

IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CIVIL EXTRA ORDINARY JURISDICTION)

DATED : 15.11.2010

CORAM

HON'BLE MR. JUSTICE P.D. DINAKARAN, CHIEF JUSTICE

1. Writ Petition (C) No. 11 of 2008

M/s Unicorn Industries
A Partnership Firm
Through it's Managing Partner,
Shri Vedprakash Wadhwani,
Khasra No. 786/1064,
Mahjigaon, Jorethang Housing Road,
Jorethang,
South Sikkim-737121.

...Petitioner.

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:



The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).

4. State of Sikkim
(Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioner : Mr. Paresh M. Dave, Mr. Chetan
Pandya and Mr. Ashim Chhetri
Advocates.

For the respondents : Mr. A. Moulik, Sr. Advocate with
Ms. K. D. Bhutia, Advocate for
respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr. S.
K. Chettri, Assistant Government
Advocate for respondent No.4.

2. Writ Petition (C) No. 20 of 2008

1. Messrs Avinashi Industries,
A Partnership firm having its factory and
Address at Khasra No. 335(P),
Near Vanaspati Factory,
Manpur Via Melli Post Office,
South Sikkim-737 128.
2. Shri Bhagvanbhai Nagardas Patel,
Partner of Messrs Avinashi Industries,
Having his Address at
C/o Messrs Avinashi Industries,

Khasra No. 335(P),
Near Vanaspati Factory,
Manpur Via Melli Post Office,
South Sikkim-737 128.

...**Petitioners**

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...**Respondents.**

For the petitioners

: Mr. A.K. Upadhyaya, Sr. Advocate
with Mr. Ashim Chhetri, Ms. Binita
Chhetri, Advocates



For the respondents : Mr. A. Moulik, Sr. Advocate with
Ms. K.D. Bhutia, Advocate for
respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr. S.
K. Chettri, Assistant Government
Advocate for respondents No.4.

3. **Writ Petition (C) No. 22 of 2008**

1. Messrs Sikkim Organics,
A Partnership firm having its
Factory at Khasra No. 392 and 393 Manpur,
P.O. Manpur, South Sikkim.
2. Shri Sunil Jaiswal,
S/o Shri C. K. Jaiswal,
Managing Partner of Messrs Sikkim Organics,
Having his address at
C/o Messrs Sikkim Organics
P.O. Manpur, South Sikkim-737 128.

...Petitioners

Versus

1. The Union of India,
It's Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,



Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).

4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. A.K. Upadhyaya, Sr. Advocate
with Mr. Ashim Chettri, Ms. Binita
Chhetri, Advocates.

For the respondents : Mr. A. Moulik, Sr. Advocate with
Ms. K. D. Bhutia, Advocate for
respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr. S.
K. Chettri, Assistant Government
Advocate for respondent No.4.

4. Writ Petition (C) No. 27 of 2008

1. Akshay Ispat and Ferro Alloys Private Ltd.,
A Company incorporated under the provisions of
The Registration of Companies Act, Sikkim 1961
And having its registered office and factory at
Mamring, Dist. Namchi, South Sikkim-737132.
2. Shri J.D. Jalan,
Son of Late V.N. Jalan,
Director, Akshay Ispat & Ferro Alloys Ltd.,



Residing at Rangpo, East Sikkim.

Both represented by their constituted Attorney
Shri Bhikhim Chand Periwal,
Son of Late Kedarmul Periwal,
Resident of M.G. Marg,
P.O. & P.S. Gangtok, East Sikkim.

...Petitioners

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. Sudesh Joshi and Ms. Manita Pradhan, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with Ms. K. D. Bhutia, Advocate for respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal, Government Advocate and Mr. S. K. Chettri, Assistant Government Advocate for respondent No.4.

5. Writ Petition (C) No. 13 of 2009

1. M/s Promising Exports Limited,
Crescent Tower-229,
J.C. Bose Road, 2nd Floor Suit # 2A,
Kolkata-700020.
Having its industrial unit at Manpur,
Khatiyon No. 25, Khasra No. 334 & 335,
South Sikkim-737132.
2. Shri Sushil Kumar Halwai,
Son of Shri Shyam Sundar Halwai,
R/o 37 VIP Road, Natural Height,
Block-8, Room No. 2C,
Kolkata-52
Director, M/s Promising Exports Ltd.,

...Petitioners

Versus

1. The Union of India,
It's Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,



Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).

3. The Deputy Commissioner of Central Excise,
Gangtok Division,
It's Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
It's Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. A.K. Upadhyaya, Sr. Advocate
with Mr. Ashim Chettri, and Ms.
Binita Chhetri, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with
Ms. K.D. Bhutia, Advocate for
respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr. S.
K. Chettri, Assistant Government
Advocate for respondent No.4.

6. Writ Petition (C) No. 17 of 2009

1. Godrej Consumer Products Ltd.,
A Company incorporated under the provisions of
the Companies Act, 1956
and having its registered office at
Pirojshanagar, Eastern Express Highway,
Vikhroli, Mumbai-400 079 and factory at



Mamring, Dist. Namchi, South Sikkim-737132.

2. Shri M.G. Subramaniam,
Son of Shri M.K. Ganapathy,
Shareholder of:
Godrej Consumer Products Ltd.,
Resident of Block No. N, Rajeswari,
Road No. 17, Chembur,
Mumbai-400 071.

...Petitioners

Versus

1. The Union of India,
It's Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.



For the petitioners : Mr. Sudesh Joshi and Ms. Manita Pradhan, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with Ms. K.D. Bhutia, Advocate for respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal, Government Advocate and Mr. S.K. Chettri, Assistant Government Advocate for respondent No.4.

7. Writ Petition (C) No. 22 of 2009

1. M/s JNRT Commercial Pvt. Ltd.,
A Private Limited Company incorporated
under the Registration of Companies Act, 1956
Having its registered office at
9/12 Lal Bazar Street,
1st Floor, Merchantile Building, Block-A
Kolkata, W.B.-700001.
2. Mr. Rajen Sharma,
S/o Manorath Sharma,
Poudyal Niwas, Sichey,
Gangtok
(Share Holder & Director of
JNRT Commercial Pvt. Ltd.)

...Petitioners

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.



2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. Zangpo Sherpa and Mr. Pem
Tshering Lepcha, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with
Ms. K.D. Bhutia, Advocate for
respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr.
S.K. Chettri, Assistant
Government Advocate for
respondents No.4.

8. Writ Petition (C) No. 23 of 2009

1. M/s Epitome Petrochemical Pvt. Ltd.,
A Private Limited Company incorporated
Under the Registration of Companies Act, 1956



Having its registered office at
16, Ganesh Chandra Avenue,
Kolkata, W.B.-700013.

2. Mr. Rajen Sharma,
S/o Manorath Sharma,
Poudyal Niwas, Sichey,
Gangtok
(Share Holder & Director of
JNRT Commercial Pvt. Ltd.)

...Petitioners

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. Zangpo Sherpa and Mr. Pem Tshering Lepcha, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with Ms. K.D. Bhutia, Advocate for respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal, Government Advocate and Mr. S.K. Chettri, Assistant Government Advocate for respondent No.4.

9. Writ Petition (C) No. 37 of 2010

1. Sikkim Agro Chem Pvt. Ltd.
A Company incorporated under the Provisions of the Registration of Companies Act, Sikkim 1961
And having its registered office and Factory at Majitar, East Sikkim.
2. Shri Sandip Killa,
S/o Shyam Sundar Killa,
Director of Sikkim Agro Chem Pvt. Ltd.,
Residing at Majitar, East Sikkim.

...Petitioners

Versus

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,



C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).

3. The Deputy Commissioner of Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C.R. Buildings,
Hakimpara, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Department of Commerce and Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

...Respondents.

For the petitioners : Mr. Sudesh Joshi and Ms. Manita Pradhan, Advocates

For the respondents : Mr. A. Moulik, Sr. Advocate with Ms. K.D. Bhutia, Advocate for respondents No. 1, 2 and 3.

Mr. Karma Thinlay Namgyal,
Government Advocate and Mr.
S.K. Chettri, Assistant
Government Advocate for
respondent No.4.



JUDGMENT

Dinakaran, CJ

The common issue that arises in this batch of writ petitions is –

Whether the respondent-State (herein called the Revenue) is justified by issuing Notification No.23/2008-Central Excise dated 27.03.2008 and Notification No.37/2008-Central Excise dated 10.06.2008 in withdrawing the exemption granted in the payment of duty for utilization towards the CENVAT credit/cash conferred upon the petitioners/assesseees by Notification No. 71/2003-Central Excise dated 09.09.2003, namely, General Exemption No. 51B and Office Memorandum dated 01.04.2007 in File No. 10(3)/2007-DBA-II/NER, both issued by the Government of India exercising the powers conferred under Section 5A of the Central Excise Act, 1944?

1.2 In this regard, it is apt to refer to Section 5A of the Central Excise Act, 1944, which empowers the Central Government to grant exemption from duty of excise, which reads as hereunder:

"5A. Power to grant exemption from duty of excise. - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured –



(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent, export-oriented undertaking and brought to any other place in India.

Explanation : In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in *Explanation 2* to sub-section (1) of section 3.

(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

(2) If the Central Government is satisfied that it is necessary in the public so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2) insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation: "Form or method", in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every notification issued under sub-rule (1), and every order made under sub-rule (2) of rule 8 of the Central Excise Rules, 1944, and in force immediately before the commencement of the Customs and Central Excise Laws (Amendment) Act, 1987 shall be deemed to have been issued or made under the provisions of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provisions of this section.

(5) Every notification issued under sub-section (1) [or sub-section (2A)] shall, -

(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations, Customs and Central Excise, New Delhi, under the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963).

(6) Notwithstanding anything contained in sub-section (5), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force."

(emphasis supplied)

2.1 In view of the core issue raised in the above batch of writ petitions, suffice it to consider the submissions made by both the sides, namely, the petitioners/assesseees and the respondents/revenue on the question of law, referred to above, instead of referring to the facts of the individual cases.

2.2.1 By notification dated 09.09.2003 as well as the Office Memorandum dated 01.04.2007, referred to above, the



petitioners/assesseees were granted certain exemptions from the Central Excise Duty and the same reads as hereunder: -

2.2.2

"9th September, 2003

Notification No. 71/2003 - Central Excise

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in Annexure I appended hereto, and cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, in the State of Sikkim, specified in Annexure - II appended hereto, from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of the said goods, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002.

2. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be available subject to the condition that, the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration, for payment of duty on goods cleared during such month and pays only the balance amount in cash.

3. The exemption contained in this notification shall be given effect to in the following manner, namely:-

- (a) The manufacturer shall submit a statement of the duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, to the Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, by the 7th day of the next month in which the duty has been paid.



- (b) The Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, shall, after such verification, as may be deemed necessary, refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, during the month under consideration to the manufacturer by the 15th day of the next month:

Provided that in cases where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, such refund shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.

- (c) If there is likely to be any delay in the verification, the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

4. Notwithstanding anything contained in paragraph 2,-

- (a) the manufacturer at his own option, may take credit of the amount of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current, maintained in terms of Part V of the Excise Manual of Supplementary Instruction issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilised by the manufacturer for payment of duty in the manner specified under rule 8 of the Central Excise Rules, 2002, in subsequent months, and such payment shall be deemed to be paid in cash:

Provided that where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, the amount of such credit shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.

- (b) the credit of duty paid during the month under consideration, other than by way of utilisation of

CENVAT credit under the CENVAT Credit Rules, 2002, may be taken by the manufacturer in his account current, by the 7th day of the month following the month under consideration.

- (c) a manufacturer who intends to avail of the option under clause (a), shall exercise his option in writing for availing of such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option and shall not be withdrawn during the remaining part of the financial year:

Provided that, for the financial year 2003-2004, a manufacturer can exercise his option on or before the 30th day of September, 2003.

- (d) the manufacturer shall submit a statement of the duty paid, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, along with the refund amount which he has taken credit and the calculation particulars of such credit taken, to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, by the 7th day of the next month to the month under consideration.
- (e) the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall, after such verification, as may be deemed necessary, determine the amount correctly refundable to the manufacturer and intimate the same to the manufacturer by the 15th day of the next month to the month under consideration. In case the credit taken by the manufacturer is in excess of the amount determined, the manufacturer shall, within five days from the receipt of the said intimation, reverse the said excess credit from the said account current maintained by him. In case, the credit taken by the manufacturer is less than the amount of refund determined, the manufacturer shall be eligible to take credit of the balance amount.
- (f) In case the manufacturer fails to comply with the provisions of clauses (a) to (e), he shall forfeit the option, to take credit of the amount of duty during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current on his own, as provided for in clauses (a) and (c).
- (g) the amount of the credit availed irregularly or availed of in excess of the amount determined correctly refundable under clause (e) and not

reversed by the manufacturer within the period specified in that clause, shall be recoverable as if it is a recovery of duty of excise erroneously refunded. In case such irregular or excess credit is utilised for payment of excise duty on clearances of excisable goods, the said goods shall be considered to have been cleared without payment of duty to the extent of utilisation of such irregular or excess credit.

Explanation.-For the purposes of this notification, duty paid, by utilisation of the amount credited in the account current, shall be taken as payment of duty by way other than utilisation of CENVAT credit under the CENVAT Credit Rules, 2002.

5. The exemption contained in this notification shall apply only to the following kinds of units namely:-

(i) new industrial units which have commenced commercial production on or after the 23rd day of December, 2002, but not later than the 31st day of March, 2007;

(ii) Industrial units existing before the 23rd day of December, 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty-five per cent. on or after the 23rd day of December, 2002, but have commenced commercial production from such expanded capacity, not later than the 31st day of March, 2007.

6. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production, whichever is later.

ANNEXURE-I

1. Tobacco and Tobacco products including Cigarettes/ Cigars/ Gutkha;
2. Branded Aerated beverages;
3. Pollution causing paper and paper products."



2.2.3

"North East Industrial and Investment Promotion Policy, 2007"

**File No.10 (3)/2007-DBA-II/NER
Government of India
Ministry of Commerce and Industry
Department of Industrial Policy and Promotion

New Delhi, Dated the 1st April 2007.

OFFICE MEMORANDUM

Subject: North East Industrial and Investment Promotion Policy (NEIIPP), 2007

The Government has approved a package of fiscal incentives and other concessions for the North East Region namely the '**North East Industrial and Investment Promotion Policy (NEIIPP), 2007**', effective from 1.4.2007, which, inter-alia, envisages the following:

(i) Coverage:

The North East Industrial Policy (NEIP), 1997 announced on 24.12.1997 covered the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. Under NEIIPP, 2007, Sikkim will also be included. Consequently, the 'New Industrial Policy and other concessions for the State of Sikkim' announced vide O.M. No.14(2)/2002-SPS dated 23.12.2002 and the Schemes thereunder i.e. Central Capital Investment Subsidy Scheme, 2002, Central Interest Subsidy Scheme, 2002 and Central Comprehensive Insurance Scheme, 2002, notified vide Notifications No. F.No.14(2)/2002-SPS dated the 24.12.2002 will be discontinued from 1.4.2007.

(ii) Duration:

All new units as well as existing units which go in for substantial expansion, unless otherwise specified and which commence commercial production within the 10 year period from the date of notification of NEIIPP, 2007 will be eligible for incentives for a period of ten years from the date of commencement of commercial production.

(iii) Neutrality of location:

Incentives will be available to all industrial units, new as well as existing units on their substantial expansion, located anywhere in the North Eastern Region. Consequently, the distinction between 'thrust' and 'non-thrust' industries made in NEIP, 1997 will be discontinued from 1.4.2007.



(iv) Substantial Expansion:

Incentives on substantial expansion will be given to units effecting 'an increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purpose of expansion of capacity/modernization and diversification', as against an increase by 33½ % which was prescribed in NEIP, 1997.

(v) Excise Duty Exemption:

100% Excise Duty exemption will be continued, on finished products made in the North Eastern Region, as was available under NEIP, 1997. However, in cases, where the CENVAT paid on the raw materials and intermediate products going into the production of finished products (other than the products which are otherwise exempt or subject to nil rate of duty) is higher than the excise duties payable on the finished products, ways and means to refund such overflow of CENVAT credit will be separately notified by the Ministry of Finance.

(vi) Income Tax Exemption:

100% Income Tax exemption will continue under NEIIPP, 2007 as was available under NEIP, 1997.

(vii) Capital Investment Subsidy:

Capital Investment Subsidy will be enhanced from 15% of the investment in plant and machinery to 30% and the limit for automatic approval of subsidy at this rate will be Rs.1.5 crores per unit, as against Rs.30 lakhs as was available under NEIP, 1997. Such subsidy will be applicable to units in the private sector, joint sector, cooperative sector as well as the units set up by the State Governments of the North Eastern Region. For grant of Capital Investment Subsidy higher than Rs.1.5 crore but upto a maximum of Rs.30 crores, there will be an Empowered Committee Chaired by Secretary, Department of Industrial Policy & Promotion with Secretaries of Department of Development of North Eastern Region (DONER), Expenditure, Representative of Planning Commission and Secretary of the concerned Ministries of the Government of India dealing with the subject matter of that industry as its members as also the concerned Chief Secretary/Secretary (Industry) of the North Eastern State where the claiming unit is to be located.

Proposals which are eligible for a subsidy higher than Rs.30 crores, will be placed by Department of Industrial Policy and Promotion before the Union Cabinet for its consideration and approval.



(viii) Interest Subsidy:

Interest Subsidy will be made available @ 3% on working capital loan under NEIIPP, 2007 as was available under NEIP, 1997.

(ix) Comprehensive Insurance:

New industrial units as well as the existing units on their substantial expansion will be eligible for reimbursement of 100% Insurance premium.

(x) Negative List:

The following industries will not be eligible for benefits under NEIIPP, 2007:-

(i) All goods falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which pertains to tobacco and manufactured tobacco substitutes.

(ii) Pan Masala as covered under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

(iii) Plastic carry bags of less than 20 microns as specified by Ministry of Environment and Forests Notification No.S.O. 705(E) dated 02.09.1999 and S.O.698 (E) dated 17.6.2003.

(iv) Goods falling under Chapter 27 of the First Schedule to the Central Excise tariff Act, 1985 (5 of 1986) produced by petroleum oil or gas refineries.

(xi) Incentives for Service/other Sector Industries

Incentives under NEIIPP, 2007 will be applicable to the following service sector activities/industries:-

I. Service Sector:

(i) Hotels (not below Two Star category), adventure and leisure sports including ropeways ;

(ii) Medical and health services in the nature of nursing homes with a minimum capacity of 25 beds and old-age homes ;

(iii) Vocational training institutes such as institutes for hotel management, catering and food crafts, entrepreneurship development, nursing and para-medical, civil aviation related training, fashion, design and industrial training.

A number of tax concessions under the existing provisions of Section 10A and 10AA of the Income Tax Act are already available to the IT sector. However, one of the important impediments to the development of Software Technology Parks or IT related SEZs in the North Eastern Region is the non-availability of trained human resources in the North Eastern Region. Accordingly, tax benefits as is availed under Section 80 IC of the Income Tax Act would be extended to IT related training centers and IT hardware units.

II. Incentives for Bio-technology industry:

The biotechnology industry will be eligible for benefits under NEIIPP, 2007 as applicable to other industries.

III. Incentives for Power Generating Industries:

Power Generating plants will continue to get incentives as governed by the provisions of Section 81A of the Income tax Act. In addition, power generating plants upto 10 MW based on both conventional and non-conventional sources will also be eligible for capital investment subsidy, interest subsidy and comprehensive insurance as applicable under NEIIPP, 2007.

(xii) Establishment of a monitoring mechanism for Implementation of the NEIIPP, 2007:

In order to establish a monitoring mechanism for implementation of NEIIPP, 2007, a 'High Level Committee' / an 'Advisory Committee' under the Chairmanship of Secretary, Department of Industrial Policy and Promotion and comprising Secretaries of the Ministries/Departments of Revenue, Department of Development of North Eastern Region (DONER), Banking and Insurance, Representative of Planning Commission, CMD, NEDFi as well as major stakeholders including the industry associations of the North Eastern region would be constituted. In addition, an 'Oversight Committee' will be constituted under the Chairmanship of the Union Commerce and Industry Minister with Industry Ministers of NE States as its members.

(xiii) Value Addition

In order to ensure genuine industrial activities in the North Eastern Region, benefits under NEIIPP, 2007 will not be admissible to goods in respect of which only peripheral activities like preservation during storage, cleaning operations, packing, re-packing, labelling or re-labelling, sorting, alteration of retail sale price etc. take place.

(xiv) Transport Subsidy Scheme

The Transport Subsidy Scheme would continue beyond 31.3.2007, on the same terms and conditions. However, an early evaluation of the scheme will be carried out with a view to introducing necessary safeguards to prevent possible leakages and misuse.

(xv) Nodal agency

The North East Industrial Development Finance Corporation (NEDFi) will continue to act as the nodal agency for disbursement of subsidies under NEIIP, 2007.

2. The 'New Industrial Policy and other concession in the North Eastern Region' announced vide O.M. No.EA/1/2/96-IPD, dated 24.12.1997 (NEIP, 1997) will cease to operate with effect from 1.4.2007. Industrial Units which have commenced commercial production on or before 31.3.2007 will continue to get benefits/incentives under NEIP, 1997.

3. Government reserves the right to modify any part of the Policy in public interest.

4. All concerned Ministries/Departments of the Government of India are requested to amend their respective Acts/rules/notifications etc. and issue necessary instructions for giving effect to these decisions.

(N. N Prasad)

Joint Secretary to the Government of India"

3.1 Concededly, sub-section (1) of Section 5A of the Central Excise Act, 1944 empowers the Central Government to issue notification to exempt generally either with or without conditions, excisable goods as may be specified, from the whole or any part of the duty of excise, provided the Central Government is satisfied that it is necessary **in the public interest** to grant such exemption. The proviso, thereunder, lays down an embargo in relation to goods produced or manufactured in free trade zone and states that unless specifically exempted by



such notification, in lieu of the expressed words used in the proviso, no exemption therein shall apply to excisable goods which are produced or manufactured -

- (i) in a free trade zone or a special economic zone and brought to any other place in India; or
- (ii) by a hundred per cent, export-oriented undertaking and brought to any other place in India.

Explanation : In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in *Explanation 2* to sub-section (1) of section 3.

3.2 Further, statutory clarification has been made in sub-section (1A) of Section 5A of the Act, declaring that where an exemption under sub-section (1A) of Section 5A of the Act in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, **the manufacturer of such excisable goods shall not pay the duty of excise on such goods.** The said sub-section (1A) of Section 5A of the Act is legislatively intended for the removal of doubts. It is also relevant to know that sub-section (2) of Section 5A of the Act empowers the Central Government if satisfied that it is necessary in the public interest so to do, by special order in each case, grant exemption from payment of



duty of excise, under circumstances of an exceptional nature which may be stated specifically in such order, any excisable goods on which duty of excise is leviable.

3.3 Sub-section (3) of Section 5A of the Act further provides that an exemption under Sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on **such goods at a rate expressed in a form or method different** from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

3.4 For the purpose of the common issue, referred to above, there is no need to refer to any other sub-sections of Section 5A of the Act.

3.5 However, suffice it to remember that there is no limitation on the powers available under Section 5A of the Act.



4. Concededly, both the Notification dated 09.09.2003 and Office Memorandum dated 01.04.2007 of the Central Government came to be issued pursuant to the New Industrial Policy Resolution of the Central Government adopted by the Union Cabinet vide Office Memorandum dated 23.12.2002 issued by the Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), exercising the power conferred under Article 73 of the Constitution of India, and pursuant to which, the Government of Sikkim also issued a Notification dated 17.02.2003 exercising its power under Article 162 of the Constitution of India, which reads as hereunder:

**"DEPARTMENT OF COMMERCE AND INDUSTRIES
GOVERNMENT OF SIKKIM**

No.G.O./2/DI/2002-2003/901

Dated: 17/02/03

NOTIFICATION

The Notification/Memorandum issued by Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Govt. of India vide No.14(2)/2002-SPS, dated 23rd December 2002 approving a special package of incentives for development of Industries in the State of Sikkim, is hereby reproduced for general information of the public and the entrepreneurs as under:

No. 14(2)/2002-SPS
Government of India,
Ministry of Commerce and Industry,
(Department of Industrial Policy and Promotion)
New Delhi. Dated 23rd Dec. 2002.

OFFICE MEMORANDUM

Subject: New Industrial Policy and other concessions for the state of Sikkim.

The Government of Sikkim has requested for a special package for development of industries in the state on the lines



for the North East Industrial Policy notified by the Central Government vide Ministry of Industry's OM No.EA/1/2/96-IPD dated 24th December 1997. Discussions on Strategy and Action Plan for Development of Industries and generation of employment in the State of Sikkim were held with the various related Ministries on the issues inter alia, infrastructure development, financial concessions and easy market access.

2. Keeping in view the fact that the State of Sikkim lags behind in industrial development, a need has been felt for structured interventionist strategies to accelerate industrial development of the State and boost investor confidence. The new initiatives would provide the required incentives as well as an enabling environment for industrial development, improve availability of capital and increase market access to provide a fillip to the private investment in the State.

3. The matter has been carefully considered by the Government and it has been decided to provide the following package of incentives for the State of Sikkim.

3.1 Fiscal Incentives to new Industrial Units and substantial expansion of existing units:

i) New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Center, Industrial Infrastructure Development Centers (IIDCs) and other locations like Industrial Estates, Export Processing Zones, Food Parks, IT Parks, etc., as notified by the Central Government are entitled to 100% (hundred percent) income tax and excise duty exemption for a period of 10 years from the date of commencement of commercial production. Thrust Sector Industries as mentioned in Annexure-II are entitled to similar concessions in the entire State of Sikkim without area restrictions.

ii) All New Industries in the notified location would be eligible for capital investment subsidy @ 15% of their investment in plant & machinery, subject to a ceiling of Rs.30 lakh. The existing units will be entitled to this subsidy on substantial expansion, as defined.

iii) An interest subsidy of 3% on the working capital loan would be provided to all new industrial units in notified locations for a period of 10 years after the commencement of commercial production. This benefit would also be extended to existing units in notified locations on expansion, as defined, as well as to Thrust Industries shown in Annexure-II.

iv) The insurance premium to the extent of hundred percent on capital investment for a period of 10 years would be extended by the Central Government to all new units and to existing units on their substantial expansion, as defined.

3.2 Development of Industrial Infrastructure:

(i) The funding pattern under the Growth Centre Scheme currently envisaging a Central assistance of Rs.10 crore for each centre is raised to Rs.15 crore per centre.

(ii) The financing pattern of Integrated Infrastructure Development Centers (IIDC) between Government of India and SIDBI will change from 2:3 to 4:1, and the GOI funds would be in the nature of a grant, so as to provide the required infrastructural support.

3.3 The above concessions/subsidies shall be available to all new units and to the existing industrial units on their substantial expansion as defined, in the industrial areas notified by the Central Government (Annexure-I) and Thrust Industries (Annexure-II) irrespective of location.

3.4 Ineligible Industries under the policy:
Tobacco and tobacco products including cigarettes/cigars/gutka, etc., Aerated branded beverages, and Pollution causing paper and paper products

3.5 Nodal Agency

North Eastern Development Finance Corporation Limited (**NEDFI**) would be designated as the Nodal Agency for routing the subsidies/incentives under various schemes notified under this Policy.

Explanation:

(i) The eligible areas for above concessions and thrust industries are as identified in Annex-I & Annex- II respectively.

(ii) The notification regarding definition of substantial expansion of the existing units shall be issued separately.

4. Government reserves the right to modify any part of the policy in public interest.

5. The Ministry of Finance, Department of Revenue, Department of Development of North Eastern Region, etc. are requested to amend Act/rules/notifications, etc. and issue necessary instructions for giving effect to these decisions.

(K.B.CHETTRI)

Secretary Commerce and Industries
Govt. of Sikkim"

5. It is, therefore, clear that the source of issuing the Office Memorandum dated 23.12.2002 of the Central Government and the Notification dated 17.02.2003 of the State Government are traceable to Articles 73 and 162 of the Constitution of India respectively, chalking out the New Industrial Policy of the respective Governments.



6.1 Similarly statutory sources of the Notification dated 09.09.2003 and Office Memorandum dated 01.04.2007 are traceable to Section 5A of the Central Excise Act, 1944, and they were, concededly, made in the public interest to achieve the objects which apparently reflects in the notifications issued by the Central and State Governments dated 23.12.2002 and 17.02.2003 respectively, invoking Articles 73 and 162 of the Constitution of India, namely,

- (i) approving a special package for development of industries in the State of Sikkim;
- (ii) to work out the strategy and action plan for development of industries in the State of Sikkim;
- (iii) generation of employment in the State of Sikkim;
- (iv) to improve infrastructural developments;
- (v) to increase financial concessions; and
- (vi) to open easy market access.

6.2 All the above objects are intended by the State of Sikkim realising the fact that the State lags behind in industrial development; and, therefore, needs structured interventionist strategies to accelerate the industrial development of the State and to boost investor confidence. It is also the intention of the State that new initiative will provide the required incentives as well as enabling environment for industrial development, improve



availability of capital and increase market access to provide a fillip to private investment in the State. The Fiscal incentive which proposes for new industrial units as well as substantial expansion of existing units specifically provides for 100% income tax and excise duty exemption for a period of 10 years from the date of commencement of the commercial production.

7. It is not in dispute that based on the above statutory guarantee for the exemption of the excise duty referred to above, the petitioners/assesseees invested their money and started new units or expanded their existing units.

8.1 But, surprisingly, the respondents/revenue by notifications dated 27.03.2008 and 10.06.2008, substituted the paragraphs 2, 3 and 4 of the earlier notification dated 09.09.2003, which provide 100% income tax and excise duty exemption. As a result of such modification the said 100% exemption of income tax and excise duty was reduced.

8.2.1 The notifications dated 27.03.2008 and 10.06.2008 read as hereunder:



8.2.2

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

New Delhi, the 27th March, 2008.

NOTIFICATION No. 23/2008-Central Excise

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978, (40 of 1978) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 71/2003-Central Excise, dated the 9th September, 2003 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 717 (E) dated the 9th September, 2003 namely:-
In the said notification,-

I. In the preamble, for the words and figures, "to the amount of duty paid by the manufacturer of the said goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002", the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit" shall be substituted;

II. for paragraphs 2, 3 and 4 the following shall be substituted, namely:-

'2. The duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excisable goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the Chapter of the said First Schedule as are given in the corresponding entry in column (2) of the said Table, at the rates specified in the corresponding entry in column (4) of the said Table:

TABLE

S.No.	Chapter of the First Schedule	Description of goods	Rate
(1)	(2)	(3)	(4)
1.	29	All goods	29
2.	30	All goods	56
3.	33	All goods	56
4.	34	All goods	38
5.	38	All goods	34
6.	39	All goods	26

7.	40	Tyres, tubes and flaps	41
8.	72 or 73	All goods	39
9.	74	All goods	15
10.	76	All goods	36
11.	85	Electric motors and generators, electric generating sets and parts thereof	31
12.	Any chapter	Goods other than those mentioned above	36:

Provided that where the duty payable on value addition exceeds the duty paid by the manufacturer on the said excisable goods, other than the amount paid by utilization of CENVAT credit during the month, the duty payable on value addition, shall be deemed to be equal to the duty so paid other than by CENVAT credit.

2A In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be subject to the condition that the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

2B The exemption contained in this notification shall be given effect to in the following manner, namely:-

(a) the manufacturer shall submit a statement of the total duty paid and that paid by utilization of CENVAT credit, on each category of goods specified in the said Table and cleared under this notification, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid;

(b) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification as may be deemed necessary, shall refund the duty payable on value addition, computed in the manner as specified in paragraph 2 to the manufacturer by the 15th of the month following the one in which the statement as at clause (a) above has been submitted.

2C Notwithstanding anything contained in sub-paragraph 2B above,-

(a) the manufacturer at his own option, may take credit of the amount calculated in the manner specified

in paragraph 2 in his account current, maintained in terms of the Excise Manual of Supplementary Instructions issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilized by the manufacturer for payment of duty, in the manner specified under rule 8 of the Central Excise Rules, 2004, in subsequent months, and such payment shall be deemed to be payment in cash;

(b) the credit of the refund amount may be taken by the manufacturer in his account current, by the 7th of the month following the month under consideration;

(c) a manufacturer who intends to avail the option under clause (a) shall exercise his option in writing for availing such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option and shall not be withdrawn during the remaining part of the financial year;

(d) the manufacturer shall submit a statement of the total duty payable as well as the duty paid by utilization of CENVAT credit or otherwise and the credit taken as per clause (a), on each category of goods manufactured and cleared under the notification and specified in the said Table, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 15th of the month in which the credit has been so taken;

(e) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall determine the amount correctly refundable to the manufacturer and intimate to the manufacturer by the 15th day of the next month to the month in which the statement under clause (d) has been submitted. In case the credit taken by the manufacturer is in excess of the amount determined, the manufacturer shall, within five days from the receipt of the intimation, reverse the said excess credit from the account current maintained by him. In case, the credit taken by the manufacturer is less than the amount of refund determined, the manufacturer shall be eligible to take credit of the balance amount;

(f) in case the manufacturer fails to comply with the provisions of clauses (a) to (e), he shall forfeit the option, to take credit of the amount calculated in the manner specified in sub-paragraph 2 in his account current on his own, as provided for in clauses (a) to (c);

(g) the amount of the credit availed irregularly or availed of in excess of the amount determined correctly refundable under clause (e) and not reversed by the manufacturer within the period specified therein, shall be recoverable as if it is a recovery of duty of excise erroneously refunded. In case such irregular or excess

credit is utilised for payment of excise duty on clearances of excisable goods, the said goods shall be considered to have been cleared without payment of duty to the extent of utilisation of such irregular or excess credit.

Explanation.-For the purposes of this paragraph, duty paid by utilisation of the amount credited in the account current, shall be taken as payment of duty by way other than utilisation of CENVAT credit under the CENVAT Credit Rules, 2004.

3. (1) Notwithstanding anything contained in paragraph 2, the manufacturer shall have the option not to avail the rates specified in the said Table and apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under this notification, if the manufacturer finds that four-fifths of the ratio of actual value addition in the production or manufacture of the said goods to the value of the said goods, is more than the rate specified in the said Table expressed as a percentage. For the said purpose, the manufacturer may, within sixty days from the beginning of a financial year, make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, for determination of such special rate, stating all relevant facts including the proportion in which the materials or components are used in the production or manufacture of goods:

Provided that the Commissioner of Central Excise or the Commissioner of Customs and Central Excise may, if he is satisfied that the manufacturer was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer to make the application within a further period of thirty days:

Provided further that the manufacturer supports his claim for a special rate with a certificate from his statutory auditor containing an estimate of value addition in the case of goods for which a claim is made, based on the audited balance sheet of the unit, for the preceding financial year;

(2) On receipt of the application referred to in subparagraph (1), the Commissioner of Central Excise or Commissioner of Customs and Central Excise, as the case may be, after making or causing to be made such inquiry as he deems fit, shall fix the special rate within a period of six months of such application;

(3) Where the manufacturer desires that he may be granted refund provisionally till the time the special rate



is fixed, he may, while making the application, apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, in writing for grant of provisional refund at the rate specified in column (4) of the said Table for the goods of description specified in column (3) of the said Table and falling in Chapter of the First Schedule of the Central Excise Tariff Act, 1985 (5 of 1986) as in corresponding entry in column (2) of the said Table, and on finalization of the special rate, necessary adjustments be made in the subsequent refunds admissible to the manufacturer in the month following the fixation of such special rate.

(4) Where the Central Government considers it necessary so to do, it may-

(a) revoke the special rate or amount of refund as determined under sub-paragraph (2) by the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, or

(b) direct the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, to withdraw the rate so fixed.

Explanation: For the purpose of this paragraph, the actual value addition in respect of said goods shall be calculated on the basis of the financial records of the preceding financial year, taking into account the following:

(i) Sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods;

(ii) Less: Cost of raw materials and packing material consumed in the said goods;

(iii) Less: Cost of fuel consumed if eligible for input credit under CENVAT Credit Rules, 2004;

(iv) Plus: Value of said goods available as inventory in the unit but not cleared, at the end of the financial year;

(v) Less: Value of said goods available as inventory in the unit but not cleared, at the end of the financial year preceding that under consideration.

Special rate would be the ratio of actual value addition in the production or manufacture of the said goods to the sale value of the said goods excluding excise duty, Value Added Tax and other indirect taxes, if any, paid on the goods.

(5) The manufacturer shall be entitled to refund at the special rate fixed under sub-paragraph (2) in respect of all clearances of excisable goods manufactured and cleared under this notification with effect from the date on which the application referred to at sub-paragraph

(1) was filed with the Commissioner of Central Excise or Commissioner of Central Excise and Customs, as the case may be.

(6) Where a special rate is fixed under sub-paragraph (2), the refund payable in a month shall be equivalent to the amount calculated as a percentage of the total duty payable on such excisable goods, at the rate so fixed:

Provided that the refund shall not exceed the amount of duty paid on such goods, other than by utilization of CENVAT credit.'

2. This notification shall come into force with effect from the 1st day of April, 2008.

[F.No. 334/1/2008-TRU]

(S.Bajaj)

Under Secretary to the Government of India

Note:- The principal notification No. 71/2003-Central Excise, dated 9th September, 2003 was published in the Gazette of India, Extraordinary, vide number G.S.R. 717 (E), dated the 9th September, 2003 and was last amended vide notification no.21/2007-Central Excise, dated 25th April, 2007 published vide number G.S.R. 308(E), dated the 25th April, 2007."

8.2.3

"GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

New Delhi, the 10th June, 2008.

NOTIFICATION No.37/2008-Central Excise

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 71/2003-Central Excise, dated the 9th September, 2003 which was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 717 (E), dated the 9th September, 2003 namely:-

In the said notification,-

(i) in paragraph 2,-

(a) after the words, brackets and figure "corresponding entry in column (2) of the said Table," the words, brackets and figure "when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory," shall be inserted;

(b) for the Table, the following Table shall be substituted, namely:-

TABLE

S.No.	Chapter of the First Schedule	Description of goods	Rate	Description of inputs for manufacture of goods in column (3)
(1)	(2)	(3)	(4)	(5)
1.	29	All goods	29	Any goods
2.	30	All goods	56	Any goods
3.	33	All goods	56	Any goods
4.	34	All goods	38	Any goods
5.	38	All goods	34	Any goods
6.	39	All goods	26	Any goods
7.	40	Tyres, tubes and flaps	41	Any goods
8.	72 or 73	All goods	39	Any goods, other than iron ore
9.	74	All goods	15	Any goods
10.	76	All goods	36	Any goods
11.	85	Electric motors and generators, electric generating sets and parts thereof	31	Any goods
12.	25	Cement or cement clinker	75	Limestone and gypsum
13.	17 or 35	Modified starch/glucose	75	Maize
14.	18	Cocoa butter or powder	75	Cocoa beans
15.	72 or 73	Iron and steel products	75	Iron ore
16.	Any chapter	Goods other than those mentioned above in S.Nos.1 to 15	36	Any goods

(ii) In paragraph 3, -

(a) for sub-paragraph (1), the following shall be substituted, namely:-

" (1) Notwithstanding anything contained in paragraph 2, the manufacturer shall have the option not to avail the rates specified in the said Table and apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under this notification, if the manufacturer finds that the actual value addition in the

production or manufacture of the said goods is at least 115 per cent of the rate specified in the said Table and for the said purpose, the manufacturer may make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, not later than the 30th day of September in a financial year for determination of such special rate, stating all relevant facts including the proportion in which the material or components are used in the production or manufacture of goods:

Provided that the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, may, if he is satisfied that the manufacturer was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer to make the application within a further period of thirty days:

Provided further that the manufacturer supports his claim for a special rate with a certificate from his statutory Auditor containing a calculation of value addition in the case of goods for which a claim is made, based on the audited balance sheet of the unit for the preceding financial year:

Provided also that a manufacturer that commences commercial production on or after the 1st day of April, 2008 may file an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, for the fixation of a special rate not later than the 30th day of September of the financial year subsequent to the year in which it commences production.

(1A) Nothing contained in sub-paragraph (1) shall apply to a unit manufacturing goods falling under Serial Nos. 12, 13, 14 or 15 of the Table."

(b) In sub-paragraph (2), for the words "six months", the words "three months" shall be substituted;

(c) for sub-paragraph (5), the following sub-paragraph shall be substituted, namely:-

"(5). The manufacturer shall be entitled to refund at the special rate fixed under sub-paragraph (2) in respect of all clearances of excisable goods manufactured and cleared under this notification with effect from the 1st day of April of the year in which the application referred to at sub-paragraph (1) was filed with the Commissioner of Central Excise or Commissioner of Central Excise and Customs, as the case may be:

Provided that in cases where the application referred to in sub-paragraph (1) had already been filed prior to the 10th day of June, 2008, the manufacturer shall be entitled to refund at the special rate fixed under sub-paragraph (2) in respect of all clearances of

excisable goods manufactured and cleared under this notification with effect from the 1st day of April, 2008

(d) after sub-paragraph (5), the following shall be inserted, namely:-

"(5A) A manufacturer who commences commercial production on or after the 1st day of April, 2008, shall be entitled to refund at the special rate fixed under sub-paragraph (2) against his first application in respect of all clearances of excisable goods manufactured and cleared under this notification with effect from the date of commencement of such commercial production and the difference between the refund payable at such special rate and the actual refund paid to him from the date of commencement of commercial production till the date of fixation of special rate, shall be refunded to him."

(iii) after paragraph 3, the following shall be inserted, namely:-

"4. (1) In case the total amount of refund paid or payable to a manufacturer in respect of goods cleared from a unit during a financial year is less than the total duty paid by him on the said goods, other than the amount paid by utilization of CENVAT credit, for the year, the differential amount, if any, shall be refunded to him subject to the condition that the total refund made to him during the year, including the aforesaid differential amount, does not exceed the total duty payable on value addition whether at the rate specified in the Table or at the special rate fixed under paragraph 3.

(2) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the differential amount, if any, to the manufacturer not later than the 15th day of May in the subsequent financial year."

[F. No. 334/1/2008-TRU]

(Unmesh Wagh)

Under Secretary to the Government of India.

Note:- The principal notification No. 71/2003-Central Excise, dated the 9th September, 2003 was published in the Gazette of India, Extraordinary, Part II, Section 3, Su-section (i) vide number G.S.R. 717 (E), dated the 9th September, 2003 and was last amended vide notification no. 23/2008-Central Excise, dated the 27th March, 2008 vide number G.S.R. 228(E), dated the 27th March, 2008."



8.3 Hence, the petitioners/assesseees have challenged the said notifications dated 27.03.2008 and 10.06.2008 in the above batch of writ petitions.

9. Heard Mr. A. K. Upadhyaya, learned Senior Counsel, Mr. Paresh M. Dave and Mr. Sudesh Joshi, learned Counsel appearing for the petitioners/assesseees and Mr. A. Moulik, learned Senior Counsel appearing for the respondents/revenue.

10. On behalf of the petitioners/assesseees, it is contended that the impugned notifications modifying the exemption of excise duty is -

- (i) without jurisdiction;
- (ii) contrary to the spirit and object of the New Industrial Policy of the Central and the State Government;
- (iii) arbitrary and unreasonable;
- (iv) exceeds the power conferred under Section 5A of the Act; and
- (v) opposed to the principles of promissory estoppel.

11.1 Per contra, Mr. A. Moulik, learned Senior Counsel appearing for the respondents/revenue contends that -



(i) by impugned notifications dated 27.03.2008 and 10.06.2008, the respondents/revenue have not proposed to withdraw any exemption but proposed only to ensure that the exemption benefit reaches the actual manufacturers so that there shall not be any misuse or abuse of such exemption;

(ii) both the notifications dated 27.03.2008 and 10.06.2008 are made in the public interest invoking Section 5A of the Central Excise Act, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and sub-section (3) of Section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978;

(iii) in the name of value addition, the manufacturer are claiming the duty exemption on bogus production and, therefore, the Revenue is well within its jurisdiction to invoke the power reserved by them in their respective notifications dated 09.09.2003 and 01.04.2007 to modify the exemption of duties provided under the respective notifications, in order to prevent loss of revenue to the State exchequer.



11.2 Elaborating the above contentions, Mr. A. Moulik, learned Senior Counsel appearing for the respondents/revenue explained that the following modus operandi is adopted by the bogus, fictitious manufacturers raising false claims for the duty exemption as hereunder: -

- "i) Reporting of bogus production by mere issuance of sale invoices without actual production of goods and supply/ clearance of excisable goods. This would result in availment of cenvat credit by buyers of such excisable goods in other parts of the country without actual production being carried out and in absence of actual receipt of goods.
- ii) Reporting of bogus production by such units in these areas where actual production takes place elsewhere in the country.
- iii) Over valuation of goods resulting in availment of excess of credit by buyer.
- iv) Goods are supplied by manufacturers, Importers to these units without issuance of sales invoice and these are backed by bogus sale invoices issued by traders who do not undertake actual supply of goods. The actual supplier of these goods issue bogus duty paid invoices to other manufacturers who take credit based on such invoices without receipt of goods."

12. I have given careful consideration to all the submissions made on behalf of the petitioners/assesseees and the respondents/revenue.

13. In the light of the above rival contentions, the issue that arises for consideration in the above batch of writ petitions, as stated earlier, reads as hereunder:

Whether the respondent-State (herein called the Revenue) is justified by issuing Notification No.23/2008-Central Excise



dated 27.03.2008 and Notification No.37/2008-Central Excise dated 10.06.2008 in withdrawing the exemption granted in the payment of duty for utilization towards the CENVAT credit/cash conferred upon the petitioners/assesseees by Notification No. 71/2003-Central Excise dated 09.09.2003, namely, General Exemption No. 51B and Office Memorandum dated 01.04.2007 in File No. 10(3)/2007-DBA-II/NER, both issued by the Government of India exercising the powers conferred under Section 5A of the Central Excise Act, 1944?

14. The settled law is that fiscal statutes should be strictly construed. But it does not rule out the application of the principle of reasonable construction to give effect to the purpose or intention of any particular provision, as apparent from the scheme of the Act, or with the assistance of external aids, as are permissible under law. In order to apply the principle of reasonable construction to give effect to the purpose or intention of the provision, as apparent from the scheme of the Act, the Court must ensure to harmonize different provisions in the same Act and prefer an interpretation which would lead to harmonized construction rather than to lead to inconsistency; because, the cardinal principle is that the statute should be interpreted in such a way as to avoid absurdity and to have harmonious effect. The Court, therefore, must construe the relevant provisions to make it workable, unless it is impossible to do so, rather than make it



meaningless. Any attempt contrary to that effect will defeat the very purpose of the enactment as well as the intention of the legislature. Therefore, every attempt must always be made to reconcile the relevant provisions as to advance the remedy by the statute and not to deny the remedy provided under the statute; otherwise the very purpose or the intention of the statutory provision would manifestly be defeated. (Vide: Judgment dated 29.08.2006 passed by the Division Bench of Madras High Court in *The Commissioner of Customs vs. M/s L.T. Karle & Co. & Another*).

"10.1. It is a settled law that the principle that fiscal statutes should be strictly construed does not rule out the application of the principles of reasonable construction to give effect to the purpose or intention of any particular provision as apparent from the scheme of the Act, with the assistance of such external aids, as are permissible under law [SHREE SAJJAN MILLS LTD. v. COMMISSIONER OF INCOME-TAX, M.P. BHOPAL, (1986 TAX LAW REPORTER 48 at p.58)].

10.2. In order to apply the principles of reasonable construction to give effect to the purpose or intention of the provision, as apparent from the scheme of the Act, the Court must endeavour to harmonise different provisions in the same Act and prefer an interpretation which would lead to a harmonise construction rather than to lead to inconsistency. The cardinal principle is that the statute should be interpreted in such a way as to avoid absurdity and to have harmonious effect.

10.3. The Court must construe the relevant provisions to make it workable, unless it is impossible to do so, rather than make it meaningless.

10.4. An attempt must always be made to reconcile the relevant provisions as to advance the remedy by the statute, but not to deny the remedy provided under the statute, otherwise, the very purpose or the intention of the statutory provision would manifestly be defeated."



15. It is also a well-settled principle in law that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the emanative factor of legislative intent. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

16. In the instant cases, both the Cabinets of the Central and the State Governments had taken an Industrial Policy Resolution (IPR) decision by exercising the powers conferred under Articles 73 and 162 of the Constitution of India respectively for industrial development and economic development of the country. The respective Governments having thus taken a policy decision, namely, the IPR to achieve the objects, referred to above, by notifications dated 23.12.2002 and 17.02.2003 and pursuant to that Policy, conferred certain benefits, namely, the exemption of duty invoking the statutory power under Section 5A of the Central Excise Act, 1944. Such policy decision as well as exercise of powers conferred upon the respective Governments in order to achieve their objects ought



to be given due effect to. This is evident, particularly, in the context of sub-section 2 of Section 5A of the Central Excise Act, 1944, which reads as hereunder:

"(2) If the Central Government is satisfied that it is necessary in the public so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable."

17.1 Similarly, a harmonious reading of both the notification dated 09.09.2003 and Office Memorandum dated 01.04.2007 makes it clear that even though, by notification dated 09.09.2003, such duty exemption are made available only to new industries way out to that date but not from 01.04.2007, the notification issued on 01.04.2007 reaffirms the same duty exemption benefits in view of paragraph xv(2) of the notification, which reads as hereunder:

"2. The 'New Industrial Policy and other concession in the North Eastern Region' announced vide O.M. No.EA/1/2/96-IPD, dated 24.12.1997 (NEIP, 1997) will cease to operate with effect from 1.4.2007. Industrial Units which have commenced commercial production on or before 31.3.2007 will continue to get benefits/incentives under NEIP, 1997."

17.2 Therefore, it is necessary that the benefits conferred vide notification dated 09.09.2003 are extended and benefits conferred under Office Memorandum dated 01.04.2007 are given similar effect as that of notification dated 09.09.2003 and the same shall be curtailed in the manner which is not known to law.



18.1 Then, the next question arises, whether the Government is empowered, invoking the right to reserve, to modify the provisions under notification dated 09.09.2003 and Office Memorandum dated 01.04.2007 as contended by Mr. A. Moulik, learned Senior Counsel appearing for the respondents/ revenue.

18.2 There is no doubt that the exemption of duty was provided to the petitioners/assesseees by the notification dated 09.09.2003 pursuant to the policy, the IPR, of the respective Governments in order to achieve, as per the policy decision of the Government, new industrial policy and for the economic development of the country, invoking the power conferred under Articles 73 and 162 of the Constitution of India and pursuant to which they exercised statutory powers conferred under Section 5A of the Act, in the public interest.

18.3 Once it is established that the respective Governments are giving the impugned duty exemption in public interest, the same cannot, at any stretch, be withdrawn **unless there is a larger public interest involved**. Such an attempt to withdraw the exemption, relying on which, the petitioners have acted upon



the New Industrial Policy, would not only be illogical but also irrational.

18.4 No doubt, the power to grant includes the power to cancel or modify but the same should be based on reasons and not arbitrarily.

18.5 It is true that the Government has the right to modify any part of the policy in public interest as per clause 4 of the notification dated 17.02.2003 exercising the power of the State under Article 162 of the Constitution of India, which reads as hereunder:

"4. Government reserves the right to modify any part of the policy in public interest."

18.6 Similarly as per clause 3 of the Office Memorandum dated 01.04.2007 of the Central Government exercising the power of the Central Government under Article 73 of the Constitution of India, the Government reserves its right to modify any part of the policy in public interest, which reads as hereunder:

"3. Government reserves the right to modify any part of the Policy in public interest."



But it cannot be ignored that the said policy of the respective Governments were given effect to by statutory notification under Section 5A of the Central Excise Act, 1944.

19.1 Clause 3 of the notification dated 09.09.2003, issued under Section 5A of the Act, as referred to above, provides the manner in which the exemption of duty should be worked out and given. Clause 4(c) of the said notification specifically states that a manufacturer who intends to avail of the option under sub-clause (a), shall exercise his option in writing for availing of such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option and shall not be withdrawn during the remaining part of the financial year. If the manufacturer fails to comply with the provisions mentioned in sub-clauses (a) to (e) of clause 4, he shall forfeit the option, to take credit of the amount of duty during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2004, in the account current on his own, as provided for in sub-clauses (a) and (c). Clause 5, which was inserted by notification dated 09.07.2004, expressly makes it clear that the exemption contained in the notification dated 09.09.2003 shall apply only to the following kinds of units, namely:-



- (i) new industrial units which have commenced commercial production on or after the 23rd day of December, 2002, but not later than the 31st day of March, 2007;
- (ii) industrial units existing before the 23rd day of December, 2002, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty-five per cent on or after the 23rd day of December, 2002, but have commenced commercial production from such expanded capacity, not later than the 31st day of March, 2007.

19.2 Section 5A of the Act itself provides for vesting of powers in the Central Government to issue a notification to exempt from whole or any part of duty of excise leviable on specified excisable goods. Hence, the concept of the Central Government foregoing certain amount of revenue is inherent in the provision and the contention that a loss occurs to the Central Government by virtue of operation of an exemption notification and hence, the same is required to be modified, or varied or rescinded cannot be countenanced.

20. It is a settled law that **an authority exercising delegated legislation cannot read in the provision granting powers of delegated legislation something more than what such provision in fact provides. In other words, a delegate of powers of delegated legislation cannot exercise such**



powers, even by attempting to read intent, in excess of the powers granted by the provisions. Therefore, the respondents having granted exemption as a New Industrial Policy of the State in the public interest so to do are not entitled to curtail such exemption in purported exercise of power under Section 5A of the Act itself by trying to read into an object, which actually did not exceed, when such was not the object of the legislature itself. Unless there are materials to substantiate there arises a superior public interest or larger public interest.

21. The power reserved by the Government namely, the Government reserves the right to modify any part of the policy in public interest, therefore, may, in general, be correct and work out **only where such superior or larger public interest warrants to do so.** When such a contention arises, the Court is under obligation to examine as to whether such an exercise is within the scope and extent of power available under Section 5A of the Act. While examining so, the fact that the power under Section 5A of the Act is essentially a power to grant exemption in relation to duty of excise which is otherwise leviable under other provisions of the Act cannot be disregarded. Therefore, in exercise of such power under Section 5A of the Act, the authority



cannot be permitted to take recourse to the principles applicable for determining whether duty is correctly levied or not.

22. From any angle, once power under Section 5A of the Act has been exercised and exemption granted, a larger/superior public interest has to be shown for curtailing/modifying/withdrawing an exemption already granted and in such eventuality, the onus shall be on the Revenue and the same cannot be discharged by merely referring to the contention that the petitioners/assesseees are claiming the exemption on bogus ground, in surmise.

23.1 The Office Memorandum dated 01.04.2007, presumably in view of Clause 5 of the notification dated 09.09.2003, states that Industrial Units which have commenced commercial production on or before 31.03.2007 will continue to get benefits/incentives under the 'New Industrial Policy and other concessions for the State of Sikkim', and they alone are entitled for exemption. The Government came with another Office Memorandum dated 01.04.2007 (in File No.10(3)/2007-DBA-II/NER) wherein it has specifically provided that Excise Duty Exemption will be continued as hereunder: -

"100% Excise Duty exemption will be continued, on finished products made in the



North Eastern Region, as was available under NEIP, 1997. However, in cases, where the CENVAT paid on the raw materials and intermediate products going into the production of finished products (other than the products which are otherwise exempt or subject to nit rate of duty) in higher than the excise duties payable on the finished products, ways and means refund such overflow of CENVAT credit will be separately notified by the Ministry of Finance."

23.2 The Office Memorandum dated 01.04.2007 also provides a clarification with reference to the Value Addition in order to ensure genuine industrial activities, which reads as hereunder: -

"In order to ensure genuine industrial activities in the North Eastern Region, benefits under NEIIPP, 2007 will not be admissible to goods in respect of which only peripheral activities like preservation during storage, cleaning operations, packing, re-packing, labelling or re-labelling, sorting, alteration of retail sale price etc. take place."

23.3 Paragraph 2 of the Office Memorandum dated 01.04.2007 makes it clear that exemption granted in earlier Office Memorandum dated 24.12.1997 will cease to operate with effect from 01.04.2007. The Industrial Units which started on or before 31.03.2007 will continue to get the benefits and incentives



under the North East Industrial Policy (NEIP), 1997. The same reads as hereunder: -

"2. The 'New Industrial Policy and other concession in the North Eastern Region' announced vide O.M. No.EA/1/2/96-IPD, dated 24.12.1997 (NEIP, 1997) will cease to operate with effect from 1.4.2007. Industrial Units which have commenced commercial production on or before 31.3.2007 will continue to get benefits/incentives under NEIP, 1997."

23.4 Of course, by Office Memorandum dated 01.04.2007, also the Government reserves the right to modify any part of the Policy in public interest and the same is subject to the test of larger/superior public interest as discussed above.

24. In a similar situation before the Division Bench of the Madras High Court as to the withdrawal of the deferral and waiver of sales tax in Writ Petition No. 13697 and 13698 of 2002 - *The India Cements Ltd. vs. The Assistant Commissioner (CT) & Ors.* by order dated 22.12.2006 to which I am a party, has observed as hereunder:

"16.1. The power of taxation can be used not merely for raising the revenue, but also to regulate the economy, to promote the industrialisation and to encourage the investment for expansion or diversification of the existing industries and to develop new industries.

16.2. Our country is emerging as a major power with the goal aiming:

- (i) to maintain a sustained growth in productivity;
- (ii) to enhance gainful employment;



- (iii) to achieve optimal utilization of human resources;
- (iv) to attain international competitiveness; and
- (v) to transform India into a major partner and player in the global arena.

16.3. In the process of meeting the challenges that come across the globalization of economy, industry, trade and commerce, the Government have come forward with liberalization schemes such as, granting certain exemptions in respect of tax payable on the turnover of the sale of goods produced and sold by the new or expanded or diversified industrial units, of course, subject to the directions, qualifications and the terms and conditions prescribed in the scheme, eligibility certificate and the consequential agreements, with a view to boost the industrialisation by

- (i) deregulating Indian Industry,
- (ii) allowing the industry freedom and flexibility in responding to market forces, and
- (iii) providing a policy regime that facilitates and fosters growth of Indian Industry.

16.4. The power to maintain economic unity includes the power to grant exemptions or to reduce the rate of interest or defer or waive the sales tax as a special case for achieving the industrial development and to provide certain tax incentives which is also intended to attain the economic equality in the growth and development. The economic development of the State to bring it into equality with all other States and thereby develop the economic unity of India is one of the major commitments or the goals of the constitutional aspirations of this land."

X X X X

"19.1. It is a settled law that fiscal laws must be strictly construed and the words must say what they mean and nothing should be presumed or implied. It is also a trite that the principle that fiscal statutes should be strictly construed does not rule out the application of the principle of reasonable construction to give effect to the purpose or intention of any particular provision as apparent from the scheme of the Act, with the assistance of such external aids, as are permissible under law [SHREE SAJJAN MILLS LTD. v. COMMISSIONER OF INCOME TAX, M.P. BHOPAL, 1986 TAX LAW REPORTER 48].

19.2. In order to apply the principle of reasonable construction to give effect to the purpose or intention of the provision, as apparent from the scheme of the Act, the Court must endeavour to harmonise the source of the Schemes as well as the regulatory procedure, because the statute should be interpreted in such a way to avoid absurdity and oracular interpretation and to have harmonious construction to advance the



implementation of the schemes and to make them workable, unless it is impossible to do so, rather than making it meaningless.

19.3. This leads us to refer back the intention behind the Sales Tax Deferral/Waiver Scheme. The power conferred on the State to notify the Schemes, either for deferral or waiver, is nothing but a concession or a freedom from an statutory obligation which an exemptee is otherwise liable to discharge. It is a privilege granted, not available to all others. Therefore, an exemption, thus granted under statutory provisions of a fiscal statute is held to be a concession granted, so that the beneficiaries of such concession are required to pay the tax after the deferral period in case of deferral of sales tax or required not to pay tax during the waiver period in the case of waiver of sales tax, which they are otherwise liable to pay under the statute. Hence, the recipients of such concession have no legally enforceable right against the Government to grant a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one as it may be taken away in simpliciter or on the ground of violation of the conditions prescribed under the respective schemes, in exercise of the very power under which the exemption was granted. Either for declaring or for withdrawing such exemption in the case of deferral or waiver, the cardinal principle is that the same must be exercised in the public interest and not otherwise [vide: *State of Rajasthan v. J.K.Udaipur Udyog Ltd.* (2004) 7 SCC 673]."

25. With the above rules of interpretation and in the light of the objects expressed in the respective notifications, the Government undoubtedly, in public interest, exempted excise duty, by notification dated 09.09.2003 and Office Memorandum dated 01.04.2007 -

(i) to improve productivity of the State;

(ii) to encourage economy, sustainable growth in the productivity;



(iii) to achieve the optimal utilization so that the economy, trade, commerce and the standard of living in the State of Sikkim would grow and improve in all spheres;

(iv) the State would qualify to compete with all other States of Indian democracy and so that this country, in turn, would compete globally.

26.1 A very identical issue under Section 5A of the Central Excise Act, 1944 also came for the consideration before the Gujarat High Court in Special Civil Application No. 6299 of 2008, *Sal Steel Limited and Anr. vs. Union of India & Ors.*, where a majority of 2 out of 3 Hon'ble Judges by their independent and separate Orders dated 28.10.2009 and 10.03.2010, held as hereunder:

"22. The contention that the power to modify/vary/ revoke a notification already issued is inherent in the power under Section 5A of the Act to issue a notification may in general be correct, but when such an exercise is challenged, like in the present case, it becomes necessary to examine as to whether such an exercise is within the scope and extent of power available under Section 5A of the Act. The authority has to be alive to the fact that the power under Section 5A of the Act is essentially a power to grant exemption in relation to duty of excise which is otherwise leviable under other provisions of the Act. Therefore, in exercise of such power under Section 5A of the Act the authority cannot be permitted to take recourse to the principles applicable for determining whether duty is correctly levied or not. Once the authority has come to the conclusion that an exemption is required to be granted from payment of duty of excise, the only caveat being that it is in public interest, the authority cannot thereafter refer to loss of revenue as larger public interest for withdrawing such exemption, when the notification originally issued has fixed a time frame for the exemption. To put it differently, once power



under Section 5A of the Act has been exercised and exemption granted, a larger / superior public interest has to be shown for curtailing / modifying / withdrawing an exemption already granted. The onus shall be on the respondent authority in this regard and the same cannot be discharged by merely referring to a perceived loss of revenue on comparison with similar units in other areas which are not entitled to exemption. If non-comparables are compared it would not yield correct result. Therefore, the attempt on part of the respondent authority to refer to certain pan India figures and percentages thereof to compare with the figures and percentages thereof from new industrial units in the District of Kutch cannot be permitted. It is not possible to even ascertain as to whether the other units, not located in the District of Kutch, were put up within the same period; and even if so put up, were put up in an area affected by a devastating earthquake. The object and purpose of issuing Original Notification was in relation to a region, namely, District Kutch, which was almost razed to ground by the earthquake in January 2001, and the package for economic and social revival thereof cannot be treated at par with industries set up in other areas of India and, therefore, the assimilation of percentile figures of two incomparable regions would give a misleading picture. The entire exercise of issuing subsequent notifications on 27.03.2008 and 10.06.2008 is thus without any basis, i.e. the basis adopted has no nexus with the object, intent and purpose which formed the basis for issuing Original Notification in 2001.

23. Section 38A of the Act is in relation to effect of amendments, etc., of Rules, Notifications or Orders. The said provision reads as under:

[38A. Effect of amendments, etc., of rules, notifications or orders. -- Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not--

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect, or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accorded or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or



(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded."

24. Under Section 38A of the Act it is provided that where any Rule, Notification, etc. made or issued under this Act is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescission then five clauses (a) to (e) are set out to lay down that what is provided in each of the five clauses, which are alternative to each other, shall not take place. Clause-(b) stipulates that an amendment, etc. shall not affect the previous operation of any Rule, Notification, etc. so amended, etc. or anything duly done or suffered thereunder. Therefore, an amendment of a notification shall not, not only not affect the previous operation of the notification, but shall also not affect anything duly done or suffered under the notification. Similarly, clause-(c) provides for a situation where an amendment, etc. shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Rule, Notification, etc. so amended, etc. which means that where under a notification any right or privilege has been acquired or has accrued, the same shall not be affected by the amendment, etc. of the notification, and correspondingly an obligation or liability incurred under the notification shall have to be discharged even after the amendment, etc. Clauses-(d) and (e) similarly provide for permitting continuation of levability of any penalty, etc. and continuation of any investigation, legal proceeding or remedy, etc.

25. Thus, the scheme which emerges on a plain reading of Section 38A of the Act is that even in a case where a Rule, Notification, etc. is amended, etc., unless the amending Rule, Notification, etc. specifically denotes a contrary intention, everything that has taken place under the Rule, Notification, etc. prior to amendment shall continue to its logical end. This provision is not only a saving provision, but is a provision which correspondingly obligates both the person who was a beneficiary under the existing Rule, Notification, etc. and the authority under the existing Rule, Notification, etc. to continue to comply with the requirements of the Rule, Notification, etc. as it existed even after amendment once the parties have duly done anything or suffered under the existing Rule, Notification, etc. An assessee, who is required to act in a particular manner as specified by the Rule, Notification, etc. as existing before the amendment, is obliged in law to act accordingly, and correspondingly the authority is equally obliged in law to act as if the amendment had not taken place, such act on part of the authority being not only in relation to collection of revenue and other attendant provisions like penalty, etc., but also in relation to the entitlements of an assessee. This provision, namely, Section 38A of the Act incorporates in the statute the principle

of a completed contract between the parties, whereunder the parties are obliged to fulfill their respective part of the concluded contract, and in case of failure, the Court may step in and direct the defaulting party to specifically perform his part of the promise. To put it differently, one may say that the principle of promissory estoppel, as normally understood, has been incorporated in the statute.

* * * *

27. In view of various decisions of the Apex Court cited by both the sides a consensus emerges that the approach of the Court in the matter of invoking the principle of promissory estoppel depends on facts of each case. The general principle is that once a representation has been made by one party and the other party acts on that representation and makes investments and thereafter the other party resiles, such act cannot be stated to be fair and reasonable. This principle is applicable even in a case where one of the parties, namely, the party making a representation may be the State. It is also stated that promissory estoppel cannot be invoked against legislation. This is only partly correct. A distinction has to be made between the delegated legislation and the primary legislation. So far as the primary legislation is concerned, no estoppel can be applied against an Act. However, in case of delegated legislation it is not so. The general principle will come into play and if a subject is able to establish having acted on the promise made, put himself in a detrimental position, the other party is obliged in law to make good the promise, even if the promise is by way of a delegated legislation. The State cannot be heard to complain that the promise has resulted in financial loss. If the nature of promise is such where in exercise of delegated legislation the State has consciously agreed to forego certain revenue the State cannot resile from the said position only on the ground of loss to the exchequer. Of course, it is equally well settled that no person can be permitted to misuse the concession or benefit and invoke promissory estoppel. If one party abuses the concession it is always open to the other party to revoke such concession. But for this there has to be cogent material in the form of direct evidence pointing out misuse of the concession. When public interest is pleaded the same cannot be general and vague for the purpose of either modifying or revoking an exemption already granted. Supervening public interest is always a good ground for modifying or withdrawing an exemption. But once again such supervening public interest has to be established by direct cogent evidence in this regard, and not on basis of general and vague apprehensions.

28. In a case where the State invited new industries by offering concessional power tariff and thereafter withdrew the same on the ground that there was power theft on a large scale the Apex Court in case of U.P. Power Corporation Limited (supra), after detailed analysis of the law on the subject, struck down the action of the State by invoking principle of promissory estoppel and in the process stated:

"20. In this 21st century, when there is global economy, the question of faith is very important. Government

offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the shortsightedness of the governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the appellant-Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in the governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith." "

26.2 Accordingly, Full Bench of the Gujarat High Court in *Sal Steel Limited & Anr. Vs. Union of India & Ors.* held that withdrawal of exemption without any basis, whatsoever, as in the instant case, is arbitrary, unreasonable, illogical and irrational and contrary to the doctrine of promissory estoppel.

27. The Government having granted such benefits of exemption of excise duty, basically invoking the powers traceable under Articles 73 and 162 of the Constitution of India by which respective Governments took policy decisions and consequently tracing the statutory power under Section 5A of the Central Excise Act, 1944, the same cannot be restricted by way of executive orders and by way of these impugned notifications



dated 27.03.2008 and 10.06.2008, unless a greater public interest required so.

28.1 It is true as pointed out by Mr. A. Moulik, learned Senior Counsel appearing for the respondents/revenue, the bogus manufacturers should not be permitted to avail the exemption which is intended to the real manufacturers; otherwise not only the above object of the notification of the respective Governments will be defeated, but it will also end in the loss of revenue of the State.

28.2 Undoubtedly, only genuine and bona fide manufacturers are entitled for exemption of excise duty and not bogus or fictitious manufacturers. The power of the revenue undoubtedly is still available to deny the exemption of excise duty conferred under the notification dated 09.09.2003 and Office Memorandum dated 01.04.2007, by way of individual proceedings which always could be initiated by the revenue against the faulty, bogus claimants or manufacturers as contended by Mr. Moulik, learned Senior Counsel or otherwise the very public interest enshrined in the New Industrial Policy of the Central and the State Governments, exercising the powers under Articles 73 and 162 of the Constitution of India, of course



without compromising the loss of revenue. Therefore, the revenue is always well within the power to deny the duty exemption in appropriate cases where the norms, terms and conditions required for such duty exemption cannot be satisfied. But, to deny the benefits statutorily conferred upon the petitioners/ assesseees in the public interest, pursuant to the New Industrial Policy of the Central and State Governments, reducing the percentage of such statutory concessions, suffers from elements of arbitrariness and unreasonableness, which, in turn, are relatively illogical and irrational.

29.1 It is true that tax and equity are strangers. Equity cannot be relied on even by the revenue to tax an amount which is not taxable under the statute, and therefore, tax cannot be levied on the basis of the equity. Nor tax can be evaded placing reliance on the equity. [Vide: *Kabil Mohan vs. CIT* (1999) 1 SCC 430].

29.2 As discussed in detail by the Full Bench of the Gujarat High Court in *Sal Steel Limited & Anr. Vs. Union of India & Ors.* in paragraph 27 of the Order dated 28.10.2009 of Justice D. A. Mehta, referred to above,



(i) if a subject is able to establish having acted on the promise made, put himself in a detrimental position, the other party is obliged in law to make good the promise, even if the promise is by way of a delegated legislation; and the State cannot be heard to complain that the promise has resulted in financial loss;

(ii) of course, it is equally well settled that no person can be permitted to misuse the concession or benefit and invoke promissory estoppel. If one party abuses the concession, it is always open to the other party to revoke such concession; and

(iii) if there is no cogent reasons in the form of direct evidence pointing out misuse of the concession.

30 The above view is also fortified by the decision of the Apex Court in *U.P. Power Corpn. Ltd. and Anr. Vs. Sant Steels & Alloys (P) Ltd. & Ors.* reported in AIR 2008 SC 693.

31. For the above reasons, the impugned proceedings dated 27.03.2008 and 10.06.2008 are quashed but however, without prejudice to the rights of the Revenue to deny duty



exemptions in appropriate cases, based on material facts and cogent reasons, of course, after following due process of law.

In the result, the writ petitions are allowed with the above observations and the petitioners/assesseees are entitled to workout their refund, in the manner known to law. No costs.



(P.D. DINAKARAN)
CHIEF JUSTICE
15.11.2010

Index : Yes/No
Internet : Yes/No

rsr/pm