5. The BIFR dismissed the application by its impugned order dated 11.03.2013. It held that the petitioner should not have collected and deposited VAT/Sales Tax and could have written in the tax invoices that their unit was exempted from VAT/Sales Tax, which the petitioner did not do. BIFR also said that the petitioner company did not avail the exemption and, therefore, such amount of VAT/Sales Tax under Section 60 of VAT Act, 2002 had become public money which could not be refunded by the government. Moreover, the respective buyers of the company from whom the company collected VAT/Sales Tax had already claimed input tax credit on their corresponding purchases. BIFR also noted the State Government's submissions made by their Sales Tax Departments that any refund or retention of tax under above situation is against the doctrine of 'unjust enrichment' as held by the Supreme Court of India in *Mafatlal Industries v. Union of India* 1997 (5) SCC 536 that if the burden of a duty/tax is passed on to the customers, the claimant cannot seek refund under any allowed/granted exemption and the person who bears the burden of tax can only claim such refund, and if such person does not come forward for refund, it is just appropriate that such amount is retained by the government.

6. In the light of the above, BIFR was of the view that the company itself did not avail the benefit of exemption under para 12.2(b) of SS-06 and continued to collect VAT/Sales Tax from its customers and now asked for refund. It was also held that the application was filed only in March 2012, i.e. after expiry of more than 6 years of reliefs provided and the said miscellaneous application deserved to be treated as time-barred. It also dismissed the Review Application MA-122A filed by Government of Gujarat as it was of the view that it could not review its own orders.

Furthermore, it was reasoned that exemption from payment of taxes and duties under the scheme were incorporated without the consent of Gujarat by ignoring the specific objections raised by it. And hence the sanctioned scheme is not binding on it. The sanctioned scheme only provided for exemption of payment of Sales Tax/VAT and electricity duties and was not a refund. Refund of taxes already collected and paid to the State was different from exemption from its payment. A refund claim was a new relief, which was not provided under the scheme. Lastly, provision of the sanctioned scheme cannot be interpreted to allow the company to collect taxes and retain the same as levying and collection of taxes is a sovereign function. Lastly, it was held that BIFR and AAIFR ceased to have jurisdiction as the appellant company has already been discharged from the purview of SICA on 19.12.2007.

7. The petitioner felt aggrieved and preferred an appeal, contending that the sanctioned scheme permitted it to collect and retain the taxes for its own use and having deposited the taxes with the State, it is entitled to its refund which will not amount to undue enrichment as the scheme has an overriding effect over other laws by virtue of Section 32(1) of SICA. The scheme, it was contended, was binding on the Respondents as it was not challenged by them. The other grievance was that BIFR in its order has considered issues relating to VAT/Sales Tax only and has not dealt with the issue of Electricity Duty except by holding the claim as time-barred. The burden of VAT/Sales Tax payable by a company is ultimately passed on to the consumers through a series of intermediaries whereas electric duty is paid by the company as a consumer itself and its burden is not passed on to a third party.

8. The AAIFR formulated and answered several questions on both VAT/Sales Tax and Electricity Duty in the appeal. It was held that Gujarat did not consent to terms of Section 19(2) above and filed its objections to the relevant provisions of the rehabilitation scheme. This does not fall under the category of deemed consent as such. Section 19(4) of SICA provided that in the absence of consent by any person, the Board may adopt such other measures including winding-up of the sick industrial company as it might deem fit. AAIFR was of the view that the BIFR could not override or completely ignore the requirement of consent required under Section 19(2) of SICA as such a proposition would render that provision totally redundant. The AAIFR rejected as untenable, the argument that as there existed a provision for appealing, the order of BIFR (Section 25) it could ignore the mandate under Section 19(2) of SICA and sanction a scheme against the wishes or consent of a person required to provide the financial assistance. It was held that there was no reasoning to show why BIFR thought it fit to reject Gujarat's objections against the proposed scheme. AAIFR held that the sanctioned scheme providing reliefs and concessions from Gujarat was without jurisdiction and unenforceable. It was held, however, that the Government of Maharashtra did not file any objection to the rehabilitation scheme and is deemed to have consented to the reliefs and concessions of the sanctioned scheme and was thus binding upon it.

9. AAIFR was of the view that the Petitioner did not avail the exemption granted to it in the scheme voluntarily for a period of six years after the scheme was sanctioned and it cannot seek an alternated remedy of refund, which was not part of the scheme at the end of the scheme period. Refund of already deposited VAT/Sales Tax to the State was not a benefit sanctioned

by the Scheme. Therefore, BIFR and AAIFR had no jurisdiction to order a refund. Only the concerned tax authorities of the States under their respective statutes were competent to order such a refund to the appellant if at all permissible under the law. At best, the petitioner could have sought enforcement of provisions of the sanctioned scheme in consonance with the state policy from the period 23.03.2012 to 30.09.2012. However, it did not do so.

10. The AAIFR additionally held that the objective of SICA is to revive a sick industrial company in the larger public interest. As there was no sick company after sanctioning of the merger scheme on 15.05.2006, permitting the refund of taxes already collected and paid to the State would be contrary to the public interest. AAIFR held that the reliefs and concessions given to the petitioner, under Clauses 12.1(b) and (d) of the sanctioned scheme were neither necessary nor in public interest and are contrary to the public purpose sought to be achieved under SICA. It, therefore, concluded that the provisions for exemption were *void ab initio* in the exercise of its powers under section 18(5) of SICA.

11. AAIFR answered the issue of refund in favour of Gujarat and Maharashtra by appreciating the consequences of the contrary positions taken by the parties. The proposition advanced by the petitioner made the VAT scheme dysfunctional, because if A were permitted to retain the tax collected by it from B on the ground that it was exempted from payment of such taxes, then the presumption that the input tax in respect of consumer B had already been deposited with the State will not be correct. Therefore, the consumer B would not be entitled for a set-off on its input tax. On the other hand, if A does not collect VAT/Sales Tax and does not pay anything to the

State by virtue of its exempted status, then it would be entitled for reimbursement of its input taxes to get an equivalent credit in its account to be adjusted in future as and when it starts paying output taxes. In this scenario, no tax burden is passed from A to its downstream consumers. However, consumer B having not paid any input tax is not entitled for any set-off against its output taxes. As such, it pays the full VAT to the State on its sales. Thus, the State exchequer receives its full VAT from B and compensates A to the extent of input taxes paid by it. Thus, there is no loss to the public exchequer and the person A benefits not only by getting the reimbursement/credit for its input taxes but also gets the flexibility in pricing of its products in the market as it does not contain any element of VAT/Sales Tax.

12. The petitioner company had failed to produce evidence on the discussions/proceedings before BIFR or meetings of Operating Agency as part of preparation of sanctioned scheme in support of clauses 12.1(b) and 12.2(b), which intended to give the appellant the benefit of collecting taxes from consumers and retaining the same for its use. The clauses of the scheme have to be interpreted in the context in which they were formulated and in the absence of such context, in terms of the established practice and policy of the States. As the appellants had failed to provide any context of formulation of the scheme, the established practice and policy of the State has to prevail. Therefore, the sanctioned scheme does not permit the petitioner company to collect taxes and retain it for its own use. And having collected taxes and paid to the State, it is not entitled for any refund. The said provisions only permit UCL not to collect taxes from its purchasers and not pay any taxes to the State on its sales. And in such circumstances, it is permitted to seek

reimbursement of input taxes or equivalent tax credit from the State on its purchase.

13. AAIFR relied on and applied the ruling of the Supreme Court case of *Amrit Banaspati Co. Ltd v. State of Punjab* (1992) 2 SCC 411, that exemption from tax and refund are two distinct things. Once a tax is collected by a private person or a dealer and paid to the State, not even a legislature much less a Government can enact a law or issue an order or agree to refund the tax realized by it. The AAIFR reasoned, *inter alia*, as follows:

> *"The schemes formulated by the BIFR under the provisions of SICA are not exempted from the test of reasonableness and constitutional validity. The non-obstante cause of Section 32(1) of SICA certainly cannot be said to have an overriding; effect over these principles. The prayer of refund sought by the appellant herein, is clearly contrary to constitutional scheme of things as propounded by the Hon'ble Supreme Court in the cases cited above. It also fails to meet the test of reasonableness as the appellant has failed to produce any evidence, whatsoever, to suggest that the interpretation of the relevant clauses of the scheme, as sought by it,- were even remotely considered or were in the mind of BIFR whileapproving, the same. In other words, If the interpretation of the relevant clauses of the scheme, as sought by the appellant, was indeed intended by the BIFR while sanctioning the scheme, the same is devoid of any reasonableness as no reasoning for the same is available on the records of BIFR. In the circumstances, as held by us in Para 33 above the only option is. to accept the established practices and policies, as submitted by the respondents and supported by credible legal provisions and pronouncements. We, accordingly, reject the contention of the appellant and hold that refund of taxes, collected and paid by the appellant to the concerned States is not legally permissible."*

Parties' contentions

14. It is argued by the petitioner that AAIFR and BIFR, while passing the impugned order failed to take into consideration the applicability of the provisions of the sanctioned scheme which is final and binding on the parties in terms of Section 18(8) read with Section 19(3) of SICA wherein parties cannot be permitted to wriggle out of their obligations. Mr. Huzeffa Ahmadi, learned senior counsel, argued that while making the order, AAIFR erroneously concluded that the provisions of the Scheme are not binding on the Gujarat government. The petitioner stepped out to invest in the sick company for its revival on the basis of reliefs as envisaged in the sanctioned scheme and on legitimate expectation that parties would perform their part of the obligations. Gujarat was aware about the provisions of the sanctioned scheme and is guilty of willful disobedience. It never filed appeal against the sanctioned scheme despite communicating its intention to the Petitioner. AAIFR's letter of 30.11.2011 establishes the fact that no appeal was filed against BIFR's order dated 15.05.2006 sanctioning the scheme. Further, Gujarat did not pursue its application (MA) filed with BIFR (on 12.10.2006) till March 2012, i.e. for more than 5 years.

15. It was highlighted that BIFR and AAIFR passed the impugned orders by relying upon and adopting submissions for respondents without adequately dealing with factual and legal submissions made by the Petitioner company. Mr. Ahmadi argued that Sections 19 and 32 of SICA operate in their independent domain and provide for separate powers to be exercised by the BIFR. AAIFR failed to consider that Section 19(2) of SICA relates to consent for reliefs and concession within its statutory framework, however, Section 32(1) duly empowers and gives adequate authority to BIFR to pass

appropriate directions overriding the provisions of any other Statute. It was submitted that AAIFR's conclusion that refund of taxes and duties claimed by the petitioner are not part of the sanctioned scheme is legally untenable. The present case is not a case of refund as concluded by AAIFR. The present case is a case where the respondents acted illegally and collected amounts contrary to the terms of the sanctioned scheme. Since respondents, contrary to the terms of the sanctioned scheme, illegally collected the amounts, they were liable to be refunded with interest.

16. It was emphasized that AAIFR erred in concluding that petitioner is not entitled to a refund and BIFR/AAIFR does not have jurisdiction to order such a refund. BIFR is the authority that sanctions the revival scheme and is the sole authority which has the jurisdiction to implement as well as monitor the progress of the scheme. Sections 18(8), 18(9), 18(10) and 18(10) of SICA arm BIFR with authority to ensure implementation. Consequently anything pertaining to the sanctioned scheme formulated by BIFR falls within exclusive jurisdiction of BIFR it is the sole authority, which can make appropriate directions and order for its implementation. Section 26 categorically bars jurisdiction of other Civil Courts on matters falling within the ambit of BIFR. Sections 33 and 34 too empower BIFR/AAIFR to ensure due compliance of their orders and issue appropriate directions in case of violation of its orders. Thus, tax authorities of concerned states can be duly directed by BIFR to refund the amounts, collected contrary to the provisions of the Sanctioned Scheme.

17. Mr. Ahmadi relied upon and cited the Calcutta High Court in *ACC Cement Ltd. v. Assistant Commissioner, Commercial Tax* (2011) 46 VST 244 (Cal) to state that while upholding the terms of the sanctioned scheme as

final and binding on parties in terms of Sections 18(8), 19(3) and 32 of SICA refund of tax collected by the Government in violation of the terms of the sanctioned scheme was directed. It was submitted that the settled legal position is that in cases where there is no liability to pay the tax and tax has been paid, retained, the same is eligible for refund by the State as retention of the same would be unjust and wrongful on part of the State.

18. Counsel argued that the Scheme provides for "exemption from payment" of VAT/Sales Tax and Electricity Duty. AAIFR has erroneously proceeded on the premise that the Scheme does not permit the Petitioner to collect tax from its purchaser and not to pay taxes to the State on its sales. This would enable it to either lower prices of its products to generate higher demand and sale or alternatively realize higher profit margin without reducing its prices. It was stressed that on plain reading of the provisions of the Scheme, UCL was not exempted from collection of Sales Tax/VAT but only exempted from its obligations for payment of Sales Tax/VAT. "Exemption from payment of Sales Tax/VAT" has a different connotation from "Exemption from collection of Sales Tax/VAT". The present case is of exemption from payment of Sales Tax/VAT. Mr. Ahmadi submitted that payment of VAT and Electricity Duty comes within the purview of financial assistance under Section 19(1) of SICA. Delhi High Court in *Lords Chloro v. BHEL & Ors at 181* (2011) DLT 46 held that financial assistance is a positive act by which some amount is given for rehabilitation of the Company. AAIFR fell into error in concluding that the clauses of the sanctioned scheme have to be read in consonance with the policy of the concerned States on the subject. SICA being a central enactment has to be

interpreted in terms of the object and purpose clause of the said enactment as provisions of SICA cannot be diluted on the pretext of State policies.

19. It was contended that the aspect of VAT/Sales Tax paid by consumer is not of material significance as consumer pays a consolidated amount for purchase of goods. The consumer pays consideration of goods and tax thereon in composite manner and not separately. The Supreme Court decision in *George Oakes Pvt. Ltd. v. State of Madras* AIR 1962 SC 1037 recognizing the principle of liability for payment of indirect tax is on the dealer irrespective of whether the same is realized from the ultimate purchaser or not was cited. Learned senior counsel submitted that AAIFR's reliance on *Amrit Banspati Company Ltd (supra)* and *State of Bihar & Ors v. Kalyanpur Cement Ltd* (2010) 3 SCC 274 to highlight how there is no element of private benefit accrued to UCL, as he is claiming what it was legally entitled to. The relief was lawfully given to UCL, which had attained finality but was unlawfully pocketed by the Respondents due to its inaction. UCL has not levied any tax, which is contrary to the constitutional mandate as alleged. UCL was under an obligation to collect tax on sale of goods and in terms of reliefs envisaged in the sanctioned scheme was legally entitled to retain the differential amount. It was highlighted that even in the absence of a sanctioned scheme under SICA, a State is empowered to grant similar reliefs for promoting industrialization through the Scheme for Deferment of Sales Tax, non-payment of Sales Tax/VAT at the stage of purchase of raw materials and sale of finished goods, tax holidays etc. The grant of reliefs to UCL under the scheme, therefore, was reasonable. None of the respondents had either submitted or pleaded that the relevant clauses of the sanctioned scheme are void *ab initio*. Thus, AAIFR's conclusion that clauses 12.1(b) &

(d) and 12.2 (b) and (d) did not serve public purpose was erroneous. It was also argued that AAIFR, despite concluding that the scheme was binding on the Government of Maharashtra held the provisions of the scheme inapplicable to it declaring it to be void *ab initio*.

20. It was submitted that the present case is not one of unjust enrichment as there was a duly sanctioned BIFR scheme, binding on all concerned. SICA was enacted to give effect to the policy of the State towards securing principles enshrined in Article 39 (b) & (c) of the Constitution of India. Learned senior counsel argued that the unjust enrichment cannot be presumed merely because the burden of the tax has been passed on. It was argued that unjust enrichment is inapplicable for electricity duty paid by UCL. The refund of electricity duty was rejected by the BIFR and AAIFR erroneously.

21. Learned senior counsel relied on the Bombay High Court's judgment in *Vadilal Dairy International Ltd. v. State of Maharashtra* 2009 (111) Bom LR 3585 (Para 8) examined the scope of Section 32 of SICA and held that the rehabilitation scheme as sanctioned by BIFR would override the policy guidelines of the State Governments. Once a scheme has been sanctioned, it becomes sacrosanct and in absence of any appeal followed by the order of the Competent Authority/Court against the same, it becomes final and binding on the parties to the scheme. Reliance is placed on *ACC Ltd. v. Assistant Commissioner, Commercial Taxes* (2011) 46 VST 244 (Cal) by the Calcutta High Court, which held in Section 32 of SICA overrides all State law, viz., Sales Tax laws enacted under Entry 54 of List II of the Seventh Schedule. The claim for Sales Tax exemption, allowed, based on by BIFR's order is applicable notwithstanding anything contained in any other law to

the contrary. Therefore, under SICA, the exemption that has been allowed in respect of Sales Tax will override any other provision of the local Sales Tax Act. It is urged that BIFR refers to exemption of Sales Tax without referring to any statute and it does not refer to any particular Sales Tax law. The Court, in that case, therefore, enforced the scheme for exemption and directed that if the amount has already been realized the same should be refunded with interest at the rate of 12% per annum from the date of receipt till the date of return. It is argued, in addition, that BIFR's role is adjudicatory, although it is also tasked with the duty of providing an overall solution to the problem of sickness. It can thus direct some party or all parties to make sacrifices.

22. Counsel contests AAIFR's finding that once the scheme was sanctioned by the BIFR, no further approval was required by the concerned State Authorities and UCL only had to show its exempted status in the Sales Tax/VAT returns and to calculate and deposit taxes accordingly. UCL while performing obligations repeatedly approached the concerned State Authorities for implementation of the Sanctioned Scheme. The State of Gujarat addressed communication to UCL keeping its application pending in view of the proposed appeal to be filed, which was never filed. The Maharashtra Government remained silent and disregarded the sanctioned scheme. UCL duly approached BIFR during subsistence of the scheme period and sought for directions to implement the remaining part of the operative period of the scheme. The provisions of the State VAT laws and Electricity Duty laws are inapplicable as the BIFR and AAIFR are the sole authority having jurisdiction to order refund of amount collected by Respondents contrary to the provisions of the sanctioned scheme.

23. Mr. Ahmadi argued that the respondents could not contend that the consent of the two or either State was not forthcoming; he drew attention of the court to the order dated 15.05.2006 of the BIFR which stated that *"all parties concerned had given their consent under Section 19 (2)".* If there were any doubts about that order, the correct method would have been to approach BIFR itself. In this regard, counsel relied on *State of Maharashtra v Ramdas Shrinivas*1982 (2) SCC 463 and *Commissioner of Customs v. Bureau Veritas* 2005 (3) SCC 265 in support of the submission. It was also urged that in the absence of any appeal (to the sanctioned scheme), the legal consequence of the order cannot be escaped. Counsel relied on *Dakshin Gujarat Bij Company v Amardeep Association* 2014 SCC Online Guj 6761; *Marshall Sons and Co. (India) Limited v. Income Tax Officer* 223 ITR 809 (SC) and *Tayyabhai M. Bagaswarwalla & Anr v. Hind Rubber Industries (P) Ltd Ors* (1997) 3 SCC 443. Learned counsel furthermore argued that the relief of refund is consequential and is not barred by delay or laches. Counsel also relied on *Madras Port Trust v. Hymansha International* AIR 1979 SC 1144.

24. Counsel for the State of Gujarat argues that the AAIFR's conclusions about the nature of relief granted by BIFR and its inadmissibility cannot be faulted. It is urged that after circulation of the Draft Rehabilitation Scheme in 2006 (DRS), the Government of Gujarat had clearly expressly objected to BIFR by its communication dated 07.04.2006 stating that the Gujarat Government would not provide the concessions as sought. Although the objections were on record before BIFR, it erroneously stated that Gujarat Government consented to the DRS and assumed jurisdiction over it to give relief and concessions. It is stated that these facts were duly noted and

recorded by BIFR in its order and summary record of proceedings dated 27.09.2012. Counsel argues that Section 19 of SICA mandates that consent or deemed consent of the State Government is necessary. Consequently, a scheme involving financial assistance and sacrifice by the State Government cannot be sanctioned without the consent of the State. No consent was given by Gujarat in the present case and express dissent and objection was given. Hence, the scheme could not be enforced against or be binding upon the State of Gujarat. BIFR's jurisdiction under Section 19 to frame a scheme binding upon any State Government is based upon the jurisdictional fact that express or deemed consent is given by the State Government. In the present case, the said jurisdictional fact was missing. Counsel submitted that it is settled law that when a jurisdictional fact is wrongly or erroneously assumed by a Court, when in fact it does not exist, the assumption of jurisdiction would be bad in law and any orders passed would be null and void. Such an order can be challenged in any proceedings without preferring appeal against the same.

25. It is argued that the application for modification of the sanctioned scheme remained pending before BIFR. Finally, the application was disposed of along with the application of the appellant for refund of taxes by way of common order dated 11.03.2013, i.e. the impugned order of the BIFR. The view that it could not modify the original scheme since it did not have power of review was erroneous. It is pointed out that a bare reading of Section 18(5) of SICA read with Clause 33 of BIFR Regulations clearly proves that the BIFR has power to review any sanctioned scheme and make necessary modifications to it or the BIFR may direct the OA to prepare a fresh scheme. It is also pointed out that Section 18(9) of SICA confers BIFR

with the power to remove difficulties in giving effect to the sanctioned scheme. This power could, therefore, be used to modify the scheme appropriately. It is argued that Section 32 only provides that the provisions of the Act shall prevail over other provisions of the law. In the present case, however, the scheme was contrary to the provisions of the Act itself specifically Section 19. The *non-obstante* clause in Section 32 of SICA does not enable the BIFR to pass orders arbitrarily and completely ignores other provisions of SICA.

26. It is argued that the writ petition is based on an erroneous interpretation of the sanctioned scheme. Whereas the provisions of the scheme provide for an exemption only, the relief was for refund of taxes paid, without demur. The claim presupposes that "exemption from taxes" and "refund of taxes already paid" mean the same thing. There is a difference between exemption from tax, to encourage industrialization and refund of tax. The two are completely different. A sick company may be granted exemption to improve its competiveness and encourage industrialization. However, refund of tax cannot be granted when the tax has been paid and the company is running profitably. The sanctioned scheme only spoke of exemption. Therefore, if UCL felt aggrieved, it ought to have approached the BIFR at the earliest opportunity, seeking implementation of the "exemption". Instead, it readily paid the taxes for the whole term of the scheme (almost 6 years) and has approached this Court at the fag end seeking "refund". In case a person wishes refund, such a person ought to apply to the tax authorities in terms of VAT laws and the Electricity Act. Thereafter appeals if any would lie to the tax Tribunals in terms of respective enactments. That was the only remedy available UCL. In fact, it did avail of

this remedy and applied to the tax authorities who rejected the application. Hence, the only remedy available was to appeal before the competent forum. No application for "refund" would lie before the BIFR or AAIFR.

27. Counsel for the State of Gujarat argues that the State's VAT laws and the Gujarat Electricity taxation laws contain provisions for refund of tax. It was imperative on the part of UCL to pursue any claim of "refund" of VAT or Electricity Duty in terms of those, since the concerned sanctioned scheme had no provision for "refund" of tax. It is stated that under Gujarat's VAT laws, application for refund can be made within 2 years. Under the relevant enactment for electricity duty, refund can be claimed within one year. In the present case, UCL has applied for refund after a period of 6 years. It is settled law that a person cannot seek to bypass the limitation provided for in a special statute by going before another forum. The limitation as provided in the scheme of the VAT Act and Electricity law would continue to bind the Appellant.

28. Both respondents point out that Section 18(12) of SICA confers power upon the BIFR to periodically monitor the implementation of the sanctioned scheme. However, UCL chose not to approach the BIFR for 6 years. UCL was aware of State Government's objections to the scheme. However, it remained silent and did not seek any remedies. It is urged that the principle of unjust enrichment as enunciated by the Supreme Court and the High Courts applied squarely to bar the relief claimed in the present case by UCL. The interpretation by UCL means, in effect, that UCL is entitled to levy, collect, realize and appropriate the taxes. The power of taxation is a sovereign function that cannot be given up or delegated by the State in favour of a private corporation.The sanctioned scheme was sanctioned in

2006. Within one year, i.e. in the year 2007, UCL turned net-worth positive and is a profit making concern. Further, UCL was discharged from the purview of SICA in 2007. Therefore, there was absolutely no requirement to refund the duly collected taxes and duties. SICA aims to help only in rehabilitating a sick company.

29. The State of Maharashtra argued that till 24.10.2011, its Sales Tax Department was not aware of any Rehabilitation Scheme sanctioned by BIFR. The department was not party to the summary proceedings dated 15.05.2008. The copy of the summary proceedings was not endorsed to the department. It was totally unaware of any such proceedings. Counsel highlighted that merger of NCCL with UTCL was not communicated to the Sales Tax Department as required under Section 18 of MVAT Act, 2002 within the prescribed time, but only on 26.07.2007 after a period of one year from BIFR order. Learned counsel submitted that UCL took it for granted that it was entitled to avail relief in respect of VAT payable, without intimating the concerned authorities within prescribed time, as envisaged under the statute.The exemption/concession claimed by the company had not been reflected in returns filed by the Company for more than 6 years. UCL claimed refund worth ₹ 11.90 crores towards VAT liability for the period October 2005 to March 2011, whereas in its intimation letter dated 05.10.2011, received by the department on 24.10.2011, it claimed to have paid VAT to the tune of ₹ 20.20 crores for the financial year 2010-2011. The intimation reveals that the company had collected VAT from customers, paid it into the State Exchequer and now wanted the amount as refund under the pretext of exemption/concession granted by BIFR. UCL was granted exemption under the Package Scheme of Incentives, 1993 introduced by

GOM for the period from 16.10.1998 to 15.10.2005 with the monetary, ceiling of ₹ 6,40,68,750/-. At the end of the exemption period, the company had approached BIFR seeking further relief for a period of seven years. UCL continued to collect VAT from customers as is evident from the sample copy of Sale Registers for 01.12.2005 to 31.12.2005 and from copy of sample tax invoices issued by the company. The company collected taxes throughout the relief period of 7 years as seen from sample bills for each financial year. This showed that UCL volunteered to forego the exemptions granted by BIFR. If UCL had any concern, it should have approached BIFR and not collected VAT separately from the customers. The tax thus collected cannot be claimed as refund.

30. Learned counsel pointed out that Section 60 of Maharashtra Value Added Tax Act, 2002 prohibits a dealer from collecting taxes in excess of the tax payable by him. Any such tax collected is liable to be forfeited under Section 60 of the said Act. Since the buyers of the applicant company have claimed income tax credit on their purchases from the company, thus would amount to GOM incurring twofold losses to the State exchequer.

31. It is argued that BIFR, while passing its order had no intention to allow the dealer to collect taxes. If the BIFR upholds the requests made by the company in the MA. It would have amounted to a direct violation of the principle of unjust enrichment as enunciated by the Supreme Court in a number of cases, notably in the *Mafatlal Industries (supra)*, since refund of the amount would amount to unjust enrichment of the dealer.

Analysis and Conclusions

32. The issues that arise for consideration in the present writ petition, is whether the sanctioned scheme in this case was binding on the States of

Gujarat and Maharashtra as far as UCIL's claim for refund of VAT/Sales Tax and electricity duty in terms of clauses 12.1 and 12.2.

33. It is crucial to analyze Section 19 of SICA, which deals with Rehabilitation by giving of Financial Assistance. It reads as follows-

> *"**19. Rehabilitation by giving financial assistance.**—(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.*
>
> *(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation [or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given].*
>
> *(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.*
>
> *(4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."*

34. Notably Section 19(2) specifically provides that a draft scheme has to be circulated to every person required by the scheme to provide financial assistance for his consent within 60 days from the date of circulation or within such further period (maximum 60 days) as may be allowed by the Board (BIFR) and if no consent is received within such period or further period, it shall be deemed that consent has been given. Section 19 (4) provides that where consent is not given by any person required by the scheme to provide financial assistance, the BIFR may adopt such other measures, including winding-up of the sick industrial company as it may deem fit. It mentions that the consent is deemed in instances where no consent is received within the time stipulated by the Board. Thus, a positive approval is necessary by the authorities envisaged in the scheme for the scheme to be binding on them. That provision clarifies that the rehabilitation scheme cannot provide for any reliefs or concessions or sacrifices from the State Government without its consent.

35. The State of Gujarat complains that its objections, when responding to notice of Section 19 (2) – after it was asked to consent to the DRS went unheeded and rather BIFR ignored it and went ahead by sanctioning the scheme without assigning any reason. This act of BIFR is in clear violation of Section 19(2) of SICA, which mandates the consent of the person required to provide the financial assistance. Since the scheme providing for exemption from payment of VAT/Sales Tax has been sanctioned in violation of the mandatory provision of Section 19(2) of SICA, the same is void and without jurisdiction and, therefore, not binding on the Government of Gujarat.

36. The High Court of Delhi in *Union of India v. Cimmco Ltd.* 2015 (193) Com Cases 289 determined the scope of Sections 18 and 19 of SICA. The relevant paragraphs are quoted below-

> *"As regards the first two questions, the Court notes that the provisions of Section 18 and 19 are complementary, and dealing with different spheres of action. Section 18(8) states that the scheme sanctioned by the BIFR will be binding on the sick company, its creditors, employees, guarantors etc. Indeed, these are the only entities which the BIFR can unilaterally bind. The scope of application of Section 19 however is different. In the words of the section, as regards, "the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority", the BIFR does not have the authority to bind these entities by its orders and thus modify the obligations and rights owed between the sick company and these entities. However, the scheme for rehabilitation may- in the interests of ensuring that the sick company returns to a profitable state as soon as possible- envisage "financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from" any of the above entities. These provisions in the DRS will not be binding on these entities, unless their consent is obtained. Thus these entities may determine whether the concessions envisaged in the DRS will be provided by them and either to consent or reject the provision. If the entity rejects the provision, unlike in the case of entities covered under Section 18(8), they will not be bound by the scheme sanctioned subsequently. This is made clear by clause 2 of Section 19, which states that the DRS is to be circulated in order to obtain consent. Once consent is obtained, however, the provision becomes binding for the period of the sanctioned scheme. Crucially in this regard, Section 19(2) categorically provides that "if no consent is received within such period or further period, it shall be deemed that consent has been given."*

37. The Punjab and Haryana High Court, in *State of Haryana v. AAIFR* (2009) 22 VST 210 (P&H) held as follows-

> *"14. Question for consideration is whether the impugned Scheme is arbitrary for altogether ignoring the objections put forward by the Petitioner State and is hit by section 19(3) of SICA and whether the dismissal of appeal of the petitioner by the AAIFR calls for interference.*
>
> *15. As regards the scope of jurisdiction of BIFR, we find that though, the object of a scheme to be framed by BIFR is to rehabilitate a potentially sick unit by framing an appropriate Scheme contemplating preventive, ameliorative, remedial or other measures, the power of BIFR is circumscribed by the statutory provisions and cannot be held to be plenary. A statute has to be read as a whole and no provisions of a statute can be ignored. Section 19(3) envisages consent for framing a scheme covered under section 19(1) of SICA, which may contemplate giving of financial assistance. In absence of such consent, the only course open to BIFR is to frame a scheme under section 18(4) by including measures specified in section 18(1) or other measures than directions for giving financial assistance, including winding up. The impugned Scheme, is thus clearly ultra vires the powers of BIFR under section 19(1) read with Section 19(3). Not only the petitioner did not give its consent to the draft scheme, the petitioner put forward its objections vide letters dated 21/6/2001 and 31/8/2003, which have not been in any manner discussed by the BIFR, which cannot be upheld as proper judicial approach. No judicial or quasi-judicial authority or even administrative authority can act arbitrarily and pass an order affecting a party without considering the view by ignoring altogether objections of the petitioner state. No doubt, Section 32 of the SICA contains a non-obstante clause; even the said provision cannot empower BIFR to act arbitrarily or to go contrary to the statutory scheme. The operation of non-obstante clause will be limited to making a provision of the SICA operative in case of conflict. The Act itself contemplates an order stipulating financial assistance to be passed with consent or to prepare a scheme adopting*

measures as are specified in Section 18 or other measures contemplated under Section 19(1) which may include winding up. Thus, there is no conflict in the Sales Tax statute and the SICA had such a construction which results in harmonious constriction of the two provisions, has to be accepted."

38. UCL in this regard contended that the BIFR is empowered to sanction a scheme under 19(4) of SICA by overriding the objections of the parties whose consent is required under Section 19(2). It was also submitted that if the State of Gujarat's contention that it did not have to file an appeal challenging provisions of the sanctioned scheme is accepted, then Section 25 of SICA (which provides for appeal against order of BIFR by any aggrieved person) would become redundant.

39. The State of Maharashtra's arguments are, however, convincing; they are that till 24.10.2011 its Sales Tax Department was not aware of any Rehabilitation Scheme granted by BIFR. The department was not a party to the summary proceedings dated 15.05.2008. A copy of the summary proceedings was not endorsed to the Sales Tax Department. The department was totally unaware of any such proceedings. The merger of NCCL with UTCL was not communicated to the Maharashtra Sales Tax Department as required under the provisions of the local VAT Act, within the prescribed time, but only on 26.07.2007, after a period of one year from BIFR's order.

40. It a matter of record that the State of Maharashtra till 24.10.2011 was unaware of any rehabilitation scheme sanctioned by BIFR and that it was only then that UCL had furnished a copy of summary record of proceedings of hearings held on 15.05.2006 before BIFR. The Sales Tax Department was not a party to the summary proceedings dated 15.05.2006 and the copy of those summary proceedings was never endorsed to it. Clearly, the State

being the authority to decide about granting financial assistance under Section 19 of SICA was not given the due notice or heard before granting the exemption under the scheme. The absence of notice of the Sanctioned Scheme to the State of Maharashtra, it cannot be held to have given its ascent to the said scheme. In the light of these circumstances, this court is of the view that UCL took it for granted that it is entitled for availing such relief in respect of the reliefs envisaged under the scheme without intimating the concerned authorities within the prescribed time as envisaged under the statute.

41. This Court further observes that under Section 19, BIFR read with Regulation 33 does not have any power to direct, in the absence of specific consent, the State Government to grant any incentive, which is not part of the policy of the State Government. In view of the decision of the Supreme Court in *State of UP v UPTRON Employees Union* (2006) 5 SCC 319, no direction can be given by the BIFR directing any State to grant or not to grant any incentive or to relieve the Petitioner of any statutory liability. In *Ambuja Cements Ltd & Anr. v State & Ors* (DB W.P. No. 3233-38/2014, decided on 19.12.2014), the Rajasthan High Court observed as follows:

> *"63. We may observe here that the BIFR under section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985 read with Regulation 33, does not have any power to direct, in the absence of specific consent, the State Government to grant any incentive, which is not a part of the policy of the State Government. In view of the decision of the Supreme Court in State of U.P. v. UPTRON Employees' Union, CMD ((2006) 5 SCC319, no direction can be given by the BIFR directing any State to grant or not to grant any incentive or to relieve the petitioner of any statutory liability.*

> *64. We do not find any weight in the submission made on behalf of the petitioner-Company that the Sanctioned Scheme-04 by itself granted to the petitioner the benefit of 75% wholly independently of the Notification dated 22.2.2002 and that the Sanctioned Scheme-04 may be considered or read in the manner in which the petitioner was not required to pay back any part of exemption amount. There is nothing in the Sanctioned Scheme-04, which may have bound the State Government to grant any such concession. We also do not agree with the submission that in case the State Government was aggrieved by relieving the petitioner from its liability in the Sanctioned Scheme-04, it should have challenged 38 the order of the BIFR before the AIFR, which alone had the authority of law to amend or modify the scheme."*

42. It is thus apparent that without the consent of the States, the condition to waive, or exempt VAT incidence, for the duration of the sanctioned scheme was not binding on them. This court further notes that the judgment of the Supreme Court in *Director General of Income Tax v GTC Industries* 2016 (12) SCC 62 is an authority on the point that even though the revenue may not object to a scheme at the stage of sanctioning, its right to claim dues under provisions of the controlling enactments cannot be overridden, *especially when the sick company's net worth turns positive.* In the present case, the situation is converse: during the subsistence of the sanctioned scheme, the company (UCL) willingly and knowingly collected local taxes and paid electricity duties. Significantly, the UCL did not record or post losses, during or after the period of the scheme. It was a profit-making company and continued to earn them for the duration of the scheme's operation.

43. VAT is levied on sale of goods of every description. It is collected at each stage in chain when value is added to the goods. The tax is centered

around the basic concept of set-off for the tax paid earlier (input tax credit). This input tax credit for any period means setting-off the amount of input tax by a registered dealer against the amount of his output tax. The structure and world of VAT along with input tax credit is based on documentation of tax invoice, cash memo or bill. VAT is collected in bills at each stage in chain and paid after taking set-off of the amount of input tax credit (tax paid on purchases supported with tax invoices).

44. The State of Maharashtra explains its incentive schemes declared as linked to industrial promotion in the State. The first scheme exempts the dealer from payment of tax on sales upto a fixed period or up to monetary limit. The second scheme is tax deferment, where the dealer is allowed to postpone the payment of tax on sales. These are based on entitlement certificates granted under Section 89 of MVAT Act, 2005. In the case of exemption, the company does not collect tax from consumers on sale of exempt goods, and is governed by a notification dated 01.04.2005. Here, the exempt company does not collect tax from sale to consumers of exempt goods; there is no obligation to pay tax. The scheme- it is explained, is such that if the dealer is exempt from payment of tax, in the invoices issued by seller, if the VAT collected is separately shown then only the set-off of input tax credit has been allowed to consumers. The exempted company is entitled to get refund of tax of an amount equal to the set-off to which it would have been entitled under the Act or Rules on the purchases of raw materials made on or after the appointed day, if it was not holding Certificate of Entitlement in respect of each period for which it is required to file a return under Rule 79 (1) of MVAT Rules. Rule 79 (2) of MVAT prescribes that, *"If the unit is holding an Entitlement Certificate for exemption from payment of tax under*

*the 1979, 1983, 1988 or 1993 Package Scheme of Incentives or as the case may be, under the Power Generation Promotion Policy 1998, then, it shall also be entitled to claim refund of tax equal in amount calculated for the purpose of reduction from set-off under Rule 53, if the said dealer was not holding the Certificate of Entitlement."*The Maharashtra State distinguishes the cases in which VAT is payable by the dealer from those not payable by the dealer based on the certificate incorporated in the tax invoice issued by the dealers as per Rule 77 (2). Further, the tax invoice reveals whether the customer has paid the tax or not. If the amount of tax is mentioned separately in the tax invoice then it means that the customer has paid the tax. If the concern does not collect VAT from customers, then in such cases the benefits actually given to the exempted company is to the extent of exemption granted concerning VAT. The benefits to the exempted unit by non-levy of VAT are of cost advantage to withstand competition *vis-à-vis* dealers not having exemption benefits.

45. The State of Gujarat's position is that the Draft Rehabilitation Scheme in 2006 was objected to by it before BIFR, by its communication- dated 07.04.2006. However, the BIFR failed to consider them although they were on record. This fact was noted and recorded by the BIFR in its order and summary record of proceedings dated 27.09.2012 as follows:-

> *"1.3 ....*
> *The Bench further perused the Government of Gujarat's communication dated 29.03.2012 conveying that they filed their objections dated 07.04.2006 to company's DRS, which were not taken into account when the Board Sanctioned the Scheme on 15.05.2006. The Government of Gujarat subsequently filed a review application dated 12.10.2006 seeking modifications in the reliefs envisaged from Gujarat Govt. in SS-06. The Bench*

observed that the objections filed by Govt. of Gujarat, were apparently not considered when the Board sanctioned the SS-06 on 25.05.2006, whereas the same are available in the Bench file. Bench was informed that review application of GOG dated 12.10.2006 is also available on record and has apparently remained unheard and undecided. Therefore, the Bench considered it even more necessary that opportunity is provided to Government of Gujarat for filing reply to Misc. Application-122 filed by the company…."

"3. Having considered the submissions made during the hearing and materials on record the Bench noted that the review application dated 12.10.2006 of Govt. of Gujarat is on records of BIFR, which is yet to be decided, hence the review application dated 12.10.2006 need to be heard and decided before taking any decision in MA No.122 of 2012. The Ld. Advocate of the company intervened and submitted that they may also be given an opportunity to file a reply to the review application of Govt. of Gujarat, which is already available with the company. The bench agreed to the request of the company and issued following directions. …… ….. ….."

46. The State of Gujarat cites Section 19 to say that without consent, there cannot be any sanction. It also submits that it moved an application for Modification of the sanctioned scheme. That application remained pending before the BIFR. Finally, the said application for modification was disposed of along with the application of the petitioner for refund of taxes by a common order. It is also stated besides that UCL had collected VAT and deposited it with the State Government all through the relevant period. It took the benefit of Input Tax Credit during the relevant period. The tax invoices issued by UCL and its returns show that (a) There is no mention or stamp about any incentive scheme or exemption scheme on bills and (b) it issued tax invoices, collected tax and deposited the tax with the Government;

(c) On purchase side (on inputs), it has paid tax on inputs, and has, thereafter, taken the benefit of Input Tax Credit. Furthermore, no refund or remission was claimed in the tax *regime.* Apparently in the State of Gujarat too, the petitioner UCL did not seek exemption under Section 5 (2) of the VAT Act. It is also apparent that here too, the regime and VAT provisions are such that an exempt unit cannot collect taxes from the buyers.

47. In the present case, no doubt, clauses 12.1 and 12.2 of the scheme *ex facie* confer the right upon UCL to claim exemption of the levies that they deal with. However, such exemptions cannot "kick in" or operate automatically, or *proprio vigore* (by its own force); they depend, rather on suitable consequential action by way of notifications, *enabling* such exemptions. Both the conditions relied on, are conditional entitlements; they need follow up action by the State in the form of suitable notifications. In the present case, at least as far as VAT is concerned, the matter is complex, because the petitioner UCL *collected* VAT from third parties, i.e. those who entered into transactions with it, that were subject to VAT levy. On the basis of such sales (including input sales VAT paid by UCL) credit of VAT levy was secured: at both ends, i.e. the seller and the downstream buyer. Thus, an input credit chain formed which led to completed assessments. The refund of levy in such circumstances would be a windfall to UCL. Clearly, this was not the intent and purport of the sanctioned scheme; rather the object of directing exemption was to ensure that there was relief from the burden of taxation for its duration, to ensure the sick unit's viability. The scheme worked itself out; UCL did not sustain losses and reported positive net-worth at the end of the stipulated period; it was discharged from the operation of SICA. In these circumstances, the argument of the States that refund was not

contemplated and that if granted, it would result in aggrandizement of the petitioner, is substantial and justified.

48. Exemption from tax to encourage industrialization cannot be equated with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. The underlying intention of exemption is to incentivize production and economic activity. VAT is an indirect tax passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or Orders issued by government are neither illegal nor against public policy. A provision or agreement to refund tax due or realized in accordance with law is not justified. Refund is directed only when the amount collected is excessive, or there is no levy or for wrongful collection. In all such cases, a fault must be located within the revenue before the courts order refund. The Supreme Court in *Amrit Banaspati (supra)*, observed as follows:

> *"... Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well known to be one of the methods to grant incentive to encourage industrialization. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt*

from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacture, and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Government are neither illegal not against public policy.

But refund of tax is made in consequence of excess payment of it or its realisation illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realised in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realised under a statute. It would be invalid and ultra vires. The Punjab Sales Tax Act provided for refund of sales tax and grant of exemption in circumstances specified in Sections 12 and 30 respectively. Neither empowered the Government to refund sales tax realised by a manufacturer on sales of its finished product. Refund could be allowed if tax paid was in excess of amount due. An agreement or even a notification or order permitting refund of sales tax which was due shall be contrary to the statute. To illustrate it the appellant claimed refund of sales tax paid by it to the State Government of sale made by it of its finished products. But the tax paid is not an amount spent by the appellant but realised on sale by it. What is deposited under this head is tax which is otherwise due under provisions of the Act. Return of refund of its or its equivalent, irrespective of from is repayment or refund of sales tax. This would be contrary to Constitution."

49. In a subsequent judgment, i.e. *State of Bihar v Kalyanpur Cements (supra)*, it was held by the Supreme Court that refund could not be given, in somewhat similar circumstances:

"During the interregnum the company has been collecting the amount equivalent to the tax from the consumers. According to Dr. Rajiv Dhawan, Mr. Dwivedi during this period the

company has collected more than Rs.60 crores on the sale of cement by virtue of the directions issued by this Court in the Order dated 18.11.2002. In view of the law laid down by this Court in Amrit Banaspati (supra) the company cannot be permitted to retain the amount collected from the customers. This would amount unjust enrichment. Therefore, a direction is required to be issued that the amount deposited by the company with the bank pursuant to the orders of this Court be released to the appellant State. On the other hand, Mr. Parshad has submitted that the delay in issuance of the exemption Notification by the State has crippled the Companyfinancially. Even then the Company is trying to revive itself through financial restructuring. The survival of the Company now depends on the approval of the Financial Restructuring Package prepared by the respondent No.2. This package has been submitted to the Chief Minister of Bihar which is still on the consideration of the Government. With regard to the non-deposit of amount equivalent to the tax due, Mr. Parshad reiterated that the Company had made bona fide efforts, but was unable to deposit the amount due to its `sickness'. On the one hand the revised rehabilitation package is kept under consideration, on the other the appellants seeks the vacation of the order dated 18.11.2002. The application, according to the learned senior counsel, deserves outright dismissal.

79. We have considered the submissions made by the learned counsel. It would be not possible to accept the submissions of Mr. Parshad that in view of the financial condition of the company it may be permitted to retain the amount collected under the orders of this Court. The amount was collected from the consumer to offset the tax liability. Such amount cannot be permitted to be retained by the company. In Amrit Banaspati case (supra) it has been held that exemption and refund of tax are two different legal and distinct concepts. The objective of the exemption is to grant incentive to encourage industrialization. It is to enable the industry to compete in the market. On the other hand, refund of tax is made only when it has been realized illegally or contrary to the provisions of law. Tax lawfully levied and realized cannot be refunded. In view of

> *the settled position of the law, we decline to accept the suggestion made by Mr. Parshad.*
>
> *80. Direction is, therefore, issued that the amount deposited by the company in the designated account opened and operated pursuant to the order of this Court dated 18.11.2002 together with accrued interest shall be released to the appellant State, forthwith."*

50. The petitioner is correct, when it argues that if an order remains unchallenged, it becomes final and binding and the consequences of that order cannot be termed illegal, without a challenge to the basic determination. There cannot be any dispute with that enunciation of principle. However, in this case, what is noteworthy is that the petitioner took no steps absolutely till 22.03.2012, when it moved an application. By that time the tenure of the scheme had ended. The petitioner did not seek remission or exemption; rather it was a demand for refund.

51. This Court concurs with the view of the AAIFR that since it is not in dispute that the Government of Gujarat did not give its consent in terms of Section 19(2) above and instead filed its objections to the relevant provisions of the rehabilitation scheme, there was no question of deemed consent. As is evident from Section 19(4) of *SICA, it is in the absence of consent by any person, the Board may adopt such other measures including the winding up* of the sick industrial company as it may deem fit. Likewise, the Maharashtra State had no notice of the scheme and became aware of it later. In its case too, its consent cannot reasonably be deemed. Therefore, BIFR could not have overridden or completely ignored the requirement of consent required under Section 19(2) of SICA. The argument that since there is a provision for filing an appeal against the order of BIFR (under Section 25 of SICA),

the BIFR can ignore the mandate of Section 19(2) of SICA and sanction a scheme in the absence of consent without intimation to any state, or contrary to its object is an untenable proposition. To admit of this eventuality is to countenance any order of BIFR contrary to the law as it can be challenged in an appeal. There is nothing to indicate to why the BIFR thought it fit to reject the State of Gujarat's objections, to the proposed scheme.

52. In the circumstances mentioned above, this Court is of the opinion that the sanctioned scheme was not binding on both the States for want of consent on part of the State authorities rendering financial assistance.

53. Now, it is necessary to deal with the petitioner's argument relating to Section 32. The Act has vested substantial powers in the BIFR, which enables it to finally determine the fate of a sick company. Such powers include the power to decide whether the company should be allowed some time to make its net worth positive, to frame a suitable scheme for its reconstruction, revival or rehabilitation, to determine on the precise provisions in the scheme for this purpose or to decide to wind up the company, the decision of the BIFR on all these issues is, subject to certain exceptions, binding on the company and all concerned parties like promoters, shareholders, employees, creditors, financial agencies and the like. Section 32 goes to the extent of clothing the scheme with such legal effect as to over-ride even the provisions of other laws (except FERA and Urban Land Act) so as to make such provisions inapplicable to or in relation to the company. All this raises a question whether this constitutes an excessive delegation of legislative power to BIFR.

54. As far as this Act is concerned, it is observed that the policy of the legislature has been clearly formulated in the preamble and its other

provisions, namely to revive and rehabilitate the potentially viable sick companies as quickly as possible and to salvage the productive assets and realize the amounts due to the banks and financial institutions from the non-viable sick companies through their liquidation. Adequate guidelines have also been provided to BIFR through various provisions of the Act, particularly Sections 17, 18 and 20.The important aspect to notice is that the overriding effect of the Act, scheme or rules made thereunder would be there only when there is anything inconsistent in the said Act or rules or scheme *vis-a-vis* the other laws or provisions. If the rules or schemes made under the Act are silent on any particular subject matter and the other laws require any particular action being taken, such a law would have to be complied with. The question of the overriding provision operating would arise only if the provisions of SICA are followed. In the present case, the previous discussion clearly reveals that SICA was not followed, in that one State had objected to the scheme; the other was not even aware of it. Therefore, there was no consent, but opposition in one case and lack of knowledge: both contingencies could not have attracted the provision for "deemed consent". In such event the scheme, being violative of SICA, could not have prevailed, by virtue of Section 32.

55. This Court is further of the opinion that the petitioner's grievance was to be redressed by it, within reasonable time of the denial of exemption, i.e. within one or two years of the sanction for the BIFR scheme. By not seeking recourse, firstly by pursuing with the State authorities for notifications or directions, to grant the needed exemption, on the one hand, and proceeding to recover VAT and other levies on the other, after the duration of the scheme, the petitioner has approached the Court after an inordinate delay.

The idea of granting exemption was to incentivize growth and ensure commercial viability. The petitioner effectively gave up that relief by its inaction (in not seeking exemption or approaching BIFR or the courts in a timely manner) and by collecting taxes and depositing them.

56. For the foregoing reasons, the writ petition has to fail; it is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

DECEMBER 7, 2017