HIGH COURT OF JAMMU AND KASHMIR AT JAMMU.
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OWP No. 579/ 2005
OWP No. 513/ 2002

Date of decision: 11-9-2007:

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1 Hindustan Coca Cola Beverages Pvt Ltd Vs State and others
2.Hindustan Coca Cola Beverages Pvt Ltd Vs State and others

CORAM:

HON'BLE MR. JUSTICE Y.P. NARGOTRA: JUDGE

Appearing Counsel:

M/s. Muzaffar Hussain Beig, D.C Raina, Senior Advocates with Safina Beig, Vikram Singh,. F A Natnoo, Advocates for petitioner:
Mr. A.H. Naik, Advocate General, A S Dogra, Dy A.G for respdts

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Whether to be reported in Press/ Journal/Media: YES
Whether to be reported in Digest/ Journal: YES

By this common order instant writ petitions are being disposed of.

The dispute in OWP No. 513/ 2002 relates to the entitlement of the petitioner Company to the benefit of tax exemption leviable under the provisions of Jammu and Kashmir General Sales Tax Act being a '***Prestigious Unit'***, in terms of Industrial Policy formulated and implemented for the years 1998- 2003.

The Government of Jammu and Kashmir with the object of encouraging large Scale investment in the Industrial Sector in the State introduced New Industrial Policy 1998- 2003 for providing Package of incentives for development of large/ medium/ small and

Tiny Industries by Govt order No. 202-Ind of 1998 dated 27-5-1998.

Clause 3 of the order provided as follows:

> "3. All existing Units shall also be entitled to avail the incentives as described in Annexure-B to this order except in cases where they have already drawn any benefit under the packages of incentives as per earlier package of incentives"

One of the incentives envisaged by Clause 10 of Annexure-B to the Govt Order was:-

> "10. Special provision for prestigious units:
>
> (1) Notwithstanding anything contained in paras 7,8 & 9 above, prestigious units i.e. those having capital investment of Rs 25 Crores or above shall have the option to avail of full exemption from payment of GST, CST and special/ additional toll tax for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150% of capital investment in the project whichever occurs earlier.
> (2) Notwithstanding anything contained in para 7,8 & 9 above those prestigious units which come into commercial production in the year 1998, shall have the option to avail a power tariff freeze at the rate of Rs 1.50 per unit for a period of five years from the date of commercial production.
> For proposes of paras 7,8,9 and 10 above, all the new units shall also have the option to count the period of 5 years from the date of production or from the succeeding financial year".

The scope of the above benefit was extended to existing units by clause 14 of the Annexure-B which reads as follows:-

> "14. Substantial Expansion:
> An existing unit which increases its installed capacity by at least 25% or adds additional line of manufacturing so as to increase its capacity of turn-over by 25% in terms of volume or value of finished goods shall be deemed to have gone for substantial expansion and shall be entitled to the benefit on capital investment or such expanded

capacity as if the investment would have been made in a new unit."

The term substantial expansion was defined by Govt order No. 432-Ind of 1998 dated 2-12-1998, as follows:-

"Sub: Amplification of the term, substantial expansion, in the new Industrial Policy.

Ref: Cabinet Decision No. 183/17 dated 1-12-1998.

Govt order No. 432-IND of 1998
Dated 02-12- 1998."

"In amplification of clause 14 of Annexure-B to Government order No. 22-IND of 1998 dated 27-5-1998 relating to Substantial Expansion, following proviso is hereby added:-

'Provided that if an existing unit makes a further investment of Rs 25 Crore or more, the expansion programme shall be treated as a prestigious project for the purpose of grant of incentives under the New Industrial Policy notwithstanding the fact that such investment is by way of expansion of existing Unit'

By order of the Government of Jammu and Kashmir"

No. Ind-41-DIC/97 dated 2-12-1998

Addl Secretary to Government,
Industries & Commerce Department"

Thus for availing the benefit of Tax exemption in terms of clause 10 an existing Unit could go for expansion programme by making further investment of Rs 25 Crores or more in the Unit and become a Prestigious Unit.

It is significant to note that while extending the similar benefit of Tax exemption to Small Scale/ Medium and Large Industrial Units

an exception stood carved out by SRO 249 dated 20-8-1998 that no benefit would be available if the item produced by such Unit came in the purview of the negative list of items specified, but in case of Prestigious Units, there was no such restriction/ exception.

The petitioner is a Company duly registered under the Companies Act 1956. It applied for and was accorded registration as Medium Scale Industrial Unit in the State for manufacture and Sale of aerated water, Maza etc (Soft Drinks) under Certificate of Registration bearing No. SSSI/1962-67 dated 11-1-2002. The Unit of the petitioner has also been registered with Sales Tax Department No. J&K under Certificate of Registration No. J&K GST 1111198 and CST No. 5112174 dated 8-10-1998.

The petitioner after its registration as Medium Scale Industrial Unit initiated the steps which were requisite for running the Unit on Commercial basis and in the process made large investments reflected in the Project report submitted to the Directorate of Industries for claiming declaration of the Unit as Prestigious Unit.

The Directorate of Industries of the State of Jammu and Kashmir by its order No. SSI-J/1662-67 dated 11-1-2002 declared the Unit of the petitioner as 'Prestigious Unit'. On the basis of the order dated 11-1-2002 of the Directorate of Industries the petitioner was declared entitled to the benefit of Sale Tax and Toll Tax exemption by order dated 18-5-2002.

Consequent upon the order dated 11-1-2002, the petitioner started availing full exemption from the payment of General

Sales Tax and Central Sales Tax as a Prestigious Unit w.e.f. 12-1-2002 under intimation to Sales Tax Department.

The respondent No.5 issued and communicated to the petitioner order dated 15-1-2002 vide its No. 7517-18/STJ dated 15-01-2002.:

> "Refer to your office letter No. nil dated 12-1-2002 regarding the subject cited above. In this connection, it is to inform you that you are not qualifying for SRO 247 dated 20-8-1998 as the commodity you are dealing falls in negative list. Your plea is therefore, rejected."

The Sales Tax Department thus declined to allow the petitioner Company to avail the benefit of Tax exemption available to Prestigious Unit on the ground that the product manufactured fell in the negative list to which the Tax benefit stood excluded in terms of SRO-249 dated 20-8-1998.

The respondent No.5 then again passed and forwarded to the petitioner another order dated 18-3-2002 under No. 3407-08/STJ which is in the following terms:-

> "With reference to the subject cited above, I would like to make you clear that after giving a fresh look to your letter, other incentives granted by DIC as well as Sales Tax Department and different SROs issued by the Finance Department, I have come to the conclusion that you are mis-interpreting SRO 247 dated 20th August, 1998.
>
> First of all you should not read SRO 247 in isolation it should be read in continuation with SRO 249 which is for negative list, so it is clear that SRO 247 is not for the commodities falling in negative list.

Secondly the theme of the notification SRO 247 dated 20th August 1998 is, a Industrial Unit with Capital investment of Rs 25 Crores or above is described as prestigious unit is entitled to exemption from payment of General Sales Tax and Central Sales Tax for a period of 5 years. "From the date of production" until such amount of exemption reaches the level of 150 percent of the capital investment of the project which ever secures earlier. I want to bring your attention on this line i.e. from the date of production. This line applies for those units who wants to start their production and who are at their take off stage but not for those units who had already gone into production and had availed the time period framed, regarding your unit you are paying a handsome amount of tax regularly, so five years from the date of production does not apply on you or you do not falls in this provision.

The amount of investment mentioned in SRO 247 as Rs 25 Crore and above should be invested before going for production, but not the investment made in installments or the subsequent investment after earning a lot of profit. This Unit M/s Hindustan Coca Cola Beverages (P) Ltd J/F, Gangyal, want into production from 1998-99 and from that period and from that period right upto and of 3rd quarter of 2000-2001, you are paying tax fairly and regularly. So make it a point that here also SRO 247 is not applicable on you.

As per our record your unit is already registered as Medium Scale is Unit which is also notified by the DIC Moreover, Industries Department vide their Order No. SSI/J/1862-68 dated 11-1-2002 had not made it clear that they are converting a medium scale Unit into Prestigious Unit so, we in our record consider you as a Medium Scale Unit.

Lastly, I want to clear this point that it is the job of the Finance Department to decide whether to grant you exemption or not, the decision of Industries Department are not obligatory for sales Tax Department.

> The Sales Tax Department cannot afford to grant you exemption.
>
> So you are again hereby intimated that your plea for exemption is rejected and you are directed to be regular in your tax payment fairly as previously."

Thus, the sales Tax Department vide its Order dated 18-3-2002 quoted above found the petitioner dis-entitled to the Tax exemption under the Industrial Policy on two counts. Istly that it was not entitled to the Tax benefit because the product of the petitioner fell in the negative list to which the benefit was not available in view of the provisions made in SRO 249 dated 20-8-1998, and Secondly that the benefit of SRO 247 was not available to the petitioner because the petitioners' unit was earlier registered as Medium Scale Industrial Unit and it had as such already come into production in 1998-99. The petitioner for questioning the legality of the order dated 18-3-2002 quoted above, and the order dated 15-1-2002 passed by respondent No.5 the Assessing Authority of the Sales Tax Department, filed the instant writ petition.

By the interim order dated 19-7-2002 this Court directed the parties to maintain status-quo till next date before the bench. There-after the respondents filed their reply affidavit in which it was stated that Under Secretary to Government, department of Industries and Commerce had issued order No. 20-GR (IND) of 2002 dated 25-10-2002 in which it was stated as follows:

> "The orders issued by Directorate of Industries and Commerce according prestigious status to the following units is hereby kept in abeyance till these cases are

considered by the Competent Authority i.e. State Level Committee-I:-

1. M/s Kohinoor International Agro Products, Rangreth;
2. M/s Chenab Textiles Mills, Kathua;
3. M/s Jai Beverages Pvt Ltd, Bari Brahmana, Jammu;
4. M/s Hindustan Coca Cola Beverages Ltd Gangyal, Jammu.

By order of the Governor."

According to the petitioner copy of the said order dated 25-10-2002 was served upon the petitioner during the course of hearing on 19-12-2002. Though in the order no reasons as to why the Prestigious Status of the petitioner-Unit was being kept in abeyance stood detailed, however, in the counter affidavit it was stated that it was for the following reasons:

(A) That the petitioner was wrongly accorded on 11-1-2002 "Prestigious Unit Status" by the Director, Industries and Commerce, even though he was not competent to issue such an order;

(B) That for the eligibility to be considered as "Prestigious Unit" the petitioner had to make capital investment of Rs 25.00 Crores or more.

Whereas according to the Industries Department as in March, 2001, the total investment made by the petitioner including the cost of infrastructure was Rs 23.93 Crores, which was less than the minimum required capital investment. It was further contended by the Industries Department in the reply that investment on Glass Bottle Shells of Rs 7.09 Crore could not be considered as part of the capital investment and therefore, the total amount invested in these items was required to be deducted. If the cost of Glass Bottle/ Shells is deducted from the total investment of Rs 30.83 Crores, the total amount of capital investment as of March, 2001 would be less than Rs 25.00 Crores and

therefore, the petitioner would not be eligible for the status of the Prestigious Unit.

Since the petitioner could not have challenged the order dated 25-10-2002 in his writ petition for having not the knowledge of the same till the filing of the counter, it sought permission for amending the writ petition, by filing a CMP (W) No. 75/ 2003. After hearing the parties, the CMP of the petitioner- Company was allowed by order dated 28-11-2003 and there-after the petitioner was permitted to amend the writ petition. Accordingly, by the amended writ petition the petitioner has also thrown challenge to the order dated 25-10-2002.

I have heard Mr. Beig, learned counsel for the petitioner and Mr. Naik, learned Advocate General for the respondents and perused the record also.

In order to determine the controversy involved in the writ petition, the questions arising for consideration and determination are:-

(A) Whether the petitioner unit fulfilled the legal requirements necessary for being accorded the status of 'prestigious unit status'?.

(B) If the answer to the above question comes to be in affirmative, Whether the petitioner is not entitled to the benefit under the industrial policy on account of the fact that the product manufactured by the petitioner falls in the negative list as envisaged by SRO No. 249. ?

The benefit of the tax exemption envisaged by clause 10 of the Govt order No. 202-Ind of 1998 (quoted above) has been made available as a special package to 'Prestigious Units'. The 'Prestigious Units' are those new units established after the coming into force of the Govt order No. 202-Ind of 1998 dated 27-5-1998 in which capital investment of Rs 25.00 Crore or above has been made.

The Units which were existing on the date of coming into the force of Industrial Policy in terms of Govt order No. 202-Ind of 1998 could also become eligible for acquiring the status of 'Prestigious Unit', by going for substantial expansion by investing Rs 25.00 Crores or above in terms of clause 14 of the said Govt order for implementation of which the Govt issued SRO 432 dated 2-12-1998 (already quoted).

From the bare reading of the SRO 432, it is manifest that even an existing unit which may have already gone in production could go for substantial expansion by making a further investment of Rs 25 Crores or more for acquiring the status of Prestigious Unit. Substantial expansion was not restricted to those existing units which were yet to enter the production level, irrespective of entering or not entering production an existing unit by making further investment of Rs 25 Crores or more could become eligible for being granted the status of Prestigious Unit.

Towards implementation of the Industrial Policy envisaged under Govt order No. 202-Ind of 1998, the Govt had issued SRO 247 dated 20-8-1998 which provided as under:-

> "SRO 247- In exercise of the powers conferred by section 5 of the Jammu and Kashmir General Sales Tax Act, 1962 (XX of 1962) and read with sub-section (5) of Section 8 of the Central Sales Tax Act, 1956 (Act 74 of 1956) the Government of Jammu and Kashmir hereby direct that the prestigious units i.e. those having capital investment of 25 crores or above shall have the option to avail of full exemption from payment of General Sales Tax and Central Sales Tax for a period of five years from the date of production or until such amount of exemption reaches the level of 150% of capital investment in the project, whichever occurs earlier"

SRO 247 then came to be amended by SRO 171 dated 28-5-2003 by providing:-

> "The Government of Jammu and Kashmir hereby directs that the prestigious Units i.e. those having capital investment of 25 crores or above shall have the option to avail of full exemption from payment of General Sales Tax and Central Sales Tax upto 30-9-2003 or till a new industrial policy is announced by the State Government or until such amount of exemption reaches the level of 150% of Capital Investment in the Project whichever occurs earlier".

The case of the petitioner is that after Registration of the petitioner's unit as Medium Scale Industrial Unit it made capital investment of more than 25 Crores reflected in the Statement of Accounts submitted for declaration of its Unit as Prestigious Unit and commenced Production by 11-1-2002 the date on which it was declared as

Prestigious Unit. Undisputedly the petitioner had taken over already existing Unit from Jammu Bottling Plant Ltd. According to the Statement of Accounts submitted with Project Report the petitioner claims that towards substantial expansion of the existing unit it has invested more than Rs 25.00 Crores as capital investment so is entitled to the status of Prestigious Unit.

The respondents have not disputed the fact of making of the investments in the existing Unit by the petitioner as per its expansion programme. They are disputing the entitlement of some of such investments for being qualified to be treated as capital investment. And if those investments are excluded from the other investments which qualify for capital investment then the total capital investments would be less than the requisite amount of Rs 25 Crores.

According to Mr. Naik learned Advocate General the investments which can qualify as capital investment are those investments which are covered by Govt order No. 315-Ind of 1998 dated 15-10-1998. Govt order No. 315-Ind of 1998 which provides as follows:-

> "Sub: Procedure for regulating grant of Capital Investment subsidy.
>
> Govt order No. 315-Ind of 1998
> Dated 15- 10- 1998.
>
> In pursuance of para 4 and clause 11 of Annexure B to Government order No. 202-Ind of 1998 dated 27-5-1998, it is hereby ordered that procedure for regulating grant of CIS shall henceforth be as per the enclosures annexed with this Government Order.

> This issues with the concurrence of Finance Department conveyed vide their GO No. FD-ET-ST/188/ 98 dated 22-9-1998"

Mr. Naik contends that three items of investments namely, sale generating assets, office equipment and furniture, Motor Vehicles and Glass Bottle Shells, do not stand the test of above Government order.

Mr Beig, learned counsel for the petitioner, however, submits that above Govt order has no application to the issue of capital investment relevant for the 'Prestigious Unit' status of a Unit. He contends that the Govt order deals with question of entitlement of a Unit to the capital investment subsidy under the Industrial policy.

The contention of Mr. Beig is well founded. Under the industrial policy the industrial units are entitled to capital investment subsidy in terms of clause 9 of Annexure A to the Govt order No. 202-Ind of 1998, which provides as follows:

> "9. Capital investment subsidy (CIS) at 30% subject to a maximum limit of Rs 30 Lakh shall be available on capital investment in priority areas of electronics including computronics and software, food processing including agro-based industries (excluding conventional grinding extraction units) Floriculture handicarafts, leather processing and leather goods, sport goods, forest based industry (excluding + saw mills and joineries) Processing or aromatic plants and herbs, pharmaceuticals based on herbs, bulk-drugs, silk reeling, weaving, processing, printing, hosiery and made ups, cutting and polishing of stones, gems and jewellery, precision engineering and where a unit is identified as thrust area, the upper limit of the subsidy available is increased to Rs 45 Lakhs and for Prestigious units (those with capital investment of minimum Rs 25.00 Crores) the upper limit of CIS shall be Rs 75 Lakh in thrust areas and Rs 60 Lakhs otherwise. Over and above the amount, 100 subsidy on project feasibility report and 100 subsidy on testing equipment (with some monitory ceilings) for

> maintaining quality standards, shall also be available. Purchase of captive DG Sets upto 1 MW also qualifies for 100% capital subsidy."

Order No. 315-Ind of 1998 applies to capital investment subsidy alone and therefore, cannot be validly made basis for finding out whether an investment qualifies as capital investment for the purposes of Prestigious Unit status. There being no provision in the policy or in any Government order as to how capital investment in a unit is to be worked out the general principles at common law are required to be applied for determination.

Keeping this in view now let us take items of investments made to see whether those investments can qualify to be the capital investment of Rs 25.00 Crores. The existing value of the Unit when it was taken over by the petitioner is to be excluded for having not been spent for substantial expansion.

As per the statement of accounts the total investments according to the petitioner are to the tune of Rs 75.75 Crores upto January, 2002 which includes Rs 38.51 Crores admittedly spent for taking over the Unit from Jammu Bottling Ltd. By deducting the said amount of Rs 38.51 Crores from total investments made the amount comes to Rs 37.24 Crores. Thus, it is to be seen whether the investment of Rs 37.24 Crores can qualify as capital investment. This amount has been spent according to the petitioner under different heads classified in the following table. The relevant investments would be those investments which have been made upto 11-1-2002.

Particularsof Investment	Investment as on (Rs Crores)					
	Actual			Project Estimate		
	26-2-99	99-00	00-01(P)	01-02		
1.0 Land Leasehold	0.61	0.76	0.96	0.96		
2.0 Buildings	3.00	3.84	4.00	4.25		
3.0 Plants & equipments	6.62	11.92	17.24	18.64		
4.0 Office equipment And furniture:	0.14	0.50	0.86	0.86		
5.0 SGAs	1.01	3.97	6.04	7.29		
6.0 Motor Vehicles	0.73	0.58	0.58	0.58		
7.0 Glass & Shell	6.65	10.58	13.14	16.14		
8.0 Intangible assets (Goodwill & not complete)	19.75	20.28	20.28	20.28		
9.0Capital works in progress	.	1.55	7.15	6.75		
Total	38.51	53.80	70.25	75.75		

Mr. Naik learned Advocate General conceded at bar that items No.1,2,3 of the table qualify and can be treated as capital investment. And as regards item No.8 Mr. Beig, learned counsel for the petitioner submits that he would not press for item No.8 for being considered as capital investment. After deleting item No.8 from consideration the total amount of investment being relied upon by the petitioner comes to Rs 37.24 Crores minus 0.53 Crore = 36.71 Crores. Therefore, dispute remains to items No. 4 to 7 and 9. At the same time investment of Rs 13.62 crores in items No. 1 to 3 is not disputed.

As regards item No.4 which refers to the investment of Rs 0.72 Crores on account of office equipment and furniture, the contention of Mr. Naik is that amount spent does fall in capital investment as it has

nothing to do with the substantial expansion in production. Likewise according to him the investment shown in item 6 relating to Motor Cars is not admissible for having not been spent at all after the take over by the petitioner. Mr. Beig accepts the contention of Mr. Naik so an amount of Rs 0.72 Crores and 0.58 Crore also gets excluded leaving the total investment as Rs 36.71 - 1.30 = 35.41 Crores. Now dispute remains with regard to the investments made in items No. 5,7 and 9, which total upto Rs 22.62 Crores..

Item 5 refers to the investment made on account of Sales Generating Assets to the tune of Rs 6. 28 Crores. The contention of Mr. Naik is that the investment is not relatable to plant and machinery or production of the end product and therefore, is not a capital investment. On the same reasoning he questions the investments of 9. 59 Crores on Glass and Shells and Rs 6.75 Crores on capital works in progress.

According to Mr. Beig the above said investments are to be treated as investments towards the head “plant and machinery/ equipments. He submits that sale Generating Assets are those equipments like Visi Coolers, Chest Coolers which belong to the Company but are given to the retailers under a bailment agreement, for chilling the product manufactured by the company to ensure that when the product is sold it tastes the best for having been stored in a hygienic condition. The object is to generate sales. According to him Glass Bottle Shells are used for storing for sale the product whereas capital works in progress are those investments which are made to

make payments in advance for purchasing new machinery etc for the unit. Submission of Mr. Beig is that these investments qualify as capital investments under the head “Plant and Machinery”.

For appreciating the contention of Mr. Beig, learned counsel for the petitioner it would be necessary to understand the meaning of expression “plant”.

In Commissioner of Income Tax, Andhra Pradesh Vs M/s Mahal Hotel, Secunderabad, AIR 1972 SC 168, the Apex Court observed as follows:-

> . “Now it is well settled that where the definition of a word has not been given, it must be construed in its popular sense if it is a word of every day use. Popular sense means "that sense which people conversant with the subject matter with which the statute is dealing, would attribute to it". In the present case, S. 10 (5) enlarges the definition of the word "plant" by including in it the words which have already been mentioned before. The very fact that even books have been included shows that the meaning intended to be given to "plant" is wide. The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the "statute". When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. The word "include" is also susceptible of other constructions which it is unnecessary to go into.

Their Lordships further observed-

> “It cannot be denied that the business of a hotelier is carried on by adapting a building or premises in a suitable way to be used as a residential hotel where visitors come and stay and where there is arrangement for meals and other amenities are provided for their comfort and convenience. To have sanitary fittings etc. in a bath room is one of the essential amenities or conveniences which are normally provided in any good hotel, in the present times. If the partitions in Jarrold's case, (1963) 1

> WLR 214 (supra) could be treated as having been used for the purpose of the business of the trader, it is incomprehensible how sanitary fittings can be said to have no connection with the business of the hotelier. He can reasonably expect to get more customers and earn larger profit by charging higher rates for the use of rooms if the bath rooms have sanitary fittings and similar amenities. We are unable to see how the sanitary fittings in the bath rooms in a hotel will not be "plant" within S. 10 (vi) (b) read with S. 10 (5), when it is quite clear that the intention of the Legislature was to give a wide meaning and that is why articles like books and surgical instruments were expressly included in the definition of "plant". In decide cases, the High Courts have rightly understood the meaning of the term "plant" in a wide sense. (See. Commissioner. of Income-tax, U. P. v. Indian Turpentine and Rosin Co. Ltd. (1970) 75 ITR 533 (All)).”

In Scientific Engineering House (P) Ltd Vs Commissioner of Income Tax, Andhra Pradesh, AIR 1986 SC 338 it has been held as under:-

> “The next question is whether the acquisition of such a capital asset is depreciable asset or not? Under section 32 depreciation allowance is, subject to the provisions of section 34, permissible only in respect of certain assets specified therein, namely, buildings, machinery, plant and furniture owned by the assessee and used for the purpose of business while section 43(3) defines 'plant' in very wide terms saying "plant includes ships, vehicles, books, scientific apparatus and surgical equipments used for the purposes of the business". The question is whether technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of plant'.
>
> 11. Counsel for the assessee urged that the expression 'plant' should be given a very wide meaning and reference was made to a number of decisions for the purpose of showing how quite a variety of articles, objects or things have been held to be 'plant'. But it is unnecessary to deal with all those cases and a reference to three or four decisions, in our view, would suffice. The classic definition of 'plant' was given by Lindley, L. J. in Yarmouth v. France, (1887) 19 QBD 647 a case in which it was decided that a cart-horse was plant within the meaning of section 1(1) of Employers' Liability Act,

1880. The relevant passage occurring at page 658 of the Report runs thus :-

" "There is no definition of plant in the Act but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead. which he keeps for permanent employment in his business."

In other words, plant would include any article or object fixed or movable, live or dead, used by businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant the article must have some degree of durability, as for instance, in Hinton v. Maden and Ireland Ltd. (1960) 39 ITR 357 knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In C.I.T., Andhra Pradesh v. Taj Mahal Hotel, 82 ITR 44: (AIR 1972 SC 168) the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipeline fittings installed fell within the definition of plant given in S. 10(5) of the 1922 Act which was similar to the definition given in S. 43(3) of the 1961 Act and this, Court after approving the definition of plant given by Lindley L. J. in Yarmouth v. France as expounded in Jarrold v. John Good and Sons Ltd. (1962) 40 Tax Cas 681 (CA) held that sanitary and pipeline fittings fell within the definition of plant.

13. If the aforesaid test is applied to the drawings, designs, charts, plans, processing data and other literature comprised in the 'documentation service' as specified in Clause 3 of the agreement it will be difficult to resist the conclusion that these documents as constituting a book would fall within the definition of 'plant'. It cannot be disputed that these documents regarded collectively will have to be treated as a 'book', for, the dictionary meaning of that word is nothing but "a number of sheets of paper, parchment, etc. with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished by length and form from a magazine. tract, etc." (vide Webster's New World Dictionary). But apart from its physical form the question is whether these

> documents satisfy the functional test indicated above. Obviously the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and up-to-date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they were in a sense the basic tools of the assessee's trade having, a fairly enduring utility, though owing to technological advances they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired, by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of 'plant' and therefore a depreciable asset."

In another case CIT Vs Jai Drinks (P) Ltd Vol 173 ITR 100, the Rajasthan High Court held as follows:

> "The definition of 'Plant' in section 43 of the Income Tax Act 1961 is an inclusive definition and the intention of the Legislature to give it a wide meaning is evident from the fact that articles like books and surgical instruments have been expressly included in the definition of "plant". This inclusive definition of plant must be understood to mean, in its ordinary sense, as including all apparatus used by a businessman for carrying on his business but not as stock-in-trade"

Like-wise in Commissioner of Income Tax Vs Prem Nsth Monga Bottlers (P) Ltd (1997) 226 ITR 864 a Divion Bench of Delhi High Court held as follows:-

> "That the bottles were essential tools of the trade for it was through them that soft drink was passed on from the assessee to the customers. Without the bottles and shells, the soft drink could not be effectively transported. The

> bottles and their contents were totally inter-dependent. So were the Shells. The bottles and shells also satisfied the durability test because it was nobody's case that their life was so transitory or negligible so as to warrant an interference that they had no function to play in the assesse's trade. The bottles and shells were, therefore, 'plant' for purposes of the Income Tax Act and the assessee was entitled to depreciation in respect of them under section 32 (1) (ii) of the Income Tax Act 1961."

From the above judgments, it is manifest that in order to decide whether a particular subject is an apparatus/ plant, the test would be "***Does the article ful-fill the function of a plant of the assessee's trading activity*?** Is it a tool of trade with which he carries on his business. If the answer is in the affirmative, it will be 'Plant'.

Applying the afore-said test in the above cases different High Courts and the Supreme Court have held that even the documents constituting books would come within the term 'plant' and like-wise bottles and shells would constitute 'plant' if those are necessary for carrying on the business.

In the present case the plant has not been defined in the policy or by any SRO issued by the Government and therefore, for determining as to whether the investments made on account of sale, generating assets, glass bottles and shells the test to be applied would be as to Whether these are necessary for the trading activity of the petitioner company. It cannot validly be disputed that in view of the nature of the product which is soft drink manufactured by the petitioner, the requirement of the sale generating assets as well as the glass bottles and shells are necessary for the effective trade activity of the petitioner- Unit. Without the glass bottles & shells, Soft Drinks

manufactured by the petitioner Company cannot be sold nor the quality of the product can be maintained at the time of sale without the use of vici coolers etc. Therefore, in my considered view by applying the afore-said test, the investments made towards the sale generating assets and the Glass Bottles and Shells shall qualify as a capital investment. The investments made for works in progress for acquiring new machinery etc for the Unit would also qualify as capital investment. The investments made under the above heads do not deserve to be excluded simply because these are not connected with the plant, installed for manufacture of the Soft Drinks for the petitioner Unit. The investments made in connection with generation of sale of the manufactured product and for storage thereof would be deemed to be investments made for the 'plant' of the Unit.

The contention of Mr. Naik, therefore, does not have any merit.

Now counting the investments made on the items, land, lease-hold, building, plant and equipments, sale generating assets, Glass Bottles and Shells and capital work in progress, the total amount of investment made by the petitioner comes to Rs 36.24 Crores which is more than Rupees 25.00 Crores. Therefore, the petitioner company was entitled to be conferred the status of 'Prestigious' Unit in terms of the industrial policy.

The next contention of Mr. Naik, learned Advocate General is that even if the petitioner company is found to have invested more than Rs 25.00 Crores, as capital investment it could not

have been conferred the status of 'Prestigious Unit' by the Directorate of Industries, Jammu. The petitioner company could only be granted the status of the Prestigious Unit by the Government. Since the Director of Industries has no competence to declare the Unit of the petitioner as Prestigious Unit, therefore, the Government was justified in issuing the Govt order No. 20-GR (IND) of 2002 dated 25-10-2002 for keeping the Prestigious unit status of the petitioner company in abeyance.

The contention of Mr. Beg is that it will be of no consequence whether the order was issued by the Directorate of Industries or by the Government. Once the petitioner Company is found to have invested the amount requisite in its Unit it was entitled to the status of Prestigious Unit. The Government, therefore, could not have validly kept the order of the Director of Industries in abeyance. The Director of Industries is one of the functionaries of the Government and it is that department which was empowered to register the Units, so it was that office which was competent to declare the petitioner as 'Prestigious Unit', there being no provision either in the policy or in any SRO as to who would issue the declaration. Once the Director of Industries issued the declaration declaring the status of the petitioner company as prestigious unit the same could not validly be disputed by the Sale Tax Department of the Government nor the Government was justified in keeping the order of Director of Industries and Commerce in abeyance.

The fact of having made the investment of more than Rupees 25.00 Crores by the petitioner in the Unit towards substantial expansion of the Unit leads only to the conclusion that the Director of Industries and Commerce was justified in declaring the petitioner Unit as Prestigious Unit. The decision of the Director of Industries and Commerce for declaring the petitioner Unit as Prestigious Unit was in consonance with the new Industrial policy formulated by the Government and implemented through various SROs. The documents and material on record discloses that the Director of Industries and Commerce had issued the declaration after considering all the aspects of the Industrial policy. The order of the Director, Industries and Commerce having been issued after the policy of the Government came into force, could not be objected to either by the Government or by the Sales Tax Department validly. The Government is not entitled to project a technical plea that the order of the conferring the status of Prestigious Unit upon the petitioner company should have been passed by the Government instead of its Director, Industries and Commerce. The determinative factor for determining the entitlement of the petitioner company is making of investment of Rupees 25.00 Crores or more and not the authority which has issued the order for declaring such status of the petitioner company.

On the above facts it is therefore, held that the petitioner's unit ful-filled all the legal requirements necessary for being accorded the status of prestigious unit.

The next question relates to the entitlement of the petitioner company to the benefit of Tax exemption.

The contention of Mr. Naik, Advocate General is that the petitioner company is not entitled to the benefit of the Tax exemption as the product manufactured by it falls within the negative list as envisaged by SRO 249. The contention of Mr. Naik is without any force. On 20-8-1998 a Notification in terms of SRO 247 was issued by the Government of Jammu and Kashmir exempting Prestigious Units from payment of General Sales Tax and Central Sales Tax for a period of five years from the date of production or until such amount of exemption reaches the level of 150% of the capital investment in the project, whichever occurs earlier. The said SRO has already been re-produced above. On the same day SRO 249 was issued regarding exemption of General Sales Tax on sale of finished goods manufactured by the medium and large scale industrial units, registered with the Department of Industries and Commerce. It made no reference to Small and tiny units as also to Prestigious Units. The proviso to clause 6 of the Notification provided that incentives guaranteed shall not apply to goods specified in the schedule. It is not in dispute that Soft Drinks has been shown as item 8th to Schedule to Notification SRO 249 dated 20-8-1998.

Mr. Naik, learned Advocate General contends that as the petitioner's Unit was registered as Medium Scale Industrial Unit as it was involved in the manufacture of Soft Drinks being one of the goods specified in Schedule to SRO 249 it was not entitled to any

incentive. The contention of Mr. Beig however, is that there was no separate registration of Prestigious Unit. A medium or large scale industrial unit is different from a Prestigious Unit in the sense that if the capital investment made in the Unit is Rs 25.00 Crores or more, it becomes entitled to the status of Prestigious Unit and thereby becomes eligible for the incentives available to a Prestigious Unit. According to Mr. Beig the negative list which is applicable to Medium and large scale Industrial Unit cannot be applied to Prestigious Unit having a capital investment of Rs 25.00 Crores or more.

Similar contention was raised by the State of Jammu and Kashmir in the case of Jai Beverages (P)_ Ltd Vs State of J&K, (2006) 5 SCC 772. Their Lordships repelling the contention observed:-

> 28. SROs 247 and 249 were both issued on the same date, namely, on 20-8-1998. SRO 247 provides that the "prestigious units" shall have the option to avail of full exemption from payment of general sales tax and Central sales tax for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150% of the capital investment in the project, whichever occurs earlier. This exemption which was granted by the State Government in exercise of powers conferred by Section 5 of the Jammu and Kashmir General Sales Tax Act, 1962 read with sub-section (5) of Section 8 of the Central Sales Tax Act, 1956, does not refer to any negative list.
>
> 29. On the other hand SRO 249 issued on the same date provides that finished goods manufactured by newly established medium and large-scale industrial units registered with the Department of Industries and Commerce shall be exempted from

payment of general sales tax, which would have been otherwise payable, equivalent to 150% of the total capital investment made by the unit or for a period of 5 years from the date of production which ever occurs earlier subject to the conditions specified therein. It is not necessary for us to notice the conditions specified therein, but the proviso to para 6 of the notification is to the effect that the exemption granted under SRO 249 shall not apply to goods specified in the Schedule. Thus no exemption was permissible to medium and large-scale industrial units for the manufacture of goods mentioned in the Schedule, which includes "soft drinks" It was, therefore submitted by Mr. Venugopal that the negative list contained in SRO 249 is applicable only to " medium and large-scale industrial units" and not "prestigious units" contemplated by SRO 247. Both the SROs, namely, 247 and 249 were issued on the same date i.e. 20.8.1998. Whereas SRO 249 contains the negative list and confines its application to medium and large-scale industrial units, there is no such limitation in SRO 247. Moreover, Annexure 'B' to Government Order No. 202-IND of 1998, particularly paras 8 and 9 thereof refer to certain benefits conferred on small-scale, medium-scale and large-scale units. Sub-para (i), (ii) and (iii) of para 8 in terms provide that the benefits contained therein shall not be available to units which manufacture items brought on the negative list. Para 10 begins with non obstante clause and in terms provides that notwithstanding anything contained in para 7, 8 and 9, "prestigious units" shall have the option to avail of full exemption from payment of general sales tax, Central sales tax, etc.

30. Mr. Rohatgi, learned Senior Counsel appearing on behalf of the State, submitted that there is no reason why the negative list must not apply to all industrial units, whether small-scale or medium scale or large-scale or even "prestigious units". According to him the concept of negative list is the same and there is no reason why

"prestigious units" should be treated on a different footing from other units in the matter of application of negative list.

31. Having perused Annexure 'B' to GO No. 202-IND of 1998 of 27.5.1998, SRO 247 and SRO 249 issued on 20.8.1998, we are of the view that the negative list concept is not applicable to "prestigious units". Para 10 of Annexure 'B' to GO No. 202-IND of 1998 of 27.5.1998 in terms provides a special package of incentives for "prestigious units" and begins with the words "notwithstanding anything contained in paras 7, 8 and 9 above". In paras 8(i), (ii) and (iii) certain benefits are conferred on small-scale units, medium-scale units and large-scale units in the matter of payment of general sale tax, except on items brought in the negative list. There is no mention of the negative list in para 10 of the GO which clearly brings out the intention of the Government to treat "prestigious units" on a different footing altogether. Similarly, SRO 247, which grants exemption to "prestigious units" from payment of general sales tax and Central sales tax doe not refer to the negative list. Even SRO 249 to which the negative list is appended as a Schedule, only refers to finished goods manufactured by newly established "medium and large-scale" industrial units but does not refer to "prestigious units" which are treated as a separate class altogether.

32. It was sought to be argued before us that a "prestigious units" also must fall in the category of medium or large-scale industrial unit. Therefore, it was not reasonable to exclude the "prestigious units" while applying the negative list to medium and large-scale industrial units. The submission is not tenable. This is a matter of policy, and if the Government decides as a matter of policy to treat the "prestigious units" on a different footing than medium and large-scale industrial units, the courts will not interfere unless it is shown that there is something arbitrary or unreasonable in such classification. Large industrial undertaking provides greater employment

> opportunities and makes a large contribution to the State exchequer by way of revenue, and this may very well be a reason for according a special status to "prestigious units". It is worth noticing that while the Government's Industrial policy deals with tiny, small, medium and large-scale industrial units, the negative list is made applicable by SRO 249 only to medium and large-scale industrial units. Obviously tiny and small-scale industrial units have been excluded so far as SRO 249 is concerned. Under para 8(i) and 8(ii) of GO No. 202-IND of 1998, the negative list is made applicable to small-scale industrial units insofar as sale of finished goods and purchase of raw materials is concerned, but does not make it applicable to tiny units. It thus appears that wherever the negative list is made applicable it is so expressly provided. There is nothing in any of the notifications which may lead us to hold that the negative list applies to "prestigious units" as well. On the contrary the language employed in para 10 of GO 202-IND of 1998, which begins with the non obstante clause, supports the conclusion to the contrary. We, therefore, hold that the negative list concept does not apply to "prestigious units".

Therefore, in view of the observations made above, which apply to the present case from all four corners, I cannot agree with the submission of Mr. Naik that the petitioner-Unit is not entitled to the Tax benefits for the reason that it manufactures the product which falls in the negative list, as envisaged by SRO 249. Therefore, neither the Sales Tax Department nor the State Government could have validly denied the tax exemption in terms of the Industrial policy to the petitioner, which is a prestigious Unit.

After accepting the proposal of the petitioner and allowing him to make investment of more than Rs 25.00 Crores in the Unit the Government cannot be permitted reasonably to change its mind and thereby to restrict or fetter the amplitude of the concession provided by the Government in terms of Govt order No. 202-Ind of 1998.

In this view of the matter the order dated 15-1-2002 and 18-3-2002 issued by respondent No.5 rejecting the claim of the petitioner to the benefit of tax exemption on the grounds that it was dealing with the commodity falling in negative list cannot be legally sustained. The order of Government dated 25-10-2002 issued for keeping the prestigious status of the petitioner company in abeyance also is un-sustainable in law.

As held above the petitioner company is entitled to the Tax exemption in terms of Govt order No. 202-Ind of 1998 read with SRO 247 for a period of five years commencing from 11-1-2002, the date on which it was declared as 'Prestigious Unit' However, the State for introducing new Tax regime enacted The Jammu and Kashmir Value Added Tax Act 2005, which came into force on 1-4-2005.

During the pendency of the dispute relating to the status of the petitioner to be the prestigious unit and its entitlement of tax exemption the petitioner was not charging any tax either under GST, CST or VAT and issuing invoices with a foot note.

The commercial Tax Officer Circle-I Jammu passed order dated 26-7-2005 and thereby imposed the penalty of Rs

52307993.33 for the first quarter of 2005-2006 and consequently issued the recovery certificate dated 9-8-2005 for the said amount.

The order dated 26-7-2007 reads_

> "ORDER
>
> The dealer M/s Hindustan Coco-cola Beverages (P) Ltd., Gangyal, Jammu is a manufacturing unit dealing with Soft drinks. The state of Jammu and Kashmir introduced VAT Act, 2005 in the State w.e.f. Ist of April 2005 wherein the item of the dealer is included in schedule 'D' to the J&K VAT Act, 2005. The said item was taxable @ 12.5%. The dealer was therefore, under statutory obligation under the provisions of J&K VAT Act, 2005 to charge tax @ 12.5%. However, examination of the sale invoices being issued by the dealer revealed that the dealer was not issuing invoices as envisaged in section 59 of the J&K VAT Act, 2005. The dealer was adding a foot-note in the invoices being issued. The said foot-note read as under.
>
> "Sales tax exemptions entitlement of HCCBPL (Jammu) as per the Industrial Policy is the subject matter of writ petition before the Hon'ble High Court. We believe that the products sold under the invoice are exempt and statutory requirement needs issuance of vat invoice. Only for purpose of determining input tax credit as per provisions of the act the tax amount may be determined by deeming the same as being included in the price charged for sale of products hereinabove."
>
> The said foot note was against the spirit of J&K VAT Act, 2005 and was not in consonance with the provisions of the VAT Act. The default of the dealer was communicated vide this office letter No. 373/STI dated 25.5.2005. Subsequently, inspection of the unit was conducted on 06.06.2005 in presence of Sh. Sandeep Kohli, Finance Manager of the firm. During the course of inspection invoice Nos. 1186 to 1804 were examined and it was found that all the said invoices were bearing the Foot note mentioned above. The discrepancy was pointed on-spot and was discussed with Sh. Sandeep Kohli, Finance Manager of the firm. Besides, the statement of sales conducted w.e.f.

above number invoices was obtained from the dealer. Thereafter, a notice was issued vice this office letter No. 550/STI dt. 7.6.2005. In response to the notices issued form this office, the dealer has replied that the foot note appended to invoices is under the provisions of the J&K GST Act, 1962 wherein the dealer was entitled for exemption that has been denied by the Sales Tax Department and against which the dealer has preferred a writ before the Hon'ble High Court of Jammu and Kashmir.

With the introduction of J&K VAT Act, 2005 in the State the dealer was required to issue invoices as per the provisions of the said Act. Subsequently, issues, if any, pending like the one claimed by the dealer were to be solved as per the J&K GST Act, 1962 but after introduction of VAT regime the dealer was under legal obligation to follow the provisions enshrined in the J&K Vat Act, 2005. Therefore, the plea of the dealer that the matter is still pending before the Hon'ble High Court is not acceptable. Since the issue before the Hon'ble High Court was with regard to the exemptions issued under the J&K GST Act, 1962 which is not presently governing the item of the dealer. Therefore, the dealer was issued with the statutory notice for levying penalty vide this office no. 845-A/1 dt. 27.6.2005 and was directed to be present in this office on or before e12.7.2005. On the said date a letter was received for grant of 7 days for filing the reply. However, the matter had already been discussed at length with the representatives of the unit wherein the default committed was communicated to the dealer. Therefore, it was inferred, that by seeking more time the dealer was just trying to delay the matter and since the default of the dealer is pre-judicial to the interests of the revenue, the plea of the dealer for grant of more time, is not acceptable and hence rejected. While appending the foot-note in the invoices (Marked as Annexure-A), the dealer was issuing False Invoices.

As per the meaning of the word 'False', it means not according with fact, wrong, incorrect. 'False' means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue.

> In Black's Law Dictionary (P. 722) it is stated; "In law, this word usually means something more than untrue; it means something designedly untrue and deceitful and implies an intention to perpetrate some heachery or fraud.
>
> The invoices being issued bearing the foot note were incorrect and wrong. As per the interpretation of term False, it is found that the offence in the instant case is an offence of issuance of False invoices. Therefore, the dealer is found guilty of offence under section 69(1) (k) of the J&K VAT Ac, 2005 for issuance of false invoices. Hence the dealer is liable to be penalized under the above mentioned Section and therefore attracts a penalty equal to ten times of the tax payable on each such default or rupees ten thousand whichever is higher. The tax payable on invoice value of the false invoices was calculated from the sale statement obtained from the dealer and amount equal of ten times the amount of tax payable was compared with rupees ten thousand to determine penalty under the above mentioned Section of the Act. Penalty calculated and levied comes to Rs. 52307993.33 and stands recoverable.
>
> Office to issue Demand Notice Accordingly.
>
> Order passed on 26.07.2005.
>
> Sd/-
>
> Commercial Taxes Officer,
>
> Circle "I" Jammu."

The petitioner through OWP No. 579 is questioning the legality of the order dated 26-7-2005 and recovery certificate dated 9-8-2005.

The principal question arising for consideration in this writ petition is; ***Whether the exemption enjoyed by the petitioner in terms of SRO 247 issued under General Sales Tax Act and promissory estoppel survives after the enforcement of the Jammu and Kashmir Value Added Tax Act 2005***?

In order to appreciate controversy it would be necessary to understand the scope of General Sales Tax Act and Value Added Tax Act. Section 4 and 4-A of General Sales Tax Act deal with the liability of the dealer of the goods to pay sales tax and surcharge tax on the Sale of goods. Relevant portion of section 4 is being re-produced hereunder:

> "4.Liability to tax under this Act- (1) Subject to the provisions of this Act, every dealer, except the one dealing exclusively in goods declared tax free under section 5, shall pay for each year tax on his (taxable turnover) at a rate (not exceeding forty percent) of such turn over as may be determined by the Government and notified by the Government in the Government Gazette and such tax shall be charged on the sale of goods once only."

Section 4-A and 4-B reads:-

> " 4-A Surcharge Tax- Every dealer liable to pay tax under this Act shall also pay a surcharge equal to five percent of the amount of tax payable by him and the provisions of this Act, in regard to assessment, payment and recovery of tax and all other matters including liability to pay interest connected therewith shall apply to the assessment, payment, recovery of such surcharge as if it were a tax leviable under this Act."

> "4-B Levy of purchase tax- (1) Every dealer who is liable to pay tax under this Act and who-
> (a) purchase taxable goods from any source in the State and uses them in the State in the manufacture of other goods; or
> (b) Purchase taxable goods from any source in the State and uses them in the State in the manufacture of any other goods and disposes of the manufactured goods in any manner otherwise than by way of sale whether within the State or in the course of interstate trade or commerce or in the course of export out of the territory of India within the meaning of sub-section (1) of Section 5 of the Central Sales Tax Act, 1956; or

> (c) Purchase taxable goods and exports them; in the circumstances in which no tax is payable under any other provision of this Act, shall be liable to pay tax on the purchase of such goods at the same time at which it would have been leviable on the sale price of such goods under section 4. Such tax shall be charged and paid at such point as may be specified by the Government.
>
> (2) Notwithstanding anything contained in this Act or the rules made thereunder, if the goods leviable to tax under this section are exported in the same condition in which they were purchased, the tax shall be levied, charged, and paid before the goods leave the State and the tax so levied, charged and paid shall be provisional one and the same shall be adjustable towards the tax due from the dealer on such purchases as a result fo assessment or re-assessment made in accordance with the provisions of this Act, and the rules made there-under on the production of proof regarding the payment thereof in the State."

Thus under the above provisions a dealer has been made liable to pay tax upon the sale of goods. The dealer in fact does not pay such tax out of his own profits but pays the same after collecting it from the consumers to whom he makes the sale of his goods.

Section 5 of the Act empowers the Government to exempt a dealer from the liability to pay Sales Tax. It reads-

> "5. Exemption from Taxation- (1) The Government may; subject to such restrictions and conditions as may be prescribed, including conditions as to licence and licence fees, by order exempt in whole or in part from payment of tax any class of dealer or any goods or class or description of good.
> (2) Notwithstanding anything contained in sub-section (I) of section 4 of this Act, the Government may, subject to such conditions as it may consider necessary by notification in the Government Gazette, direct that a class or classes of dealers manufacturing goods in the State shall be entitled

> to rebate in the tax payable on the sale of such manufactured goods equal to amount of tax paid by them on the raw material actually used in manufacture of such goods.
> (5-A) Notwithstanding anything contained in section 4 and 5, the Commissioner may, in such circumstances under such conditions and for such period as may be prescribed permit (any class of assesses) to pay in lieu of the amount of tax payable by him under the provisions of this Act, a lump sum determined in the prescribed manner at prescribed rate by way of composition and the sum so compounded shall be payable by the4 assessee."

The effect of tax exemption under section 5 is not that a dealer who has been exempted from the payment of sales tax, would charge the sales tax from the consumer to whom he sells his goods and keep the same with him. The effect of exemption is that neither he charges the tax from the consumer nor he pays the same to the state meaning thereby that his goods would be sold at a cheaper price to the consumer i.e. without tax being levied on such sale of goods by the dealer to the consumers.

A dealer who is liable to pay tax on the sale of his goods is liable to pay Purchase Tax as well if he purchases taxable goods from any source in the State and uses them in the State for manufacture of other goods or disposes of such manufactured goods otherwise than by way of sale within the State or outside the State or Purchases taxable goods and exports them in the circumstances in which no tax is payable by him under other provisions of the Act.

Now under the new tax regime introduced by Value Added Tax Act broadly speaking the scheme of imposition of tax upon the dealers

is that under section 12, firstly every dealer whose gross turn over of sales or purchases during the year preceding the commencement of the Act exceeded the taxable limit has been made liable to pay tax on his sales or purchases as the case may be; secondly a dealer registered under the provisions of J&K General Sales Tax Act 1962 or Central Sales Tax Act 1956 have been made liable to pay Tax on their sales or purchases; Thirdly, the dealers except above whose gross turn over first exceeds the taxable limit during any period of twelve consecutive months; have also been made liable to pay tax on sales or purchases made on or after the appointed day with effect from the date immediately following the day on which his gross turnover first exceeded the taxable limit during a period of any twelve consecutive months; fourthly a dealer who is liable to pay tax under VAT Act or Central Sales Tax Act or who is registered dealer under VAT Act or Central Sales Tax Act at any time after the commencement of the Act has been made liable to pay tax on sale or purchase of goods.

Section 13 provides that tax payable on sale of goods by a dealer liable to pay tax, shall be levied on his taxable turnover while section 14 deals with the tax on purchase of goods. Section 15 makes the provision for levy of tax on the sale or purchase of containers and packing material. Section 16 speaks of the rate of tax.

Section 18 defines output tax and Section 19 deals with Input Tax. Section 20 provides for the manner in which tax payable is to be worked out. Section 27 makes the registration of dealers liable to pay tax compulsory. Section 30 makes failure to register liable for

imposition of penalty. Section 31 makes furnishing of periodical returns and payment of tax obligatory while Section 32 provides for imposition of penalty for default in furnishing the return and payment of tax.

From the above, it would transpire that though object of both the Acts essentially is to impose tax on the sale or purchase of goods, yet both operate in different fields. Under section 5 of General Sales Tax Act the Government is empowered to exempt a dealer from the liability to pay tax, however, under VAT Act by section 79-A introduced in the Act by Value Added Tax (Amendment) Act 2006, a provision has been made for remission of the tax paid by a dealer. Section 79-A reads:

> "5. Insertion of Section 79-A in Act III of 2005
>
> After section 79 of the principal Act, the following section shall be inserted, namely-
>
> '79-A Remission of Tax-Notwithstanding anything contained in the Act, the Government may for the purpose of promotion of industry in the State, by notification in the Government Gazette, grant remission from payment of tax under the Act for such period and subject to such restrictions and conditions as it may deem proper"

So under the above provision the dealer first pays the same and then gets the refund thereof. Whereas under section 5 of General Sales Tax Act the exemption granted is from payment of Tax.

Now the question is, whether a dealer who has been enjoying the benefit of the exemption under section 5 of GST Act would continue to enjoy the same upto his full period of exemption or same would come to an end on the day VAT Act came into force?

The petitioner would have been enjoying the exemption under GST Act for a period of five years w.e.f. 11-1-2002, but before the expiry of his period of exemption, the GST Act came to be repealed by VAT Act 2005 which came into force on 1-4-2005, in terms of its section 103 which reads as follows:

> "103 Exclusion and Savings
> (1) With effect from the appointment day, the Jammu and Kashmir General Sales Tax Act 1962 (Act No. XX of 1962) shall cease to have application in respect of goods to which the act applies.
> (2) Notwithstanding anything contained in sub-section (1), the application of the Act to any such goods shall not-
> (a) Revive anything not in force, or in existence, at the time of such application;
> (b) Affect the previous operation of the Jammu and Kashmir General Sales Tax Act, 1962 or anything done or suffered there-under;
> (c) Affect any right privilege, obligation, or liability acquired, accrued or incurred under the Jammu and Kashmir General sales Tax Act, 1962;
> (d) Affect any penalty, forfeiture or punishment incurred or inflicted in respect of any offence or violation committed under the provisions of the Jammu and Kashmir General Sales Tax Act, 1962; or
> (e) Affect any investigation, enquiry, assessment, proceeding, any other legal proceedings or remedy instituted, continued or enforced under the Jammu and Kashmir General Sales Tax Act, 1962;"

Case of the petitioner as projected in paras 27 and 28 of the writ petition is that by virtue of section 103 (2) (c) the petitioner's right to exemption from sales tax which had accrued or come into existence under J&K General Sales Tax Act remains

unaffected by the provisions of the VAT Act. It is the further case of the petitioner " *that in line with the provisions of section 103(2) (c) of the Jammu and Kashmir Value Added Act, the State Government issued Government order No. 168-IND of 2005 dated 30-6-2005, whereby the State Government modified para 3.12 of Annexure-II (Package of incentives) to Government Order No. 21-IND of 2004 dated 27-1-2004 (Industrial Policy 2004) and provided that small, medium and large scale industrial units (which were entitled to exemption from sales tax under the Jammu and Kashmir General Sales Tax Act shall be provided relief under the VAT regime in the form of remission of VAT on the sale of their finished products. It was further expressly provided in order that the VAT chain is not broken, VAT at the prescribed rates shall be charged on the sale of finished products by such industrial units, in order words, even though the benefit of VAT exemption was given to the small, medium and large scale industrial units, they were allowed to issue sales invoices showing VAT as having been recovered, so that the VAT chain was not broken and the customers would be entitled to claim and avail of VAT credit of the tax shown in the invoices issued by the manufacturers*."

The stand of the respondents taken in reply is as follows:

> "27. That the contents of para 27 in so far as it pertains to section 103 of the J&K VAT AQct 2004 are concerned, these are matter of record. However, it is denied that any right has accrued to the petitioner to exemption from sales tax which has specifically been rejected and against which the petitioner has filed the above titled writ

> petition, which is pending disposal before the Hon'ble Court.
> 28. That in reply to para 28, it is respectfully submitted that in the Govt order 168-IND of 2005 dated 30-6-2005, it has specifically been mentioned that the relief extended under this Government order with regard to incentives shall be subject to the existing negative list. Since the commodity dealt in by the petitioner has already fallen in negative list, therefore, it is not entitled to any exemption or incentives as alleged in this para."

The petitioner has already been held entitled to exemption from Sales Tax, therefore, the plea of the respondents taken in the reply does not hold good.

Be it so, the question remains whether section 103 (2) (c) saves the rights created under GST Act.

Section 6 of General Clauses Act deals with the effect of repeal. It provides as follows:

> "6. Effect of repeal.- Where this Act, or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not-
> (a) revive anything not in force or existing at the time of which the repeal takes effect; or
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there-under; or
> (c) affect anything, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed or;
> (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability,

> penalty, forfeiture or punishment as afore-said;
>
> and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

Thus under section 6 (2) (c) unless different intention appears in the repealing Act, the fact of repeal does not affect any right privilege, obligation or liability acquired, accrued, or incurred under the Act repealed, meaning thereby that for the purposes of such right, liability, privilege or obligation despite the repeal, would remain un-affected. It be seen that it is not a case of repeal simplicitor but here while repealing the previous Act new enactment has also been made in which the provision analogous to section 6 of General Clauses Act has also been enacted in section 103. A distinction exists between a repeal simpliciter and a repeal by an Act which is substituted by another Act..

In Gammon India Ltd Vs Special Chief Secy, 2006 (3) SCC 354, Assistant Commissioner of Commercial Taxes Warrangal Division Andhra Pradesh initiated and completed penalty proceedings under Andhra Pradesh General Sales Tax Act 1957 after its repeal on 1-4- 2005 by the coming into force of A.P. VAT Act. The question arose before the Supreme Court whether the commissioner possessed the jurisdiction in initiating proceedings under the AP General Sales Tax Act after its repeal. Andhra Pradesh GST Act was repealed by Section 80 of the Andhra Pradesh VAT Act which reads as follows:-

> "80(1) The Andhra Pradesh General Sales Tax Act, 1957 is hereby repealed provided that such repeal shall not effect the previous operation of the said Act or section or any right, title, obligation or liability already acquired, accrued or incurred there-under and subject thereto, anything done or any action taken (including any appointment, notification, notice, order, rule from regulation, certificate, license or permit) in the exercise of any power conferred by said Act or Section shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act was in force on the date on which such thing was done or action was taken and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.
>
> (2) Notwithstanding anything contained in sub-section (1), any application, appeal, revision or other proceedings made or preferred to any officer or authority under the said Act or section and pending at the commencement of the Act, shall, after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceedings was made or preferred.
>
> (3) Upon such repeal of the Andhra Pradesh General Sales Tax Act, 1957 the provisions of Sections 8, 8-A, 9 and 18 of the Andhra Pradesh General Clauses act, 1891 shall apply."

Section 8 of the Andhra Pradesh General Clauses Act referred to in section 20 (3) is in para-materia with section 6 of the Jammu and Kashmir General Clauses Act. In section 103 of the J&K VAT Ac,. the provision analogous to the provisions of section 6 has been made.

Their Lordships after noticing the legal position which existed in England before Section 38 (2) was inserted in the Interpretation Act of 1989 and other relevant cases on the point held as under:-

> "On critical analysis and scrutiny of all relevant cases and opinions of learned authors, the conclusion becomes inescapable that whenever there is a repeal of an enactment and simultaneous reenactment, the reenactment is to be considered as reaffirmation of the old law and provisions of the repealed Act which are thus reenacted continue in force uninterruptedly unless, the reenacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of the reenacted enactment and the mere absence of saving clause is, by itself, not material for consideration of all the relevant provisions of the new enactment. In other words, a clear legislative intention of the reenacted enactment has to be inferred and gathered whether it intended to preserve all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether"

On the above reasoning the Supreme Court held that proceedings were validly instituted and carried on against the appellant despite the repeal.

In State of Punjab Vs Mohar Singh, AIR 1955 SC 64 the Apex Court held:

> " ….Whenever there is a repeal of an enactment; the consequences laid down in Section 6 of the General Causes Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore

subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is reppeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

Yet again in India Tabacco Co Ltd Vs Commercial Tax Officer, AIR 1975 S.C 155 the Supreme Court held:

"16.It is now well settled that repeal connotes abrogation or obliteration of one statute by another, from the statute book as completely "as if it had never been passed"; when an Act is repealed, "it must be considered (except as to transactions past and closed) as if it had never existed." (Per Tindal, C. J. in Kay v. Goodwin, (1830) 6 Bing 576 at p. 582 and Lord Tenterdon in Surtees v. Ellison, (1829) 9 B and C 750 at p. 752) cited with approval in State of Orissa v. M. A. Tulloch and Co., AIR 1964 SC 1284.

17. Repeal is not a matter of mere form but one of substance, depending upon the intention of the legislature. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment, wholly or in part, then, it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal (see Craies on Statute Law, 7th Edn. pp. 349, 353, 373. 374 and 375; Maxwell's Interpretation of Statutes, 11th Edn. p. 164, 390 based on Mount v. Taylor, (1868) 3 CP 645: Southerland's Statutory Construction 3rd Edn. Vol. I, Paragraphs 2014 and 2022 pp. 468 and 490). Broadly speaking, the principal object of a Repealing and Amending Act is to 'excise dead matter, prune off superfluities and reject clearly

inconsistent enactments' - see Mohindar Singh v. Mst. Harbhajan Kaur,"

After noticing the above cases their Lordships of the Supreme Court in Udai Singh Dagar Vs Union of India 2007 AIR SCW 4638 observed as follows:

"65.The legal position as to where there is a repeal of an enactment and simultaneously re-enactment whether the re-enacted enactment manifests an intention in compatible with or contrary to the provisions of the repeal statute has to be ascertained upon consideration of all the relevant provisions of the re-enacted enactment. This is no longer res integra.

66. Mr. Nariman, however, would submit that in terms of Section 6(1) (c) of the General Clauses Act which corresponds to section 17(1) (c) of the English Interpretation Act, 1978 not only a vested or accrued right but also an inchoate right is protected. Strong reliance in this behalf has been placed on a decision of the Court of Appeal on Chief Adjudication Officer and another Vs Maguire (1999) (2) ALL ER 859) where it is stated:

'The relevant overpayment there had been made before the legislation changed but the fact of such over payment was not discovered until afterwards. The Secretary of State sought to contend that S. 53 was retrospective. In holding not, the House of Lords decided rather that S. 119 could still be operated to effect recovery (albeit with greater difficulty for the Secretary of State) in respect of pre-repeal overpayments. Having cited S. 16 (1) (c) (of interpretation Act 1978) Lord Woolf said this:

"Inchoate rights and obligations and liabilities are covered by (c). This was established by Free Lanka Insurance Co Ltd Vs Ranasinghe (1964) AC 541. In that case the Privy Council had no difficulty in construing the Ceylon Interpretation Ordinance 1900 as including an inchoate or contingent right and the same approach should be adopted to the interpretation of 'right', 'obligation. 'or liability in S.16 of the Act of 1978. The Section clearly contemplates that there will be situations where an investigation,

> legal proceedings or remedy may have to be instituted before the right or liability can be enforced and this supports this approach"

Their Lordships have further observed:

> "69. We are not beset with such a situation in the instant case. The right of the petitioners to practice in the field of veterinary practice has expressly been taken away. When such a right has been taken away upon laying down an essential qualification, therefore which the petitioners admittedly do not possess, the right of the petitioners to continue to practice despite the fact that they do not fulfill the criteria laid down under the Parliamentary Act or the central Act would not survive.
> 70. The expression 'unless a different intention appears' contained in section 6 of the General Clauses Act, thus, in this case, would be clearly attracted. A right whether inchoate or accrued or acquired right can be held to be protected provided the right survives. If the right itself does not survive and either expressly or by necessary implication it stands abrogated, the question of applicability of section 6 of the General Clauses Act would not arise at all."

Thus it stands firmly settled that unless in the repealing Act different intention appears, all privileges, obligations or liabilities acquired, accrued or incurred under the repealed Act would remain un-affected. In the instant case what had been acquired by the petitioner under the repealed Act was his right to be exempted from liability to pay Sales Tax leviable under the provisions of General Sales Tax Act.

Such right acquired by the petitioner would be saved only if from the provisions of VAT Act it does not appear that the legislature intended expressly or by necessary implications to destroy the right

acquired under the repealed Act. And provided that even after the enactment of VAT Act right of exemption survives. If the right itself does not survive and either expressly or by necessary implication it stands abrogated the question of applicability of section 6 of General Clauses Act or Section 103 of VAT Act would not arise at all.

The petitioner would have enjoyed exemption from its liability to pay tax in terms of SRO 247 for period of five years ending on 11-1-2007, had the value Added Tax not been enacted.

The tax benefit envisaged by SRO 247 relates to the Tax leviable in terms of the provisions of General Sales Tax Act. Therefore, the petitioner would not have been liable to pay only that sales tax under the exemption which he was to pay under the provisions of General Sales Tax Act in view of its status as Prestigious Unit upto 11-1-2007 if Value Added Tax Act had not come into force. But as already said before the said date could reach Value Added Tax Act came into force on 1-4-2005. By operation of section 103 (1) (c) of Value Added Tax Act what could be saved was his right to escape from his liability to pay tax under General Sales Tax Act, meaning thereby if the petitioner had been liable to pay any tax under General Sales Tax Act, that liability would not have been enforceable in view of the exemption granted despite the coming into operation of the Value Added Tax Act on 1-4-2005. However, the VAT Act has introduced a new tax regime. There is no provision in VAT Act for exempting from liability to pay tax under the said Act, any dealer who stood exempted from payment of sales Tax in terms of

section 5 of the General Sales Tax Act (repealed Act). Though both Acts deal with imposition of Tax upon sale and purchase of goods but extent and manner of imposition of tax is different. Section 5 of the General Sales Tax Act empowers the Government to give exemption from payment of tax to a dealer while section 79-A of VAT Act confers the power for granting remission of Tax. The VAT Act thus destroys the right of the Government to grant exemption from payment of Tax.

With the coming into force of Value Added Tax Act on 1-4-2005 the exemption granted in regard to the payment of Tax under General Sales Tax Act automatically ceased to have any effect for the reason that no sales tax under General Sales Tax Act was leviable after 1-4-2005 and there being no power to grant exemption from payment of Tax. The right of exemption saved by section 103 of Value Added Tax Act can only refer to the liability under the General Sales Tax Act and not the liability created under the Value Added Tax Act. Despite the exemption from payment of Sales Tax under General Sales Tax Act the petitioner would not be exempted from his liability to pay tax under Value Added Tax Act. Therefore, the right of exemption would stand abrogated and as such will not survive.

This being the position the petitioner is held to be liable to pay tax under the Value Added Tax Act with effect from 1-4-2005. But for the period 12-1-2002 the date on which it was declared as prestigious Unit upto 31-3-2005, the petitioner shall be entitled to

exemption from payment of Sales Tax in terms of SRO 247 read with Govt order No. 202-Ind of 1998 dated 27-5-1998.

The contention of Mr. Beig that only way to give real meaning to the exemption granted under section 5 of the General Sales Tax Act in view of the Industrial Policy envisaged by Govt order No. 202-Ind of 1998 is to hold that the privilege granted to Prestigious Units under General Sales Tax Act shifts to the privilege envisaged by Value Added Tax Act by Section 79-A is not acceptable. Both the sections of the two Acts operate in different fact situations. Section 5 deals with exemption from payment of Tax as contemplated by General Sales Tax Act while section 79-A deals with remission of tax paid under VAT Act.

Mr. Beig, learned counsel for the petitioner submits that after coming into force the Value Added Tax Act, the issue of granting benefit of Tax exemption came to be considered and the Govt issued Notification SRO 91 dated 16th March, 2006 and thereby extended the benefit of tax remission to Small, Medium and large Scale Industrial Units for the reasons recorded in Sub-joined Schedule to the SRO which reads as follows:-

> "Sub-Joined Schedule.
>
> Whereas the Industry in the State is still in a formative stage it is necessary to continue with the tax incentives provided to the industry so that competitiveness of the local industries does not suffer and at the same time sufficient employment opportunity is provided to the unemployed youth of the State. It therefore, becomes imperative that for the larger public interest Government patronage is provided to the industry allowing it to sustain also to attract investment in this fast

> growing sector so important for the economic prosperity of the State.
>
> Now, therefore, it is the considered opinion of the Government that there is a need to provide tax incentive to the industry in the shape of tax remission under the Value Added Tax regime in a manner as does not break the VAT chain."

SRO 91 contemplates granting of remission of Tax in favour of Small, medium and large scale Industrial Units upto the year 2010. According to Mr. Beig that even after the enforcement of Value Added Tax Act the Government found it necessary to grant Tax benefit to the said Units in view of the fact that the industry in the State was still in formative stage. Why similar benefit should not be extended to Prestigious Units going by the same reasoning that industry in the State is still in the formative stage. Mr. Beig contends that the State Government could not have left out the Prestigious Units while granting tax benefits to Small, Medium and Large Scale Industrial Units.

Be that it may, the fact remains that granting of the similar benefits to Prestigious Units is a policy matter for the Government to decide in which Courts have no role to play. It would suffice to say that it would have been appropriate if the Government had considered the case of Prestigious Units as well for granting Tax remissions, which it may even now consider as after all the Prestigious Units are also most important component of industrial growth needed much in the State.

Be it so the fact remains that no benefit under VAT Act stands granted to Prestigious Units, therefore, the orders of the

Authority under the Value Added Tax Act imposing the penalty cannot be held to be invalid because the petitioner was enjoying the tax exemption in terms of SRO 247. As the exemption granted is not extendable to the liability to pay tax under the Value Added Tax Act, the petitioner is, therefore, liable to pay tax under that Act.

Without prejudice to the right of the petitioner to appeal or avail other available remedies under the Value Added Tax Act the orders issued for imposition of penalty are held to be legally competent..

For the reasons stated above writ petition OWP No. 513/ 2002 is allowed and the petitioner is held to be a Prestigious Unit, entitled to the tax exemption benefit in terms of SRO 247 w.e.f. 12-1-2002 to 31-3-2005 and consequently the orders dated 15-1-2002, 18-3-2002 and 25-10-2002 impugned are set aside. However, OWP No. 579/ 2005 shall stand dismissed, alongwith connected CMPs.

(Y.P. NARGOTRA)
JUDGE

JAMMU
September 11, 2007.
*** Maini * PS**