HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 470/08 and other connected petitions as per list appended to this order

M/s Reckitt Benckiser v. Union of India and Ors

Coram:

Hon'ble Mr Justice Sunil Hali, Judge

Appearing counsel:

For the petitioner(s): M/s Jawahar Lal with Pranav Kohli, AR Madhav Rao, Ajoy K.Roy,BS Salathia, DS Thakur, SK Shukla, CS Azad, MK Sharma,Suraj S.Wazir, Dharam Paul, CS Gupta, Mrs Sindhu Sharma and Deepika Thussoo, Advs.

For the respondents: M/s MI Qadri, AG V.K. Magoo, Ajay Sharma, Senior Standing Counsel, Central Excise and Customs, Piyush Gupta, Jatinder Choudhary, Advocates.

Whether approved for reporting In Press/Digest/Journal : **Yes/No**

As the issues involved in all the writ petitions in hand are similar, they shall stand disposed of by a common order.

In order to boost the industrial activity in the State of Jammu and Kashmir, so that the growth rate of industrial sector could be accelerated which could strengthen and broaden the infrastructure base of the State in general and industries in particular, minimize the unemployment problem, the State promulgated an Industrial Policy 1998-2003, 2004, which was to remain in operation till 31st of March' 2015.

As the desired results were not so good and there being no acceleration in the rate of growth of industrial sector primarily on account of the disturbed conditions in the State and competition from cheaper imported products coming into the country as a result of the policy of globalization and economic liberalization pursued by the Government of India, forcing many local Small Scale Industrial Units to down their shutters and increase in the problem of unemployment on account of saturation in the Government jobs, impelled the State of J&K to approach the Central government for a special package for development of industries in the State on the lines of North East Industrial Policy notified by the Central Government vide Ministry of Industry's OM No.EA/1/2/96-IPD dt. 24th of Dec'97.

The Central Government felt the need for structured intervention strategies to accelerate industrial development of the State and boost investor confidence. Vide Notification dated 14th of June'2002, issued by the Ministry of Commerce & Industry (Department of Industrial Policy & Promotion), Government of India, some new initiatives were taken to provide incentives as well as an enabling environment for industrial development in the State. The policy provided various fiscal incentives to new industrial units as also to those existing units engaged in substantial expansion. As a measure of fiscal incentives, the Government approved conversion of growth center into total tax free zones for a period of ten years from the date of commencement of commercial production.

In terms of the new industrial policy approved by the Central Government, all industrial activities like growth center, industrial infrastructure development centers (IIDCs) and other locations like industrial estates, parks export processing zones, commercial estates etc., as notified by the Central Government were held entitled to 100% excise duty exemption for a period of ten years from the date of commencement of commercial production as indicated above. The State Government was also

requested to grant sales tax exemption to the units which avail of concessions under the above policy.

To carry out the object of new Industrial Policy, notification No. 56/2002-CE dt. 14th of Nov'2002, was issued granting exemption from payment of excise or additional duty of excise, as the case may be. This was done in exercise of powers conferred by Sub Section (1) of Section 5A of the Central Excise Act, 1944, (here-in-after called the Act of 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 (Textiles and Textile Articles) Act, 1978. The said notification exempted the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985, other than the goods specified in Annexure I appended to the notification, and cleared from a unit located in the industrial growth centre, 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 specified in Annexure II, appended to the notification, from so much of the duty of excise or additional duty of excise, as the

case may be, leviable thereon under any of the aforementioned Acts as is equivalent to the amount of duty paid by the manufacturer of goods, other than the amount of duty paid by utilization of Cenvat credit under the Cenvat Credit Rules, 2002.

The exemption contained in the above notification was to apply only to those industrial units namely:-

a/ who had commenced their commercial production on or after 14th of June'2002; and

b/ industrial units existing before 14th of June'2002, but have undertaken substantial expansion by way of increase in installed capacity by not less than 25% on or before the above date.

Clause (4) of the notification provided that exemption contained in the said notification shall apply to any of the aforementioned units for a period of not exceeding ten years from the date of publication of the notification in the official gazette or from the date of commencement of commercial production whichever is later.

The above notification was amended vide notification No. 5/2003-C.E., dated 13th of Feb'03, by adding following proviso in second paragraph in clause (b):-

"Provided that 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."

Thereafter, various amendments were made in the original notification dt. 14th of Nov'02. However, all the amendments were in line with the Industrial Policy of the State Government as also that of Central Government.

Vide notifications impugned No.19/2008-Central Excise dated 27th of March'2008, and 34/2008-Central Excise dt. 10th of June'08, further amendments have been carried out in the original notification, by the Central Government, whereby the excise duty refund has been restricted to a maximum limit as mentioned in the tables appended to the above notifications in respect of different goods. The said notifications changed the entire scenario by reducing the 100% exemption provided by the earlier

notifications to a limited percentage in respect of different goods manufactured by the units. Another feature of these notifications is that the exemption from duty has been restricted on value addition undertaken in the manufacture of said goods by the units. The notifications impugned have given the liberty to an industrial unit to apply to the Commissioner for determination of actual value addition if the manufacturer does not agree to the rate of excise duty exemption which has been made available under the impugned notifications. The Commissioner has been given the power to determine the actual value addition in the production or manufacture of goods and thereby order refund according to the excise duty to the extent of value addition made. Following are, thus, the salient features of the impugned notifications:-

a/ 100% excise duty refundable in terms of earlier notification restricted to the maximum limits as specified in the rate column of the table appended to the impugned notifications in respect of different goods;

b/ exemption from payment of duty on the finished goods changed to duty payable only to

value addition undertaken in the manufacture of said goods by the units.

It is the above amended notifications issued by the respondents which are the subject matter of challenge in the present petitions.

The case set out by the petitioners is that in order to attract the investors to make investment in the State of J&K, so that there is an overall industrial growth, incentives were provided to such investors by issuing notification 56/2002-CE dt. 14th of Nov'02, which granted 100% exemption from payment of excise duty for a period of ten years from the date of commencement of commercial production. It is stated that on the basis of the said promise extended to the investors by way of above notification, the petitioners invested huge money in the State of J&K, in order to start the industrial activity. It is further contended that not only the expenditure was incurred in setting up the industrial units in the State but had to train the man-power of the State for employment in these industrial units and convert them from un-skilled to specialized and skilled man-power. By setting up the industrial units in the State of J&K on the promise extended to the investors by the Central Government as also the State Government, in

the shape of the industrial policy promulgated by the respective Governments, about 70% of employment has been generated from amongst the local youths of the State.

The further contention raised is that as the raw material used for manufacture of various goods is not available in the State of J&K, the same has to be procured from outside the State from different parts of the country, which results in increase in the input cost of the product which costs would not have been incurred had the units been established in any other State. It was only on the basis of the incentives which were provided to the investors in terms of the scheme, which lured the petitioners to set up their industrial units in this State. The benefit of the notification dt. 14th of Nov'02, regarding 100% exemption from payment of excise duty was to be extended to the petitioner-units for a period of ten years from the date of publication of the original notification, referred to above, or from the date of commencement of commercial production, whichever is later.

The grievance projected is that by issuance of impugned notifications, the respondents have promulgated a new scheme withdrawing the benefit as was available to them in terms of the

original notification. This action of the respondents is said to be hit by doctrine of promissory estoppel. It is stated that in terms of the original notification, the respondents had formulated a policy to grant complete exemption from payment of excise duty for a period of ten years to the eligible industrial units in respect of the industrial activities undertaken by them in the State of J&K, and accordingly, acting upon the said promise extended to the various investors, huge investment was made in establishing the industrial units for production of such goods which make the petitioners entitled to claim the refund for the period mentioned above. The respondents after issuing the original notification thereby extending certain benefits to the investors, in pursuance to which the petitioners established their units, are bound by the promise extended by them and cannot frame a scheme which has the effect of reducing the benefit of complete exemption from payment of excise duty. It is further submitted by the petitioners that the withdrawal of the benefit by the respondents by way of issuing the impugned notifications is not in the larger public interest rather, it defeats the same.

It is stated that such a change in the policy as has been done by the impugned notifications

is not necessitated by any public interest. The action of respondents in framing an entirely new policy is hit by the doctrine of promissory estoppel and is not in accordance with the law or in public interest. In support of their contentions, reliance has been placed on the judgments reported as **U.P. Power Corporation Ltd and anr v. Sant Steel, 2008(2) SCC 777, State of Bihar v. Suprabhat Steel Ltd and anr, 1999(1) SCC 31, Union of India v. Shree Ganpati Rolling Mills, (2006) 3 GLR 586, Dai-Ichi Karkara Ltd v. UOI, 2000(4) SCC 57, Motilal Padmapat Sugar Mills v. State of Uttarpradesh and ors, 1979(2) SCC 409, Assistant Comm of Commercial Taxes v. Dharmendra Trading Co. Ltd (Dharwad, 1988(3) SCC 570, Pournami Oil Mills and ors v. State of Kerala and ors, 1986(Suppl) SCC 728, Shrejee Sales Corporation and ors v. Union of India, 1997(3) SCC 398, Satyam Steel & Alloys Pvt Ltd v. UOI, 2005(182) ELT 441 (Gau) and a judgment of Guwahati High Court in the case of Kamakhya Cosmetics and Pharmaceuticals Pvt. Ltd v. UOI and ors.**

Respondents have resisted the petitions by stating that Section 5(A) of the Act of 1944, confers the power upon the Central Government to grant exemption from payment of excise duty

in case a satisfaction is recorded that granting of such an exemption is in the larger public interest. This power can be exercised in absolute terms or subject to such conditions to be fulfilled, as may be, specified in the notification on excisable goods. In the year 2002, the Government had provided excise duty exemption to the new/existing industrial units located in the specified areas in the State of Jammu and Kashmir. The benefit granted by the Government in terms of the notification dt. 14th of Nov' 2002, led to some unscrupulous manufacturers to indulge in bogus production and different types of tax evasion tactics were adopted by such manufacturers. The goods were being supplied by the manufacturers without issuance of sale invoices and this resulted in bogus sale invoices issued by the traders who do not undertake actual supply of goods.

The further contention raised is that there was misuse of exemption benefit being granted by the Government and the units in the areas were wanting to pay maximum amount of duty in cash so that they become entitled to claim refund of entire amount of duty paid in cash. In order to ascertain this fact, an overall study was made by the Excise department at its own level on receipt of information from the Director General, Central

Excise Intelligence and other concerned agencies to find out the percentage of excise duty paid in cash and from the Cenvat Credit account by the units availing this benefit of exemption. On verification, it was found that the industrial units in specified areas were paying a very high percentage of duty in cash through Personal Ledger Account (PLA), in comparison to the units located in other parts of the country, in order to claim the refund. Keeping in view the said malpractice adopted by the manufacturers and also taking into consideration the public interest, the impugned amendments in the policy have been made to grant excise duty exemption only to the actual value addition made by the units in these industrial areas. It is stated that the power has been rightly exercised under the aforementioned Section of the Act of 1944, to modify the refund mechanism in order to provide excise duty refund only to the extent of duty payable on the actual value addition made by the manufacturers.

That in terms of the modified mechanism, the manufacturers are required to pay the duty on the full value of goods manufactured and cleared by them in the same manner as per the existing scheme but refund would be granted only to the extent of duty paid on actual value

addition made by them in the specified areas. This, as indicated above, is said to have been done in public interest and to generate the revenue. In order to show that no prejudice has been caused to the petitioner units, reliance has been placed on the sample of invoices to indicate that the petitioners collect excise duty from their customers to whom the goods are sold. Under the General Clauses Act, power to exempt includes the power to modify or withdraw the same. Placing reliance on a judgment of the Apex Court reported as **Kasinka Trading and anr v. UOI and another, (1995) 1 SCC 274,** it is contended that the action of respondents in withdrawing the exemption vide notification impugned is in accordance with the law.

Regarding the plea of promissory estoppel, it is stated that the said doctrine is not applicable in the present case. Reliance in this regard has again been placed on the judgment in the case of **Kasinka Trading (supra) and R.C. Tobacco Pvt. Ltd. V UOI, reported in 2005(1988) ELT 129.** It is stated that even if a promise is extended by way of a scheme to the investors, the Government in public interest can withdraw the same before the expiry of the date as fixed in the said Scheme regarding grant of a special incentive or benefit.

It is further contended that the impugned notifications provide for remedial measures by way of fixation of special rate by the Commissioner concerned, when the manufacturer finds that the rate so fixed under these notifications is not acceptable to him. There being such an inbuilt remedial provision in the notifications itself, the petitioners, it is stated, cannot be said to be deprived of their legal rights. It is, thus, contended that the petitioners cannot have any grievance against the action taken by the respondents by way of issuance of amended notifications dt. 27th of March'2008, and 10th of June'08.

I have heard learned counsel for the parties.

Following issues arise for determination in this case:-

A/ <u>whether any promise was extended by the Central Government to the investors to allow the operation of exemption from payment of excise duty which was to remain in force for a period of ten years on the specified finished goods manufactured in specified areas within the State;</u>

B/ whether the investors had altered their position based upon the promise extended to them in terms of the policy and the original notification issued pursuant thereto for grant of exemption from payment of excise duty;

C/ while exercising its sovereign power, whether the exemption so granted by the Government was an exemption simplicitor or the same was by way of an incentive offered to the investors for establishing industrial units in the specified areas within the State to carry on the manufacturing activities;

D/ that if it was an exemption by way of incentive to establish the units within the State, whether withdrawal of the said exemption would be hit by the principles of 'promissory estoppel';

E/ whether the impugned notification was issued keeping in view the overwhelming public interest and what exactly was the public interest in withdrawing the exemption so granted;

F/ whether the exemption was granted by way of a refund mechanism.

Question Nos. 1 and 2:

In all the writ petitions in hand, it has specifically been pleaded that the State Government, in order to promote its industrial activity in the State, formulated an industrial policy which was to remain in force uptil 2015. Various incentives were provided to the investors in terms of the said policy in the shape of subsidies and 100% exemption from payment of excise duty on manufacture of specified good within specified areas in the State. In addition to the said incentives, there was exemption from payment of sales tax, municipal tax etc., also. Lured by the said promise extended to the investors in terms of the policy and the notification issued pursuant thereto, the petitioners established their industrial units within the specified areas as defined in the policy to carry out different industrial activities.

In order to further notice the factual background, the facts as narrated in one of the writ petition i.e. OWP No. 460/08 titled M/s Bharat Box Factory Ltd v. State and ors, which is taken as the lead case, may be noticed as under:-

The petitioner in the above writ petition has contended that on the promise extended by the Central as well as the State Government in terms of the policy and the notification issued pursuant thereto dt. 14th of Nov'02, providing for refund of entire excise duty on the manufacture of specified goods as per the said policy, an industrial unit was set up in the specified area in the State on 17th of April'03, for manufacturing printed corrugated cartons at an investment of Rs. 1.77 Crores by taking loan from banks and other financial institutions. The investment as on today on the said unit is approximately Rs. 15 Crores. The second unit was installed by the petitioner in terms of the policy for manufacturing mosquito coils and toilet cleaners at an investment of Rs. 14 lacs and the total investment of the said plant as on today is about Rs. 28 Crores. Unit III was set up by the petitioner Company acting upon the promise extended by the Government for manufacturing mosquito coils and toilet cleaners at an investment of Rs. 1.97 Crores in the year 2007. The total investment of the said unit is said to be Rs. 25 crores. Due to the shortage of power in the State, the units are being run by the petitioner on DG sets installed in the said units. It is stated that the petitioner company has incurred huge amount to train the man power of

the State for employment in these units and converted them from unskilled to specialized and skilled man-power. The activity undertaken by the petitioner has generated employment in the State as approximately 3800 skilled and unskilled labourers have been engaged out of which 70% employees belong to the State of J&K.

The raw material for mosquito coils and liquid toilet cleaner for units II and III is brought by the petitioner from outside the State at higher cost as the same is not available in the State of J&K. The raw material namely paper board for Unit I is purchased from Andhra Pradesh and Punjab. The transportation cost itself puts the petitioner company at a disadvantageous position as compared to other manufacturers dealing with the same business who have set up their units in other parts of the country. The buyers of the products manufactured by the petitioner company are located outside the State. It is, thus, contended that non availability of raw material in the State and the buyers of the products outside the State itself shows that the units are otherwise economically unviable and were set up only on the promise extended by the Government that there would be refund of entire excise duty for a period of ten years in terms of the original notification No.56/2002-CE.

The petitioner company passed on the benefit of lower excise duty to its buyers as a result of which the product is sold in the market at a lower price which is primary reason for the buyers to buy the product of the petitioner company from the State of J&K.

Similar contentions have been raised by the other petitioners also, which have not been denied by the respondents.

So what emerges from the pleadings is that on the promise extended by the State Government and the Central Government in terms of the policy and the earlier notification, referred to above, the petitioners established their industrial units in the State within the specified areas and started the industrial activities, and thus, changed their position. The industrial units were so established on the promise extended to them by the Government to provide the incentive of 100% exemption from payment of excise duty on finished goods and in lieu of this, the petitioners have altered their position by establishing the industrial units within the specified areas in the State. This answers question Nos. 1 and 2.

Question No.3:

While exercising its sovereign power, whether the exemption granted by the State would be an exemption simplicitor or by way of an incentive offered for establishment of industries in the specified areas in the State, is the next question which is to be determined. it be seen that the State has the power to formulate the policies which are in public interest. Such a power can be exercised by invoking Article 162 of the Constitution of India, by taking resort to some provisions or pursuant to a policy resolution. It is in the realm of this power that the State can grant exemption by invoking certain provisions of the Statute to grant such exemption. The said power is traceable to the Statute itself and its exercise is done in the larger public interest. While exercising the power in pursuance to a policy resolution and in order to carry out the objectives of the policy, recourse is taken to the statutory provisions dealing with the subject. In the former case, the State considers granting such exemption necessary to meet the exigencies of the situation in public interest. There is no inducement or representation in such a situation. While, in the case of a policy resolution, exemption is granted due to the promise made by the State. In such an event,

where there was inducement, the State can resile from the promise made by it only when it establishes to the satisfaction of the court that overriding public interest so requires. Once, such an overriding public interest is established by the State, it can be allowed to withdraw the concessions.

In case of the former, the State can withdraw the exemption at any point of time as there is no element of promise or inducement in granting such an exemption even though, it is granted in public interest. In case of later, the underlying principle is that the State is bound by the promise it extends to its subjects and cannot be permitted to resile from the same. The Government would be bound by the promise and the promise can be enforced against the Government at the instance of the promisee. The doctrine of promissory estoppel is in the realm of equity. There is no consideration for the promise and the promise is not recorded in the form of a formal contract as required under Article 299 of the Constitution. It is an equitable doctrine and has to yield when the equity so requires. The State Government cannot exempt itself from the liability to carry on the promise merely because it feels that the change in policy is necessary. There can be no exparte

appraisement of the circumstances on behalf of the State.

What clearly emerges from the aforementioned discussion is that the exemption in the present case has been granted by way of a policy resolution extending promise to the petitioners to establish their industrial units within the specified areas in the State of J&K to manufacture specified goods in terms of the policy and in case, such an activity is carried on within the State, there will be 100% exemption from payment of excise duty for a period of ten years. In such a situation, the State cannot revoke the exemption in terms of Section 5A of the Act of 1944 on the premises that power to grant exemption also provides for its withdrawal. In case of exemption simplicitor, the power to grant and withdraw the exemption is traceable to a Statute and can be exercised in larger public interest. In case of exemption being granted on the basis of a policy resolution where there is an element of inducement, the same cannot be withdrawn if it has the effect of resiling from such a promise. However, it is not to say that the State cannot resile from its promise provided it establishes to the satisfaction of the court that overriding public interest so requires.

Whether there exists such a supervening public interest to withdraw the exemption would be discussed at a later part of the judgment.

The respondents, as noticed above, raised the contention that the impugned notifications have been issued in public interest. In support of the above contention raised by them, reliance has been placed on the judgment of the Apex Court in the case of Kasinka Trading (Supra). It is stated that the exemption was granted in exercise of statutory power in public interest and subsequently withdrawn by exercising the same power again in the public interest. At this stage, it would be relevant to notice the observations made by the Apex Court while examining this issue in the aforementioned case, which are as under:-

> *"….The appellants who are in business, have to be prepared for tides in the business. In Pournami Oil Mills, it was the incentive to set up new industry in the State with a view to boost the industrialization that exemption had been granted and it was in that fact situation that the doctrine of promissory estoppel was held available to the appellant therein. Again in Bakul Oil Industries it was the incentive to set up industries in a conforming area that the exemption had been granted and the Court held that the Government could withdraw and exemption granted by it earlier only if such withdrawal could be made without offending the rule of promissory estoppel and without*

> *depriving an industry entitled to claim exemption for the entire specified period for which exemption had been promised to it at the time of giving incentive. Both these cases therefore, cannot advance the case of the appellant and are distinguishable on facts because the exemption notification under Section 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the "public interest" so demanded. Thus, in the facts and circumstances of these cases, the appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the Act."*

A perusal of the observations made by the Apex Court in the above case, shows that a clear distinction has been made by the Apex Court in the above case in respect of exemption which holds a promise or incentive for setting up an industry and in respect of the power exercised in pursuance to a Statute which does not hold any promise.

At this stage, it would be appropriate to notice what has been observed by the Apex Court in para 16 of the judgment in the case reported

as **State of Jharkhand and others v. Tata Cummins Ltd. And another, (2006) 4 SCC 57:-**

> *"Before analyzing the above policy read with the notifications, it is important to bear in mind the connotation of the word "tax". A tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, we have to read the implementing notifications in the context of the industrial policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the industrial policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute."*

In the present case, as noticed above, an industrial policy was framed in terms of which, the State provided the incentive to the petitioner-units for setting up their industrial units for the purpose of manufacturing activities within the specified areas in the State. This incentive was provided in the nature of 100% exemption from payment of excise duty for a specified period. The amendment made vide impugned

notifications, has to be considered in the context of the original industrial policy which was formulated in terms of which incentive was provided for inviting the entrepreneurs to make investment in the State in specified areas. I, accordingly, hold that in the present case, the exemption granted by the Government was not an exemption simplicitor but an exemption granted in pursuance to a promise extended to the investors on the basis of a policy resolution and notification issued pursuant there to dt. 14th of Nov'2002.

Question No. 4:

The next question which is to be considered is whether the exemption granted in terms of the earlier notification to the units located in specified areas in the State was by way of an incentive to establish the units within specified areas in the State and whether the action of respondents in withdrawing the said exemption would be hit by the principle of promissory estoppel.

The doctrine of promissory estoppel is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. In Black's Law Dictionary

(Seventh Edition), the word 'promissory estoppel' has been defined as under:-

> *"The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promise to rely on the promise and if the promisee did actually rely on the promise to his or her detriment."*

The words 'promissory estoppel' and 'estoppel are two distinct theories. In the case of later, there is no requirement of promise but anyone invoking the principle of promissory estoppel, has to show that acting on the promise made by someone, he has altered his position. The promisor, under these circumstances, has to act upon his promise.

The doctrine of promissory estoppel is not based on the principle of estoppel. This doctrine is evolved by equity to see that no injustice is caused. Where a party by his word or conduct makes a promise to another party in unequivocal and clear terms intending to create legal relations knowing or intending that it would be acted upon by the party to whom the promise is made and it is so acted upon by the other party the promise would be binding on the party making it and the said party would not be entitled to go back on the promise made. Reliance be placed on the

judgment of the Apex Court in the case reported as **Bangalore Development Authority and others v. R.Hanumaiah and others, (2005) 12 SCC 508.** What has been observed in para 28 of the judgment in the above case, may be noticed as under:-

> *"The doctrine of promissory estoppel is not based on the principle of estoppel. It is a doctrine evolved by equity in order to prevent injustice. Where a party by his word or conduct makes a promise to another person in unequivocal and clear terms intending to create legal relations knowing or intending that it would be acted upon by the party to whom the promise is made and it is so acted upon by the other party the promise would be binding on the party making it. It would not be entitled to go back on the promise made……"*

A perusal of the afore-noticed observations made by the Apex Court, would show that the principle underlying the doctrine of promissory estoppel would be when any person acting on a promise made by the other alters its position and the person making the representation holds back from its words to the detriment of one who alters the position. When there is such a situation, the said doctrine steps in. This doctrine has been evolved as a principle of equity to mitigate the rigours of strict law and to prevent injustice taking place from strict adherence to it. There is no consideration for the promise and the

promise, as indicated above, is not reduced in the form of a formal contract as required under Article 299 of the Constitution. The State has the option not to make any promise knowing or intending to know that it would be acted upon by the promisee and the promisee would alter its position relying upon it. But, once the Government makes such a promise and the promisee has acted upon such a promise extended to it and has altered its position, the Government can be compelled to make good such a promise like any other private individual. In this regard, it would be apt to notice the observations made by the Apex Court in the case reported as **M/s Motilal Padampat Sugar Mills Co. Ltd v. State of Uttar Pradesh and others, (1979) 2 SCC 409.** What was observed in paragraphs 8 and 33 of the judgment in the above case may be noticed as under:-

> *"8…..The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to so so having regard to the dealings which have taken*

place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

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"33.The State, however, contended that the doctrine of promissory estoppel had no application in the present case because the appellant did not suffer any detriment by acting on the representation made by the Government: the vanaspati factory set up by the appellant was quite a profitable concern and there was no prejudice caused to the appellant. This contention of the State is clearly unsustainable and must be rejected. We do not think it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promise, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promise should have altered his position in reliance on the promise……"

Reliance can also be placed on the judgment of the Apex Court in the case reported as **Pournami Oil Mills and others v. State of Kerala and another, 1986 (Supp)SCC 728.** In the above case, a policy was formulated by the State of Kerala, for boosting of industrialization. Some incentive was provided in the shape of exemption from payment of sales tax and purchase tax to the industrial units for setting up their units and carrying out the industrial activities in the State of Kerala, for a period of five years. Later on, the said incentive was withdrawn. The Apex Court taking note of the

fact that the industrial units have set up their units on the basis of the promise extended to them, they are within their rights to invoke the plea of promissory estoppel. The relevant observations made in para 7 of the aforementioned judgment may be noticed as under:-

> *"Under the order dated April 11, 1979, new small scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialization, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small scale concern have set up their industries within the State of Kerala, they would be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently……"*

It be further seen that the principle of promissory estoppel is an equitable doctrine and it must yield when equity so requires. This, however, is not the absolute proposition which should bind the Government. The State or any public authority cannot be compelled to carry out a promise which is prohibited by law or which was devoid of the authority or power of the concerned officer of the Government or the authority concerned to make such a promise. The

doctrine of promissory estoppel being an equitable doctrine, as indicated above, must yield place to the equity, if there is a larger public interest involved. Reliance in this regard may be placed on the judgment of the Apex Court reported as **Sharma Transport v. Government of A.P. and others, (2002) 2 SCC 188.** The relevant observations made in this regard in para 24 of the judgment aforementioned be noticed as under:-

> *"It is equally settled law that the promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make. Doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the Government or the public authority for having regard to the facts as they have transpired that it would be inequitable to hold the Government or public authority to the promise or representation made by it. The court on satisfaction would not, in those circumstances raise the equity in favour of the persons to whom a promise or representation is made and enforce the promise or representation against the Government or the public authority……."*

What emerges from the observations made by the Apex Court, noticed above, is that in case, the State or the public authority is able to show

that the promise held out to the promisee cannot be made good as on the facts equity so demands and the larger public interest so requires, the Government cannot be made bound by the said promise. The doctrine of promissory estoppel would be displaced if the Government is able to show that during the said period, supervening public interest would be prejudiced if the promise is carried out. But in that eventuality, the court has to see the public interest as also the position of the promisee who has altered the position on the basis of the promise extended to it by the Government and a balance has to be maintained.

Not only in respect of a supervening public interest but also if the Government is able to show that the promise so made was in violation of a Statute, it will not compel the Government to act upon the promise made by it. However, the decision of the Government in this behalf has to be supported by some material indicating the facts and circumstances on account of which, the Government claims to be exempted from its liability. It cannot on some indefinite and undisclosed grounds of necessity or expediency resile itself from fulfilling the commitment made by it with the promisee in this behalf. It is for the court to decide as to whether, the facts and circumstances disclosed in this behalf are such as

to render it inequitable to enforce the liability upon the Government. The Government can also resile from the promise if it is possible for the promisee to resume its original position or restore status quo ante even if the promise is not acted upon by the Government.

So, what is contemplated by the principle of promissory estoppel stated herein supra is that the decision of the Government to resile from its commitment would be subject to judicial scrutiny which will examine while balancing the two equities-one in favour of the promisee and the other in favour of the promisor, as to whether such a promise is to be carried out or not. The Government cannot become the sole judge and take an exparte decision in this regard, as this would be in violation of the rule of law on the basis of which our system survives.

Applying the principle to the present case, it be seen that the doctrine of promissory estoppel can be applied on fulfillment of two conditions namely:

i/ clear and unequivocal promise knowing that the said promise would be acted upon by the promisee; and

ii/ acting upon such a promise, the promisee has altered in such a manner that he cannot restore his altered position to the one which was before acting upon the promise.

In the present case, in pursuance to a policy decision taken by the Central Government on the request of the State Government, as noticed above, incentive in the shape of exemption from payment of excise duty was given for carrying out the industrial activities within the specified areas in the State. Taking recourse to its statutory power under Section 5A of the Act of 1944, the Government granted 100% exemption from payment of excise duty to those industrial units who established their units on or before 14th of June'02, or who undertook substantial expansion of their units by not less than 25% on or after the said date, the detail of which has already been discussed above. The import of the policy read with the notification issued in this regard reveals as follows:-

a/ that 100% exemption from payment of excise duty on the goods manufactured by the units within the specified areas in the State for a period of ten years would be given from the date of issuance of notification or from the date of

commencement of commercial production whichever is later;

b/ the mode of exemption was by way of a refund mechanism. The excise duty payable on the finished goods was refundable except the credit for Cenvat incentive.

This was the promise extended to the petitioner units who established their units in the specified areas in the State and also those who undertook substantial expansion of their units in terms of the policy and the notification dt. 14th of June'02, and started manufacturing the specified goods. All these investors lured by the publishing of the policy and notification pursuant thereto, who set up their units or carried out substantial expansion of their units, clearly and unequivocally were made to do so to carry out the industrial activities within the State. What was also known to these investors at that point of time that this concession/incentive is to be given only in respect of the industrial activities in the State within the specified areas. To say it candidly, the activity of manufacturing the goods within the State was an essential condition for seeking such a benefit. The impugned notifications, as discussed herein supra, amended

the notification dt. 14th of Nov' 02, in two respects i.e.,:-

i/ the exemption of the excise duty was restricted to the value addition made, meaning thereby that the actual cost incurred in manufacturing the goods excluding the inputs procured in the shape of raw material;

ii/ 100% excise duty refundable in terms of the original notification restricted to a limited percentage as specified in the rate column of the table appended to the impugned notifications in respect of different goods.

The above modifications have been construed by the petitioner units to be an act of resiling from the promise extended to them by the Government in terms of the notification dt. 14th of Nov'2002. The contention raised in this behalf is that 100% exemption from payment of excise duty on the finished goods was promised vide the original notification and the concept of value addition as incorporated in the impugned notifications was never intended or indicated in the original notification, on the basis of which investors had set up their units in the State. The excise duty under the Excise Act is payable only on the finished goods and the concept of value

addition is alien in the scheme of things. The expression 'value addition' appearing in the impugned notification is not referable to the quantum of excise duty but to the industrial activity. When there is a value addition in the manufacturing of a product, such manufacturer is entitled to claim exemption on payment of excise duty on finished goods whatever may be the value of the same but when excise duty refund is limited to the quantum of value addition, then, the exemption becomes restricted to the value addition only. This is not, what is contemplated by the original notification of 2002.

The original scheme, in pursuance to which the units were set up in the State, provided that the duty payable on the inputs has to be given credit while charging the excisable duty from the manufacturer. The remaining excise duty is to be paid from the personal ledger account which alone is refunded. Certain inputs are not subjected to the excise duty but constitute the raw material for a finished product. Once this input raw material is used for the purpose of finished goods and finished goods are leviable to excisable duty, the manufacturer would not be entitled to claim exemption from payment of excise duty. What is contended is that the manufacturer will have to pay 100% excise duty

on its finished goods, the inputs of which are not excisable and he would be entitled to refund only to the extent of value addition in terms of the impugned notifications.

From the aforementioned discussion, it clearly emerges that a promise was extended by the State Government to the petitioner Units by way of an incentive in the shape of 100% exemption from payment of excise duty and acting upon the said promise, the petitioners established their units within the specified areas in the State of J&K and have altered their position. Unilateral withdrawal of that promise is barred by the principle of equitable promissory estoppel.

Question No.5:

Whether the impugned notification has been issued by the respondents keeping in view some overwhelming public interest is the next question which is required to be considered.

Before addressing the said issue, the question would be as to whether there was any change in the original policy contemplated by the impugned notifications. In this regard, the stand of the respondents has to be noticed.

The respondents, as indicated above, have stated that the impugned notification does not, in any way, change the contours of the promise which has been extended to the entrepreneurs. What is being contended is that all those units who are engaged in genuine industrial activities, would be entitled to receive the same benefit as was given to them in terms of the previous notification. In this regard, reference is being made to the impugned notification which provides ample scope for remedial measures by way of fixation of special rates and if the manufacturer finds that the rates so specified are not acceptable to him due to the reason that the 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, the said manufacturer may make application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central, as the case may be for determination of such special rate by stating all the relevant facts regarding the material components used in the production or manufacture of goods.

From the arguments raised by the respondents, it is found that the impugned

notifications, as indicated above, make two changes from the earlier notification. These are:-

a/ that the excise duty is payable on value addition; and

b/ refund is permitted only to the extent of percentage as assessed on average basis determined by the respondents by taking the said average on the basis of units located in other parts of the country in unspecified areas.

It is not in dispute that the concept of value addition is relatable to goods which are actually manufactured in the units from the raw material after excluding the cost of the said raw material. The actual activity carried out in the manufacture of goods and the cost incurred would be the value addition. There is no dispute that the petitioners could not have been misled in this behalf and they fully understood that it is the actual manufacturing activity which is required to be carried out within the specified areas in the State which entitles them to grant of such an exemption. It is the actual manufacturing activity carried out in the specified areas which is the basis on which promise has been extended. If no industrial activity is carried out in the specified areas in the State, then no such promise can be

enforced against the State. After having done so, the respondents had to maintain the refund of 100% excise duty on such value addition. It is here where the deviation has taken place by providing that the refund will be permissible only to the extent of average rates fixed in this behalf. This is not what was the promise held out by the earlier notification. It cannot be said that the impugned notifications continued to extend the same promise as was intended in terms of the earlier notification. The deviation, thus, as indicated above, has taken place in this regard vide impugned notifications and there is a change in the original policy.

After having said so, the question would be whether the promise has been withdrawn on account of supervening public interest.

The stand of respondents in this regard is that :-

i/ as a result of the provision for granting refund of cash paid duty and eligibility of credit of entire amount of said duty to the buyers of excisable goods, certain bogus manufacturers indulged in tax evasion tactics resulting in huge loss to the public exchequer;

ii/ bogus production was shown by such unscrupulous manufacturers in the specified areas whereas the actual production takes place elsewhere in the country;

iii/ over valuation of goods which resulted in availment of excess of credit by the buyer;

iv/ the goods were being supplied by the manufacturers without issuance of sale invoices when there was no actual supply of goods;

v/ bogus duty paid invoices were being issued to other manufacturers who take credit based on such invoices without receipt of goods;

vi/ the industrial units in specified areas were paying a high percentage of duty in cash through Personal Ledger Account as compared to other parts of the country on the same goods;

vii/ bogus purchase of raw material was being shown by the traders when, infact, there was no such purchase and no actual manufacturing activity within the specified areas in the State.

On the basis of above, it is contended that the impugned notification has been issued prescribing a modified scheme regarding refund

of excise duty on all India average of percentage of duty paid in cash and through Cenvat Credit so that there is a check on unscrupulous and bogus manufacturers. This, as per the respondents is the public interest which led to issuance of impugned notifications whereby a new mechanism has been devised for refund of excise duty payable in cash. The mechanism so devised has been referred to in the table as contained in the notification impugned. It is stated that the duty payable on value addition is equivalent to the amount calculated as a percentage of total duty payable on the excisable goods at the rates specified in the table prepared in this regard. The table which is referred to by the respondents in this regard, is being reproduced below:-

S. No.	Chapter of the First schedule	Description of Goods	Rate
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	41

		Flaps	
8.	72 or 73	All goods	39
9.	74	All goods	15
10.	76	All goods	36
11.	85	Electric motors and generators sets and parts thereof	31
12.	Any Chapter	Goods other than those mentioned above	36

The further stand taken by the respondents is that in order to verify the factum of bogus production by the industrial units within the specified areas, a study was carried out by the Excise department on receipt of information from the Director General, Central Excise Intelligence and other concerned agencies to find out the percentage of excise duty paid in cash from the Cenvat Credit account by the units availing this exemption. The details in this regard were compared with the duty payment details of industrial groups all over the country located in unspecified areas. It was found that the industrial units located in specified areas were paying a higher percentage of duty in cash through Personal Ledger Account in comparison to the units located in other parts of the country

through PLA on similar goods. It was only after this analysis that a need was felt to curb such illegal activities on the part of unscrupulous and bogus manufacturers.

It is under the said circumstances and in order to avoid large scale evasion of excise duty by bogus manufacturers, the present notification has been issued with a modified refund mechanism so as to grant excise duty refund to only those units who actually are engaged in the manufacturing activities in the specified areas within the State. This, as indicated above, is the supervening public interest as per the respondents which led to issuance of fresh notifications.

The reasoning provided by the respondents in issuing the impugned notification which lays down the refund mechanism apparently cannot be faulted. This court cannot look to the sufficiency of the material and satisfaction arrived at by the respondent authorities in effecting such a change. As already discussed above, the exemption was in lieu of the manufacturing activities to be carried out in the specified areas within the State of J&K. Such a manufacturing activity has co-relation with the promise extended. The exemption would be

provided if there is manufacturing activity in the State in specified areas and if there is no such activity, then, the promise extended cannot be enforced against the State. The refund in that case would be allowed only to the extent of actual activity carried out by the manufacturers in the specified areas. The State would be well within its rights to effect remedial measures in this regard. The analysis made by the respondents, which stands noticed above, do reflect that percentage of duty paid in cash in the specified areas and those in the unspecified areas is relatively high in the Personal Ledger Account. It is this amount which is to be refunded. It may also not be incorrect to suggest that there are some unscrupulous elements involved in cheating the exchequer by resorting to bogus industrial activities.

The power of the State in regulating the refund mechanism is also not disputed. However, what is required to be seen is as to whether while arriving at such a decision, some objective basis have been kept in mind or not. In essence, it is the decision making process which would be the subject matter of judicial scrutiny in the present case. Adequacy of material based on which such a changed policy decision has been taken, cannot be examined by this court. State cannot

be the judge of its own cause and when decision to withdraw its promise is taken on the basis of some supervening public interest, this question has to be determined by the court and such a determination cannot be ipse dixit of the Government. It is for the court to determine as to whether the material on the basis of which such a promise has been withdrawn is adequate or not. It is in this light that the question is required to be considered.

Now what is the material on the basis of which decision to allow refund of excise duty under revised mechanism has been taken. In this regard, the respondents have based their claim on following assertions made in the objections:-

1/ That the amount of duty paid on the personal ledger account by the units in the specified areas is higher than those units located in unspecified areas;

2/ the actual percentage of duty refundable on the value addition has been done on the basis of all India average.

The percentage principle applied in respect of the industrial units located in the specified areas in the rest of the country, as indicated

above, suffers from fundamental infirmity, as such, would not yield any appropriate result as various factors are required to be considered in order to find out the component of excise duty payable by a manufacturer. The factors which would make the units located in the specified areas different from those located in unspecified areas would be the availability of raw material, cost of transportation, adequate supply of electricity, non availability of skilled labour etc., within the said areas in the State, as also the date of installation of units in unspecified areas and other relevant factors. The respondents have produced three charts. The first chart gives the details of the excise duty paid by the units located in the specified areas which contains ten broad headings. The second chart has been prepared on all India average basis for the same ten headings and the third chart produced by the respondents shows the comparison between the two charts, referred to above.

It is not discernible from these charts as to how the percentage of value addition has been arrived at in the impugned notification. It be seen that for all the goods falling within chapter 76 of all India chart, respondents have assigned 36% as value addition. Chapter 76 includes

various goods for which uniform percentage has been fixed.

While making such an assessment, it does not get reflected as to whether any study has been conducted in this regard. There is no basis whatsoever for assigning 36% as value addition for all the goods covered by the chapter. It is also visible that the study fails to take note of the fact that the excise duty paid in cash for all goods falling in the same chapter for instance iron and steel would not be the same. The excise duty paid for manufacture of iron ingots from iron ore would be different from excise duty paid in cash for screws made from iron ore. The respondents have categorized all goods falling under the Central Excise Tariff Act into 10 categories for the purpose of all India survey. Such a categorization is legally unacceptable. The survey covers only ten categories and there are other categories for which no survey was conducted. The determination of average percentage of excise duty on value addition has not been made on scientific basis but on surmises and conjunctures. The very foundation for permitting refund duty worked out on all India basis, has been done without any study and is per se arbitrary.

The other contention raised by the respondents is that if a representation is made by a manufacturer, in specified areas, the jurisdictional Commissioner shall determine the actual value addition in the production of the goods. This determination of actual value addition has been termed as the special rate. This concept of special rate displaces the very foundation of the rate fixed in terms of original notification. Vide impugned notifications, in case, the actual quantum of excise duty payable by a manufacturer on his final product would have been reflected, the question of modification of average rate and introduction of special rate would not have arisen at all. It clearly reflects that respondents themselves were not sure regarding the actual rate payable on value addition. This leads to the conclusion and acknowledgment on the part of respondents that even in a given case, it is possible that the average rate of excise duty payable on finished goods as announced by the impugned notification may not be correct and it is in view of the subsequent notification dt. 10th of June'08, which seeks to cure such a defect by making provision for special rate. What emerges from the above is that the principle on the basis of which average rate has been fixed on all India basis was faulty.

After having said so, it has to be seen that whether the original notification can be termed to be deficient in any manner so as to lead to perceived misuse which has formed the basis for issuance of the notification impugned.

In the original notification, in clause 2, it is provided that 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 Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the seventh day of the next month in which the duty has been paid in cash. On receipt of the statement, the competent authority empowered under the Excise Act is required to undertake verification which it deems necessary and thereafter refund the amount of duty paid in cash by the fifteenth day of the next month to the manufacturer. It was further provided that in case, there is any delay in the matter of verification by the competent authority, the refund shall be made on provisional basis by the 15th of day of the next month to month under consideration, and thereafter adjust the amount of refund by such amount as may be necessary, at the time of payment of subsequent refunds.

Thus, it is not as if the statement made by a manufacturer is accepted at face value . If any claim is made for refund and the same is approved by the competent authority, the authority has to show by co-relating it with the specific transaction and by way of a specific order of refund as to where and how a concession/benefit has been availed by the manufacturer by misusing the scheme of exemption. If on verification, it is found that the amount of refund is claimed erroneously, the competent authority is well within its powers to recover the same. The bogey of misuse and the scheme of exemption, therefore, cannot be permitted to be raised under the guise of so called misuse. The court cannot be expected to accept the bald assertion regarding the misuse of the scheme as otherwise, the role of the jurisdictional Commissioner who is empowered to undertake the verification or withdraw the refund etc., is also doubted. The respondents cannot be permitted to plead such a state of affairs without bringing on record any cogent evidence in this regard.

The issue of misuse cannot be generalized. It has to be case specific covering an individual or group of individuals. Every such misuse is required to be ascertained and verified before

asserting that there has been misuse of exemption. By a general survey conducted, it cannot be said that the exemption benefit is being misused by the present petitioners.

Taking recourse to the fact that exemption granted is being misused without identifying the individual cases would be an exercise which can be termed to have been made by the respondents only to deny the exemption granted to the petitioners by way of original notification in pursuance to which they have altered their position. This action on the part of respondents can be termed to be arbitrary in nature. I am fortified in this view by a judgment of the Apex Court reported as **U.P. Power Corporation Ltd. And another v. Sant Steels & Alloys (P) Ltd. And others, (2008) 2 SCC 777.** What has been observed by the Apex Court in paragraphs 30 and 31 of the above judgment, may be noticed as under:-

> *"30……It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behove on the part of the appellant Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the respondents were legitimately entitled to avail. We fail to understand why the appellant*

Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation, the principle of promissory estoppel which has been evolved by the courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

31. Other grounds for the purpose of public interest which have been pleaded, namely, that there are two methods of tariff provided by the amendment and the actual consumption has (energy consumption charges have) been reduced based on the calculation of energy charges per kV from 308 paise to 100 paise and there was large scale theft or that units were closing down and there was no mala fide intention in the matter of revocation of the notification and the cost of production of power has gone up to Rs. 2.50 per unit, are considerations which hardly involve any public interest. They were more of a nature of losses which have been suffered by the Corporation and these methods were evolved to reduce and to make good the losses. Restructuring benefit to 17% of Tariff 4(A) (demand charges) are the factors which are aimed to make the losses good for the Corporation. This is not case in which serious public repercussion was involved. These are not the factors which put together can constitute a public interest. Theft of the energy if it was proved by cogent data that as a result of giving this benefit to the entrepreneurs in the hill areas, they were misusing it or there was theft of the energy at a large scale by these persons to whom the concession had been given then of course such factors, if all the datas were brought on record of course could have persuaded the Court to take a different view of the matter. But simply because there was theft of energy the State cannot persuade us to hold that the

> *revocation of such concession can be said to be in public interest. Since the benefit was given to these units in the hill areas, there should have been overwhelming evidence to show some mala fide on the part of these consumers which have persuaded the Corporation to revoke it. If there was no misuse of the energy by these units in the hill areas to whom the concession had been granted then in that case it cannot be taken that there was really public interest involved which persuaded the Corporation to revoke the same."*

In the present case, the plea of respondents that some unscrupulous manufacturers were involved in bogus production for the purpose of claiming maximum exemption from the payment of excise duty, cannot be generalized but has to be case specific. The same, therefore, cannot be treated to be in the public interest as projected by the respondents. This is because there has been no individual identification of such bogus manufacturers and the action of respondents vide impugned notifications would prejudice the rights of those genuine manufacturers who on the promise of the State, have altered their position and are involved in fair industrial activities.

In view of the above discussion, I am of the opinion that there is no supervening public interest in withdrawing the exemption by way of impugned notifications.

Question No.6:

The next question to be considered is whether the exemption was granted by way of a refund mechanism.

In this regard, the plea of respondents as raised by Mr Ajay Sharma, learned counsel for the respondents is to be noticed. It is stated by him that the exemption from payment of excise duty should not be confused with the refund of duty. These are two different legal and distinct concepts. The expression "exemption" would mean a concession allowed to a class or individual from a general burden for valid and justifiable reasons. Rule 6 of the Central Excise Rules, 2002, provides that the assessee shall himself assess the duty payable on any excisable good which would mean that the assessment of duty is based on self assessment. By way of impugned notification, the quantum of exemption has been rationalized by proposing rate of refund on total duty payable. Thus, it was implicit in the said provision that it could be amended, rescinded or withdrawn at any time if the public interest so demands. By providing such an exemption, the legislature had hedged it with certain conditions.

Now, examining the import of the above argument, what is being stated is that it is not the case where no duty is being charged from the investors but a case where the duty chargeable on the goods is recovered from the investors which is refunded subject to satisfying the conditions of the notification impugned.

In order to test the correctness of the argument, one has to see the substance of the concession granted and not merely certain words used out of context. Although the benefit regarding excise duty to the new entrepreneurs is by way of refund of such duty to the extent provided in the order, it is clear that, in effect, the benefit is in the nature of exemption from payment of excise duty. The nature of promise extended in the earlier notification clearly contemplates grant of exemption from excise duty. The promise in this regard is extended upto 100% exemption. The mode and manner in which this duty is payable cannot detract the court from analyzing the real intent of the promise. Therefore, I am not inclined to agree with the assertions made by Mr Sharma, learned counsel for the respondents in this regard. I am fortified in this view by a judgment of the Apex court reported as **(1988) 3 SCC 570, Assistant Commissioner of Commercial Taxes (Asst.)**

Dharwar and others v. Dharmendra Trading Company and others. What has been observed by the Apex Court in para 6 of the above judgment, may be noticed as under:-

> *".....The only submission made on behalf of the appellants is that since the benefit given is called a refund, it cannot be said to be an exemption or reduction as permitted by Section 8-A. In our view, there is no substance in this submission at all. In order to test the validity of the order dated June 30, 1969, one has to see the substance of the concession granted under the order and not merely certain words used out of context. Although the benefit regarding sales tax granted to the new industries is by way of refunds of sales tax paid to the extent provided in the order, it is clear that, in effect, the benefit granted is in the nature of an exemption from the payment of the sales tax or reduction in the sales tax liability to the extent stated in the order....."*

The other contention raised by the petitioners is the impugned notifications are prospective in nature and would not cover those units who are engaged in industrial activities and availing certain incentives in terms of the earlier notification issued in 2002, which has to remain in force for a period of ten years from the date of its issuance. In this regard, reliance has been placed by the petitioners on the provisions of Section 38 A of the Act of 1944.

In view of the above detailed discussion, I need not to enter into this arena as the writ petitions are being disposed of without addressing this controversy.

For the reasons mentioned above, these petitions are allowed. Impugned notifications bearing Nos.19/2008-CE dt. 27th of March'08, and 34/2008-CE dt. 10th of June'08, shall stand quashed. The petitioner-units shall continue to avail the benefit of exemption from payment of excise duty as provided in terms of the notification No.56/2002-CE dt. 14th of Nov'02. The respondent-State, however, shall be at liberty to take appropriate action in accordance with the relevant rules against those unscrupulous manufacturers who are involved in illegal activities of alleged bogus production.

Disposed of accordingly, along with connected CMPs.

(Sunil Hali)
Judge

Jammu
Dt. 23.12.2010
SS Khalsa/