IN THE HIGH COURT OF SIKKIM : GANGTOK

(CIVIL EXTRA ORDINARY JURISDICTION)

D.B.: HOB'BLE MR. JUSTICE SATISH K AGNIHOTRI, CJ &
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

WP(C) No. 41/2015
with
WP (C) No. 8/2017
with
WP (C) No. 27/2017
&
WP(C) No. 40/2017

Sun Pharma Laboratories Limited
Formally known as Sun Pharma Drugs Pvt. Ltd./
Sun Pharma Sikkim
Plot No. 754, Setipool, P.O. Ranipool
East Sikkim, Sikkim 737135

.... Petitioner

Versus

1. The Union of India
through the Secretary,
Ministry of Finannce Department of Revenue,
North Block, New Delhi

2. The commisioner,
Central Excise Customs and Service Tax,
Siliguri Commissionerate, Central Avenue Building,
4th Floor, Haren Mukherjee Road, Hakimpara, Siliguri.

3. The Deputy Commissioner of Central Excise and Service Tax, Gangtok Division, Siliguri, C.R Building, Haren Mukherjee Road, Hakimpara, Siliguri-734001.

4. Assistant Commissioner,
Central Excise and Service Tax,
Gangtok Division, Siliguri,
C.R Building, Haren Mukherjee Road,
Hakimpara, Siliguri-734001.

.... Respondents

Appearance:

Mr. Vikram Nankani, Sr. Advocate with Ms. Sangita Pradhan and Mr. Nanda Gopal, Advocates for the Petitioner.

Mr. Kaushik Chanda, Addl. Solicitor General with Mr. B.K Gupta, Advocates for the Respondents.

J U D G M E N T

(21.11.2017)

Bhaskar Raj Pradhan, J.

1. A classical dispute between the tax collector and the tax payer has led to the filing of four Writ Petitions before this Court whereby the tax payer seeks to invoke against the tax collector, the well settled doctrine of promissory estoppel which is a doctrine evolved by equity (and not estoppel) to prevent injustice. This common Judgment disposes of four Writ Petitions filed by Sun Pharma Laboratory Ltd., the common Petitioner in all the said Writ Petitions, as common issues are raised therein. It is the case of the Petitioner that the promised policy declared by the Central Government (Respondent No. 1) of 100% excise duty exemption which had persuaded the Petitioner to alter its position and invest huge amount of money has now been indiscriminately curtailed giving rise to the present cause of action to challenge the impugned notifications whittling down the exemption benefits and resulting in the passing of a series of impugned show cause notices and impugned orders by the Central Excise Commissionerate confirming demands of Central Excise duties, interest and penalties thereon.

W.P.(C) No. 41/2015

2. W.P. (C) No. 41/2015 impugns Notification No. 21/2008-C.E. dated 27.03.2008 (impugned Notification No.21/2008) and Notification No. 36/2008-C.E dated 10.06.2008 (impugned Notification No.36/2008) and seeks a prayer for the Petitioner units to be

permitted to avail the benefit of exemption of payment of excise duty as provided in terms of Notification No. 56/2003–C.E dated 25.06.2003 (Notification No. 56/2003). The said writ Petitions also impugns Notification No. 20/2008-C.E dated 27.03.2008 (impugned Notification No. 20/2008) and Notification No. 38/2008-C.E dated 10.06.2008 (impugned Notification No. 38/2008) and seeks a prayer for the Petitioner units to be permitted to avail the benefit of exemption from payment of excise duty as provided in terms of Notification No. 20/2007-C.E dated 25.04.2007 (Notification No. 20/2007).

W.P. (C) No. 08/2017

3. W.P. (C) No. 08/2017 impugns Order No. M.O/75748-75751/16 & F.O/76277-76280/16 dated 14.12.2016 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal Nos. E/76003/15, 75290/16, 75930/14 and 76004/15 by which the CESTAT came to the view that the constitutional validity of the impugned Notification No. 21/2008 being in question pending before this Court the said notification if upheld, the Petitioner would not have any claim before the CESTAT and if set aside, it would. Thus, holding so, liberty was granted to the Petitioner to approach the CESTAT again after the final verdict from this Court.

4. The said Writ Petition also impugns:-

(i) OIO No. 10/COMM/CE/SLG/13-14 dated 26.03.2014 issued on 27.03.2014 passed by the Commissioner of Customs, Central Excise and Service Tax, Silliguri Commissionerate (the Commissioner) by which the demand of Central Excise duty

amounting to ₹5,17,43,860/- under Section 11 A of the Central Excise Act, 1944 on the Petitioner, the interest at applicable rate up to the date of payment of duty on the duty amount under Section 11 AB of the Central Excise Act, 1944 as well as the penalty of ₹5,17,43,860/- under Section 11 AC of the Central Excise Act, 1944 was confirmed and the self credit facility available under Notification No. 56/2003-C.E dated 25.06.2003 (Notification No.56/2003) was withdrawn from the Petitioner.

(ii) OIO No.06-07/COMM/CE-SLG/15-16 dated 17.07.2015 passed by the Commissioner confirming the demands of Central Excise duty (i) amounting to ₹5,31,41,422.00 pertaining the period December 2012 to June, 2013 and (ii) amounting to ₹8,45,18,446/- pertaining to the period July, 2013 to January, 2014 on the Petitioner under the provisions of Section 11 A (4) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Rule, 2002 and sub paragraph 2C (g) of the Notification No. 56/2003 as amended by impugned Notification No. 21/2008 along with appropriate interest on the amounts confirmed in terms of Section 11 AB (now 11 AA) of the Central Excise Act, 1944 and the penalty amount of ₹13,76,59,868.00 (Rupees thirteen crore seventy six lakhs fifty nine thousand eight hundred sixty eight) (₹5,31,41,422+ ₹8,45,18,446) on the Petitioner in terms of Section 11 AC (1) (c) of the Central Excise Act, 1944. However, the Petitioner was given the offer to pay only 25% of such amount as penalty on fulfilment of the conditions as prescribed under Section 11 AC (1) (e) of the Central Excise Act, 1944. By the said order the Commissioner also ordered the

forfeiture of self credit facility as available to the Petitioner under the said Notification No. 56/2003 as amended by the impugned Notification No. 21/2008 in terms of the provision of sub-paragraph 2C (f) of the said notification.

(iii) OIO No.22/COMM/CE/SLG/15-16 dated 08.01.2016 of the Commissioner by which he confirmed the demand of central excise duty (i) amounting to ₹2,27,27,200.00 pertaining to the month of February 2014 on the Petitioner under the provision of Section 11 A (1) of the Central Excise Act, 1944 read with Rule 8 of the Central Excise Rule, 2002 and sub-paragraph 2C (g) of the Notification No. 56/2003 as amended by the impugned Notification No. 21/2008 and the appropriate interest on the said confirmed amount of duty at appropriate rate in terms of Section 11 AA of the Central Excise Act, 1944 and the penalty amounting to ₹2,27,27,200.00 on the Petitioner in terms of Section 11 AC (1) (c) of the Central Excise Act, 1944. However, the Petitioner was given the offer to pay only 25% of such amount as penalty on fulfilment of the conditions as prescribed under Section 11 AC (1) (e) of the Central Excise Act, 1944. By the said order the Commissioner also ordered the forfeiture of self credit facility as available to the Petitioner under the said Notification No. 56/2003 as amended by impugned Notification No. 21/2008 in terms of the provision of sub-paragraph 2C (f) of the said notification.

W.P.(C) No. 27/2017

5. W.P. (C) No. 27/2017 sought quashing of four show cause notices issued by the Deputy Commissioner of Central Excise and Service Tax, Gangtok Division, Siliguri (Deputy Commissioner) as well as five notifications issued by the Respondent No.1. The details of the said show cause notices and Notifications are as under:-

(i) C.No.V(18) 02/Refund/CE/Sun-754/GTK-Divn/16-17/3184 dated 5.08.2016, issued by the Deputy Commissioner directing the Petitioner to show cause as to why the refund of ₹4,62,76,710/-, ₹3,91,50,366/-, ₹5,45,22,707/-,₹2,94,34,399/- and ₹3,60,37,967/- for the month of February, 2016, March 2016, April 2016, May 2016 and June 2016 respectively claimed by the Petitioner in terms of clause 2B (b) of Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in clause 3 (i) and (ii) of the said notification.

(ii) C.No.V (18)52/Refund/CE/Sun-754/GTK-Divn/16-17/3600 dated 26.08.2016, issued by the Deputy Commissioner directing the Petitioner to show cause as to why the refund of differential amount of ₹10,54,60,351/- and ₹6,48,30,249/- for the financial year 2014-15 and 2015-16 respectively as claimed by the Petitioner in terms of clause 2.2(1) & (2) of the said Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in Clause 3 (i) & (ii) of the said notification.

(iii) C.No.V(15)19/ADJ/CE/COMM/SLG/2016/20697 dated 19.10.2016, issued by the office of the Commissioner of

Customs, Central Excise & Service Tax, Siliguri directing the Petitioner to show cause as to why the amount of ₹82,84,25,639/- erroneously refunded in contravention to the condition as laid down in clause 3 (i) and (ii) of the said notification read with clause 2B (b) of the said notification should not be deposited forthwith as undertaken by the Petitioner to do so in the undertaking submitted to the department at the time of submitting its refund claim. The said show cause notice also required the Petitioner to show cause as to why the said amount, erroneously refunded to the Petitioner, if not deposited forthwith as per the undertaking, should not be demanded in terms of Section 11A of the Central Excise Act, 1944. It further required to show cause as to why the interest in terms of Section 11AA of Central Excise Act, 1944, should not be demanded.

(iv) C.No.V(18)58/CE/Refund/Sun-754/GTK-Divn./2016-17/605 dated 20.02.2017, issued by the Deputy Commissioner, directing the Petitioner to show cause as to why the refund of ₹4,49,82,808/-, ₹5,19,93,070/-, ₹4,85,03,864/-, ₹5,01,55,727/-, ₹1,88,94,680, ₹5,09,23,261/- and ₹4,55,74,646/- for the months of July 2016, August 2016, September 2016, October 2016, November 2016, December 2016 and January 2017 respectively, in total amounting to ₹31,10,28,056/- claimed by the Petitioner in terms of clause 2B(b) of Notification No. 56/2003 should not be rejected and disallowed for not having fulfilled the condition as stipulated in clause 3(i) & (ii) of the said notification.

(v) Notification No. 27/2004-CE dated 09.07.2004, (impugned Notification No. 27/2004) issued by the Respondent No.1 further amending Notification No.56/2003 amongst others.

(vi) Impugned Notification No. 21/2008 which is also impugned in W.P. (C) No. 41/2015.

(vii) Notification No. 36/2008 C.E dated 10.06.2008, (impugned Notification No.36/2008) which is also impugned in W. P. (C) No. 41/2015.

(viii) Impugned Notification No. 20/2008-CE which is also impugned in W. P. (C) No. 41/2015.

(ix) Impugned Notification No. 38/2008-CE which is also impugned in W. P. (C) No. 41/2015.

W.P.(C) No. 40/2017

6. W.P.(C) No. 40/2017 impugns two show cause notices issued by the Commissioner and two notifications issued by the Respondent No.1. The details of the said show cause notices and notifications are as under:-

(i) C.No.V(15)20/ADJ/CE/COMM/SLG/2016/24091 dated 02.12.2016, issued by the Commissioner directing the Petitioner to show cause as to why the Verification Certificates issued by the Deputy/Assistant Commissioner, Central Excise & Service Tax, Gangtok Division, bearing No.58 dated 27.11.2015 issued vide C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015-16/4049-4053 dated 30.11.2015; No.59 dated 27.11.2015

issued by C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015-16/4044-4048 dated 30.11.2015; No.60 dated 27.11.2015 issued vide C.No.V(18)08/CE/SUN/VR/Per14-15/Gtk-Divn/2015-16/4255-4258; Verification Certificates issued No.01,02,03,04,05,06/Sun-II/2015-16 all dated 27.11.2015 and No.07 and 08/Sun-II/2015-16 both dated 22.12.2015 be considered erroneous and in violation of the provision of Notification No.56/2003 (as amended). The said show cause notice also required the Petitioner to show cause as to why the total re-credit of Rs. 43,98,61,414.00 availed and subsequently utilized during the period January, 2015 to January, 2016 should not be disallowed for being irregular and in violation of the provisions of Notification No.56/2003-CE dt. 25.06.2003, as amended, in as much as, the same should be disallowed for not having fulfilled the condition as stipulated in Clause 3(i) & (ii) of Notification No.56/2003-CE dt. 25.06.2003, as amended. The said show cause notice also required the Petitioner to show cause as to why the irregular re-credit availed and utilised by the Petitioner, amounting to Rs. 43,98,61,414.00 should not be demanded and recovered in terms of Section 11A of the Central Excise Act, 1994, as amended, for violating the provisions of Clause 2C(g) of Notification No.56/2003-CE dt.25.06.2003, as amended, read with Rule 8 (3) of the Central Excise Rules, 2002. The said show cause notice further required the Petitioner to show cause as to why the Interest in terms of Section 11AA of the Central Excise Act, 1944, as amended should not be demanded and recovered till the date of deposit of the said

amount and Penalty in terms of Section 11 AC 1(a) of the Central Excise Act, 1944, as amended, should not be imposed on them for having contravened the provisions of the Central Excise Act, 1944 as amended, issued under Section 5A of the Central Excise Act,1944 as amended.

(ii) C.No.V(15)21/ADJ/CE/COMM/SLG/2016/895 dated 13.01.2017, issued by the office of the Commissioner directing the Petitioner to show cause as to why the total re-credit of ₹15,12,61,747/- availed and subsequently utilized during the period February, 2016 and March, 2016 should not be disallowed for being irregular and in violation of the provision of Notification No.56/2003 as amended and disallowed for not having fulfilled the condition as stipulated in clause 3(i) and 3(ii) of Notification No.56/2003 as amended. The said show cause notice also required the Petitioner to show cause as to why the irregular re-credit availed and utilized by the Petitioner, amounting to Rs. 15,12,61,747.00 should not be demanded and recovered in terms of Section 11A of the Central Excise Act, 1944 (as amended), for violating the provisions of Clause 2C(g) of Notification No.56/2003-CE, dt.25.06.2003 as amended, read with Rule 8(3) of the Central Excise Rules, 2002. The said show cause notice also required the Petitioner to show cause as to why the interest in terms of Section 11AA of the Central Excise Act, 1944 as amended should not be demanded and recovered till the date of deposit of the said amount. The said show cause notice also required the Petitioner to show cause as to why the penalty in terms of Section 11AC 1(a) of the Central Excise Act, 1944 as

amended, should not be imposed on them for having contravened the provisions of the Central Excise Act, 1944, as amended, read with Notification No.56/2003-CE dt.25.06.2003, as amended, issued under Section 5A of the Central Excise Act, 1944, as amended.

(iii) Impugned Notification Nos. 20/2008-CE dated 27.03.2008 which is impugned in W.P. (C) No. 41/2015 and WP (C) No.27/2017 also.

(iv) Impugned Notification No. 38/2008-CE which is impugned in W.P.(C) No. 41/2015 and W.P.(C) No.27/2017 also.

7. At the hearing, Mr. Vikram Nankani, Senior Advocate would submit that the Petitioner seeks the promotional benefits under the North East Industrial and Investment Promotion Policy (NEIIPP), 2007 (Industrial Policy, 2007) read with Notification No. 20/2007 by which it is submitted, 100% of the excise duty was exempted which has now been reduced to 56% only vide impugned Notifications No. 20/2008 and 21/2008 although the Petitioner had already, in terms of the promise made, invested huge amounts of money between 2005 to 2008 much prior to the commencement of commercial production of Petitioner's first unit on 20.04.2009. It is the contention of the Petitioner that this has been done by the Respondents solely on the ground that the Petitioner had not opted for the same. The Petitioner contends that based on the Industrial Policy of 2003 which also exempted from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of the goods other than the amount of duty paid by utilisation of CENVAT

credit under the CENVAT Credit Rules, 2002 for a period of 10 years from the date of commencement of commercial production, the Petitioner in the year 2005 and thereafter commenced the process of establishing a new unit for manufacture of P & P Medicaments, falling under Sl. No. 11 of the schedule to the Notification No. 56/2003 including leasing of the land for establishing the said unit, generating employment in the State etc. It is the contention of the Petitioner, in the meanwhile, Office Memorandum dated 01.04.2007 was issued notifying the Industrial Policy, 2007, which also granted 100% excise duty exemption as provided in the Industrial Policy, 2003. However, the Industrial Policy, 2007 specifically provided that the new industrial units which commenced production within 10 years of the said memorandum would be eligible for the incentive thereunder. In line with the Industrial Policy, 2007, Notification No. 20/2007 was issued whereby the Petitioner's goods were exempted from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit. In the year 2008, the earlier notified 100% excise duty exemption was significantly curtailed by issuing two amending impugned Notification Nos. i.e. 21/2008 and 20/2008 by which the benefit of exemption was limited to the certain prescribed percentage of value addition i.e. 56% applicable to pharmaceutical products as mentioned in the respective notifications. Further amendment to Notifications No. 56/2003 and 20/2007 was made vide impugned Notification No. 36/2008-CE (which amends Notification No. 56/2003) and impugned Notification No.38/2008 (which amends Notification No. 20/2007) both dated 10.06.2008 whereby an option

for fixation of special rates for representing the actual value addition in respect of any goods manufactured and cleared under the respective original notification was given. The Petitioner's first unit commenced commercial production from 20.04.2009 and the second unit from 14.04.2014. The Petitioner submits that although it was eligible to get the benefit of exemption under the Industrial Policy, 2007, inadvertently, after commencing commercial production from 20.04.2009 the Petitioner started claiming excise duty benefit pursuant to the Industrial Policy, 2003 by way of self-credit of excise duty in cash for the period April, 2009 to May, 2012 at the reduced rate of 56% instead of 100% of the amount paid in cash. No objection has been taken to this credit taken by the Petitioner. Subsequently, however the Petitioner became aware of the decision of this Court in re: ***Unicorn Industries v. U.O.I***[1], wherein this Court quashed Notification No. 23/2008 and Notification No. 37/2008 which had similarly, curtailed benefits promised under Industrial Policy, 2003. It is the case of the Petitioner that it further became aware of the decision of the High Court of Jammu & Kashmir in re: ***Reckitt Benckiser v. Union of India***[2]***,*** wherein the High Court of Jammu and Kashmir had quashed the amending notifications seeking to reduce and restrict the 100% duty exemption provided pursuant to an incentive scheme for Jammu and Kashmir. Thereafter, on 22.10.2011, the Petitioner informed the authorities that it would avail 100% self-credit of the excise duty paid placing reliance on the aforesaid Judgments of this Court and the High Court of Jammu and Kashmir. For the period June, 2012 to February, 2014 the authorities denied

[1] **2013 (289) E.L.T 117 (Sikkim)**
[2] **2011 (269) E.L.T 194**

self-credit on monthly basis on the ground that the Petitioner was not eligible to claim the benefit @ 100% of the amount paid in cash but was eligible for refund @ 56% on account of the amendment vide impugned Notification No. 21/2008 which reduced the benefit from 100%. It is the case of the Petitioner that it has invested an amount of ₹186.08 crores up to March 2014 and being a large project investment continued thereafter and an amount of ₹337.51 crores have been invested up to March 2016.

8. Mr. Vikram Nankani, learned Senior Advocate for the Petitioner would argue that the Petitioner had acted on the basis of the promise set out in the Industrial Policy, 2003 and 2007 and the original Notification No.20/2007 which was amended by the impugned Notifications No. 20/2008 and 21/2008 reducing the 100% excise duty guarantee to 56% by making huge investment and therefore, on the ground of promissory estoppel alone the Writ Petitions were liable to be allowed and the offending notifications and orders of the Commissionerate quashed. He would further submit that merely because power to issue notification is available, the authority cannot, be permitted to equate what is inherently not equal. He would submit that once an exemption notification has been issued in public interest the authority cannot, by simply saying it is in public interest, withdraw or reduce the benefit under the original notification and in such cases, the onus shall be on the authority to establish a superior public interest for curtailing or withdrawing an exemption already granted. Mr. Vikram Nankani, learned Senior Advocate would rely upon the following judgments in support of his submissions on area based exemption, promissory estoppel and on his submission that benefit

cannot be denied due to claim under wrong notification: ***(1) Sal Steel Ltd. V. UOI[3], (2) Unicorn Industries v. U.O.I (supra), (3) Reckitt Benckiser v. U.O.I, (4) Herbo Foundation Pvt. Ltd. V. U.O.I[4], (5) Manuel Sons Hotel Pvt. Ltd. V. State of Kerala[5]*** **(6)** ***State of Jharkhand v. Tata Cummins[6], (7) Shiva Shakti sugars Ltd. V. Shree Renuka Sugar[7], (8) Unichem Laboratories v. Collector of CE[8], (9) Share Medical Care v. U.O.I[9]*** and **(10)** ***Hero Cycles Ltd. V. U.O.I[10]***

9. The Respondents however, defend their action and submit that in fact the impugned notifications does not actually take away the 100% excise duty benefit as sought to be made out by the Petitioner. It is claimed that a different mechanism was devised in public good and that impugned Notification No. 20/2008 does not deviate from the 100% policy. Mr. Kaushik Chanda, learned Additional Solicitor General would submit that in spite of the new mechanism devised, ultimately the benefit to the Petitioner would be 100% exemption. To explain the same the learned Additional Solicitor General for the Respondents would place two separate calculations of re-credit / refund under area based exemption notification as under:-

"CALCULATION OF RE-CREDIT/REFUND UNDER AREA BASED EXEMPTION NOTIFICATION

100% re-credit/ refund case (Not No. 20/2007):

Value of the finished goods	Duty @ 6%	Input cost	Input credit @ 12%	Duty payment from PLA/account current	100% re-credit/refund
₹100	₹6	₹22	₹2.64	₹6-₹2.64 = ₹3.36	₹3.36

Re-credit/Refund as per value addition (Not no. 20/2008):-

Value of the finished goods	Duty @ 6%	Input cost	Input credit @ 12%	Duty payment from PLA/account current	Value addition @ 56% on total	100% re-credit/refund

[3] **2010 (260) ELT 185 (Guj)**
[4] **2010 (261) ELT 98 (Gau)**
[5] **(2016) SCC 766**
[6] **(2006) 4 SCC 57**
[7] **(2017) SCC 729**
[8] **2002 (145) ELT 502 (SC)**
[9] **2007 (209) ELT 321 (SC)**
[10] **2009 (ELT) 490 (Bom)**

					duty	
₹100	₹6	₹22	₹2.64	₹6-₹2.64= ₹3.36	**₹3.36**	**₹3.36**

"

10. The Respondents would admit that the Petitioner started industrial production w.e.f. 20.04.2009 but would contest the assertion of the Petitioner that the new unit of the Petitioner was started within the period 2005-2008. The Respondents submits that the Petitioner fell within category (a) of paragraph 3 of Notification No. 56/2003 because the Petitioner started investment on or after 23rd December, 2002 i.e. from 2005. The Respondents submits that the Petitioner is entitled only to a limited claim from exemption of central excise duty vide impugned Notification No. 21/2008 since the Petitioner started commercial production from 20.04.2009. The Respondents asserts that the Petitioner had started availing credit of the amount of duty paid other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2004 @ 56% right from the beginning. It is denied that the Petitioner was granted 100% self credit of the amount of duty paid. It is further stated that the Petitioner started paying central excise duty from personal ledger account w.e.f. August 2009 by which time impugned Notifications No. 21/2008 and 36/2008 were already in existence. The Respondents would submit that the Respondent No.1 was empowered under Section 5A of the Central Excise Act, 1944 to grant exemption from duty of excise if the Government is satisfied that it is necessary and "*in public interest so to do by a Notification in official gazette.*" The Respondents would further submit that the Petitioner was duly entitled to claim the option for fixation of special rate on the basis of impugned Notification No.36/2008.

11. The learned Additional Solicitor General would submit that the Respondent No.1 had the power to issue the notifications sought to be assailed and if the said notifications were stated to be in public interest the onus would lie on the challenger to show how it was not in public interest. The learned Additional Solicitor General would fairly concede that, what was the public interest which compelled the Respondent No.1 to issue the offending notifications has however neither been specified in the offending notifications or explained in the counter-affidavit filed.

12. He would rely upon the following Judgments in support of his defence of the impugned notifications:-

> (1) ***Modipon Limited & Anr. v. Union of India & Ors.,***[11] (2) ***Kothari Industrial Corpn. Ltd. v. T.N. Electricity Board***[12]**,** (3) ***DG of Foreign Trade v. Kanak Exports***[13] and (4) ***R.C. Tobacco (P) Ltd. v. Union of India***[14]***.***

13. In rejoinder, Mr. Vikram Nankani, learned Senior Advocate for the Petitioner would submit that the chart set out by the learned Additional Solicitor General for the Respondents is flawed because whereas the previous notification provided 100% exemption from Excise Duty the offending notifications sought to curtail the same by limiting the exemption to 56% only to the duty payable on value addition undertaken in the manufacture of the goods and not on the entire excise duty payable as promised. The attention of the Court was drawn to the explanation to clause 3(4) of the impugned Notification No. 20/2008 which provides:

> **"**.....

[11] **2002 (146)ELT 45 (Del.)**
[12] **(2016) 4 SCC 134**
[13] **(2016) 2 SCC 226**
[14] **(2005) 7 SCC 725**

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."

The facts

14. The Petitioner was initially a partnership which was subsequently converted into a private Limited Company incorporated under the Companies Act, 1956 and merged with Sun Pharma Laboratories Limited, having its factory at plot no.754, Setipool, P.O. Rangpo, East Sikkim. The Petitioner holds Central Excise Registration No.AARCS9750KEM003 and is, *inter alia*, engaged in the manufacture of P & P Medicament falling under chapter heading no.3004.

15. For the development of industries in Sikkim, the Respondent No.1 notified the "New Industrial Policy and other concessions for the

State of Sikkim" (Industrial Policy, 2003) vide Memorandum No.14(2)/2002-SPS notified on 17.02.2003 inter-alia granting 100% exemption from excise duty for a period of 10 years from the date of commencement of commercial production. It was stated, 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 to boost Investor confidence. It was also stated that the new incentives would provide 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. The relevant paragraph 3.1 read thus:-

> ***"3.1*** *Fiscal incentives to new Industrial Units and substantial expansion of existing units:*
>
> ***i. 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."*
>
> **[Emphasis supplied]**

16. Notification No. 56/2003 was issued by the Respondent No.1 by which the 100% excise duty exemption under Industrial Policy, 2003 was operationalized. The relevant preamble of the said Notification No.56/2003 was as under:-

> ***"****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 Schedule appended hereto, other than goods specified in Annexure appended hereto, and cleared from a unit located in the State of Sikkim,* ***from so much of the duty of excise leviable thereon under any of the said 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 Rules, 2002.*"**
[Emphasis Supplied]

17. Paragraph 3 and 4 of Notification No. 56/2003 read as under:-

*"**3**. The exemption contained in this notification shall apply only to the following kind of units namely:-*

(a) new industrial units which have commenced their commercial production on or after the 23rd day of December, 2002.

(b) 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 23rd day of December, 2002.

4. 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."
[Emphasis Supplied]

18. On 09.07.2004 the Respondent No.1 issued impugned Notification No. 27/2004 by which paragraph 3 of the Notification No. 56/2003 was substituted with the following paragraph:-

*"**3**. 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."

19. The Respondent No.1 vide the said Notification No. 27/2004 thus restricted the date of commencement of commercial production which was open ended earlier to the period 23.12.2002 till 31.03.2007.

20. On 01.04.2007 vide an office memorandum the Respondent No.1 notified the Industrial Policy, 2007. The Industrial Policy, 2003 was discontinued on and from 01.04.2007. This Industrial Policy, 2007 covered the State of Sikkim as well. In the said Industrial Policy, 2007 it was provided:-

> ***"(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.*
> *.....*
> *.....*
> *(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.****"***

21. The Respondent No.1 issued Notification No. 20/2007 giving effect to the Industrial Policy, 2007 by which it was provided :-

> *"In exercise of the powers conferred by sub-section (1) of the section 5A of the Central Excise Act, 1944 (1 of 1944), 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 to the Central Excise Tarrif Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared form a unit located in the States of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or* ***Sikkim****, as the case may be,* ***from so much of the duty of excise leviable thereon under the said Act as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004.****"*
>
> **[Emphasis Supplied]**

22. The exemption contained in Notification No.20/2007 was to be given effect to in the manner provided under paragraph 3 thereof. Under paragraph 5 of the said Notification No.20/2007 the exemption was to apply to:-

> ***"(a)*** *New Industrial units which commence commercial production on or after the 1st day of April, 2007 but not later than 31st day of March, 2017;*
>
> ***(b)*** *Industrial units existing before the 1st day of April, 2007 but which have undertaken substantial expansion by way of increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purposes of expansion of capacity/modernization and diversification and have commenced commercial production from such expanded capacity on or after the 1st day of April, 2007 but not later than 31st day of March, 2017****".***

23. The Respondent No.1 vide impugned Notification No. 21/2008 in exercise of the powers conferred by sub-section (1) of 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 made further amendments to Notification No.56/2003. The Preamble was amended. In the Preamble, for the words and figures, *"to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation 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"* were substituted. Paragraphs 1A, 2 and 2A of Notification No. 56/2003 was substituted with new paragraphs 2, 2A, 2B, 2C and 2.1.

24. The Respondent No.1 vide impugned in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, amended Notification No.20/2007. In the Preamble, for the words and figures, *"to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004*", the words *"to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit"* were substituted. Paragraphs 2, 3 and 4 of Notification No. 20/2007 were substituted with new paragraphs 2A, 2B, 2C, 2D and 3. The new paragraph 2A to the said impugned Notification No. 20/2008 read as follows:-

> ***"2A****. 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:*

Sl. No.	Chapter of the First Schedule	Description of goods	Rate
(1)	(2)	(3)	(4)

1.	----	----	----
2.	30	All goods	56
3.	----	----	----
4.	----	----	----
5.	----	----	----
6.	----	----	----
7.	----	----	----
8.	----	----	----
9.	----	----	----
10.	----	----	----
11.	----	----	----
12	----	----	----

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."

25. Paragraph 3 of impugned Notification No. 20/2008 provided:-

***"3**. (1) Notwithstanding anything contained in paragraph 2A, 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 sub-paragraph (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 calculate 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."

26. The Respondent No.1 vide impugned Notification No. 36/2008 in exercise of the powers conferred by sub-section (1) of 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 made further amendments to Notification No.56/2003 and notified further conditions whereby an assessee could apply to the Appropriate Authority for a specific rate for value addition.

27. The Respondent No.1 vide impugned Notification No. 38/2008 in exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 made further amendments to Notification No.20/2007. The impugned Notification No.38/2008 which further amends the new paragraph 2A as inserted by impugned Notification No. 20/2008 provides now that *"the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excise 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 first schedule as are given in the corresponding entry in column (2) of the said Table* ***when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory,*** *at the rates specified in the corresponding entry in column (4) of the said Table."* The Table provided in the new paragraph 2A vide impugned Notification No. 20/2008 to Notification No. 20/2007 has also been replaced with a new Table vide impugned Notification No. 38/2008. The said Table is as under:-

Sl. 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.	.....	.....	.....	.....

2.	30	All goods	56	Any goods
3.	.....	.....	.....	.....
4.	.....	.....	.....	.....
5.	.....	.....	.....	.....
6.	.....	.....	.....	.....
7.	.....	.....	.....	.....
8.	.....	.....	.....	.....
9.	.....	.....	.....	.....
10.	.....	.....	.....	.....
11.	.....	.....	.....	.....
12.	.....	.....	.....	.....
13.	.....	.....	.....	.....
14	.....	.....	.....	.....

28. The impugned Notification No. 38/2008 further amended paragraph 3 of the Notification No. 20/2007 as amended by impugned Notification No.20/2008 and substituted sub-paragraph (1) of the said paragraph 3 with the following:-

> **"*(1)*** *Notwithstanding anything contained in paragraph 2A, 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 percent 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 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, 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."

29. Pursuant to the said impugned Notification No. 36/2008, the Department of Central Excise vide letter bearing No.C.No.V(30)01/CE/SPS/GTK/2009/528 dated 14.12.2011 informed the Petitioner that they were not eligible for 100% self credit and requested certain information in this respect. The Petitioner provided the required information vide letter dated 05.07.2012 and also informed that they have started taking 100% self credit from the month of June, 2012 to November, 2012. On the said background show cause notice No.V(15)13/ADJ/CE/COM/SLG/2012/26125 dated 31.03.2013 came to be issued to the Petitioner calling upon them to show cause as to why central excise duty amounting to ₹5,17,43,860/- being the amount excess re-credited wrongly by the Petitioner and utilised for payment of excise duty should not be collected in terms of Section 11 of the Central Excise Act, 1944 for violating the provisions of Section 11A of the Central Excise Act, 1944 read with Rule 8(3) of the Central Excise Rules, 2002. Further the show cause notice also required the Petitioner to show why the interest as per Section 11AB of the Central Excise Act, 1944 and the penalty under Section 11AC of the Central Excise Act, 1944 for contravening Rule 8(3) of the Central Excise Rules, 2002, with a clear intent to evade payment of duty, should not be imposed. The said show cause notice also required Petitioner to show cause as to why re-credited facility available under Notification No.56/2003 should not be disallowed. Although personal hearing was granted to the Petitioner on three dates the Petitioner's consultant having another pre-schedule hearing could not attend the

hearing or submit the defence reply pursuant to which the Commissioner adjudicated the show cause notice dated 31.03.2013 and passed the impugned OIO No.10/COMM/CE/SLG/13-14 dated 26.03.2014 issued on 27.03.2014. Being aggrieved by the said impugned order dated 26.03.2014 the Petitioner preferred an appeal before the CESTAT, along with an miscellaneous application for the waiver of pre-deposit and stay of the operations of the said order. The CESTAT vide order dated 21.11.2014 granted an unconditional stay to the Petitioner against the recovery duty demanded, interest and penalty imposed relying upon the judgment of this Court in the matter of ***Unicorn Industries (supra)***. While the appeal was pending final adjudication and notwithstanding the stay granted, the Department of Central Excise issued multiple show cause notices to the Petitioner for different periods and the case of the said Department in those subsequent show cause notices were identical to the case of the said Department which was stayed by the CESTAT by the order dated 21.11.2014. The said show cause notices were (i) SC Notice No.V(15)07/ADJ/CE COMM/SLG/2013/17243 for the period December 2012 to June 2013 (ii) SC Notice No. V(15)09/ADJ/CE/COMM/SLG/14/11061 for the period July 2013 to January 2014 and (iii) SC Notice No. V(15)20/ADJ/CE/COMM/SLG/2014/1863 for the period February 2014.

30. Thus Writ Petition (C) No. 41 of 2015 was filed challenging the various impugned Notifications as detailed above.

31. By an Order dated 28.07.2016 this Court directed the CESTAT to examine (i) Appeal No. E/75930/2014-DB; (ii) Appeal No.

E/76003/2015; (iii) Appeal No. E/76004/2016 and (iv) Appeal No. E/75290/2016 filed by the Petitioner and to take decision by reasoned order on his own merit, in accordance with law, at the earliest, preferably within a period of two months. The said Writ Petition was directed to be listed on receipt of the order rendered by the CESTAT.

32. On 21.11.2016 this Court granted further period of three months to CESTAT for disposal of the appeals.

33. Between the periods 05.08.2016 to 20.02.2017 four show cause notices were issued for the total period March 2014 to January 2017 seeking to demand and recover 100% benefit on the ground that Notification No.56/2003 is not applicable because the first unit of the Petitioner started production on 20.04.2009.

34. It is the case of the Petitioner that the benefit at the rate of 56% was granted for the period March 2014–August 2015 without any objection. It is the further case of the Petitioner that for the period September 2015 – January 2016 benefit @ 56% was given under Notification No.20/2007 without objection. No benefit has been extended from February 2016 till date in respect of the first unit of the Petitioner. It is the Petitioner's case that although all the four show cause notices admit that the Petitioner is eligible for benefit under Notification No.20/2007 but seek to deny the same on the ground that the Petitioner did not opt for the same. In all refund applications made after August 2016, reference has been made to both Notification No.56/2003 as well as Notification No.20/2007.

35. W.P. (C) No. 8 of 2017 was preferred on 20.02.2017 by the Petitioner seeking a writ of certiorari to quash and set aside the impugned order of the CESTAT dated 14.12.2016 as detailed above.

36. W.P. (C) No. 27/2017 was preferred on 18.04.2017 by the Petitioner to challenge four show cause notices issued by the Assistant Commissioner seeking to reject their refund claims of the Petitioner for the months of July 2016 to January 2017 pursuant to the order passed by the CESTAT dated 14.12.2016 and the impugned notifications as detailed above.

37. On 19.04.2017 the Petitioner wrote a letter to the Assistant Commissioner to keep the adjudication of the four notices in abeyance until the disposal of W.P. (C) No.27 of 2017.

38. On 12.05.2017 the Assistant Commissioner confirmed the demand in respect of show cause notice dated 26.08.2016. The Petitioner therefore filed I.A. No. 1 of 2017 in W.P. (C) No. 27 of 2017 on 13.06.2017 seeking to amend and bring on record the order dated 12.05.2017 passed by the Assistant Commissioner.

39. On 02.12.2016 and 13.01.2017 two show cause notices were issued for the period January 2015–March 2016 in respect on second unit seeking to deny the 100% benefit.

40. It is the case of the Petitioner that notwithstanding these two notices, benefit @ 56% has been granted from January 2015 to March 2017. For the period April 2014 when production commenced until December 2014 no refund application was filed since the Petitioner started paying excise duty in cash only from January 2015. For the

period prior thereto, the Petitioner had sufficient CENVAT credit amount for payment of excise duty.

41. W.P.(C) No.40/2017 filed on 21.06.2017 challenges the said two show cause notices issued by the Commissioner being (i) C.No.V(15)20/ADJ/CE/COMM/SLG/2016/24091 dated 02.12.2016 and (ii) C.No.V(15)21/ADJ/CE/COMM/SLG/2016/895 dated 13.01.2017. The said Writ Petition also seeks a writ of *Certiorari* to quash and set aside impugned Notification No. 20/2008 and Notification No. 38/2008.

Consideration

42. It is the case of the Petitioner that the Petitioner started investing for setting up its first unit from the year 2005 only. Evidently therefore, the Petitioner had started the investment only after issuance of impugned Notification No. 27/2004 amending Notification No.56/2003 which notification put into operation the Industrial Policy, 2003. The said Notification is cogent and clear. The Petitioner does not fall in any of the two categories of units as mentioned therein. On the date of the said impugned Notification No.27/2004 the Petitioner was aware that the exemption of payment of excise duty as per Notification No.56/2003 as amended would be available to it only on fulfilling the criteria laid down. To enjoy the benefit of the said Notification No.56/2003 as amended by impugned Notification No.27/2004 it was incumbent upon the Petitioner to meet the required criteria of having commenced commercial production on or after 23.12.2002 but not later than 31.03.2007. It is not the case of the Petitioner that in the interregnum between the issuance of Notification No. 56/2003 and

impugned Notification No.27/2004 the Petitioner had already started altering its position. It is neither pleaded nor argued.

43. As per the Industrial Policy, 2007, the Petitioner having admittedly started its commercial production on and from 20.04.2009 for its first unit i.e., within the 10 years period from the date of issuance of memorandum declaring the Industrial Policy, 2007 i.e., 01.04.2007 was eligible for incentives for a period of 10 years from the date of commencement of commercial production i.e., from 20.04.2009 till 20.04.2019.

44. The Industrial Policy, 2007 had declared that 100% excise duty exemption will be continued on finished products made in the North Eastern Region as was available under the Industrial Policy, 1997. However, in cases, where the CENVAT paid on the new materials and intermediate products going into the production of finished goods (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 Respondent No.1.

45. Notification No. 20/2007 provided for exemption of goods cleared from unit located in the State of Sikkim from so much of the duty of excise leviable thereon under the Central Excise Act, 1944 as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT Credit Rules, 2004.

46. It is quite clear that when the Industrial Policy, 2007 was declared on 01.04.2007 which was followed by the issuance of the Notification No. 20/2007, the Petitioner had already started investing, as per the Petitioner, from the year 2005 itself. The exemption provided for in Notification No.20/2007 would be available to new industrial unit which commence commercial production on or after 01.04.2007 but not later than 31.05.2017. It would also apply to those industrial units existing before 01.04.2007 but which have undertaken substantial expansion by way of increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purpose of expansion on capacity/modernization and diversification and have commenced commercial production from such expanded capacity on or after 01.04.2007 but not later than 31.05.2017. The exemption contained in Notification No.20/2007 were to apply to any of the said units for a period not exceeding 10 years from the date of publication of the said notification or from the date of commercial production whichever is later.

47. The crucial question which must necessarily be answered is whether the Petitioner has been able to establish that the Respondents had vide the Industrial Policy, 2007 and Notification No. 20/2007 made a promise, which the Petitioner had acted upon putting itself in a detrimental position which would compel the Respondent No.1 to make good the promise. If the answer to the first question is in the affirmative then the second question which also needs to be answered is whether by issuing the impugned Notification No.20/2008 the Respondents has done away or curtailed the benefit granted under

Notification No.20/2007. To answer the first question it is necessary to examine the pleadings in the present proceedings.

48. In paragraph 4 and 5 of W.P. (C) No.41 of 2015 it is pleaded by the Petitioner that:-

> ***"4.*** *On the above statutory guarantee for the exemption of the excise duty, the Petitioner invested Rs.39,26,34,897/- during the period from 2005 to 2008 till the date of notification and total investment till 31/3/2014 is of Rs.253,89,64,817/-, their capital and started new units and expanded their existing units in the state of Sikkim.*
>
> *5. The Petitioner started their industrial production w.e.f. 20.04.2009. Since then the Petitioner has been manufacturing P & P Medicaments falling under Sr. No. 11 of the Schedule to Notification 56/2003 dated 25.06.2003."*

49. In paragraph 6 and 7 of the counter-affidavit filed by the Respondents to W. P. (C) No. 41 of 2015 it is pleaded:-

> ***"6.*** *That with reference to paragraph 4 of the writ petition, the Respondents state that the facts and figures stated therein are within the exclusive knowledge of the petitioner and the petitioner is put to strict proof thereof. However, the Respondents state that new unit of the petitioner was not started within the period 2005 to 2008 and the Respondents vehemently deny and oppose the said claim of the petitioner. The Respondents further state that the total investment claim of the Petitioner is within the exclusive knowledge of the Petitioner and the Petitioner is put to strict proof thereof.*
>
> ***7.*** *That with reference to paragraph 5 & 6 of the writ petition, the Respondent state that the claim of the Petitioner that he started industrial production w.e.f. 20.04.2009 and that the Petitioner is manufacturing P & P medicaments falling under Sr. No. 11 of the schedule to Not No. 56/2003-CE dt. 25.06.2003 is a matter of record which the Petitioner may establish during the course of the hearing of this instant writ petition. The Respondents state that reference to para 3 of the said Notification the petitioner falls within category (a) because the Petitioner started investment on or after 23rd December 2002 i.e. from 2005. However, the production of P & P medicament commenced from the year 20.04.2009 which is as per their paragraph 5 of the writ petition."*

50. In paragraph 4 of the rejoinder filed by the Petitioner it has been pleaded:-

> ***"4.*** *That with regard to the statements contained in Para 6 and 7 of the counter affidavit, it is submitted that the effective step of implementation has been taken and proper intimation has been filed with appropriate authorities. It is further submitted that the capital expenditure for establishing new unit has started in the year 2005, and year wise investment is already given in the petition. The deponent craves leave of this Hon'ble Court to rely upon and produce documents to substantiate the above facts at the time of hearing."*

51. In paragraph 3(iii) of W.P. (C) No.08 of 2017 it is pleaded by the Petitioner that:-

> ***"3(iii)*** *Based on the aforesaid statutory guarantee of 100% excise duty exemption, the process for establishing a Unit for the manufacturing of P & P medicaments falling under Serial No. 11 of the Schedule to the 2003 Notification was commenced as early as in 2005-06. An area of 1.5750 hectares (i.e. location of the present Sikkim Unit) was taken on lease. Right from the project stage, nearly 100 employees / workmen were engaged by the Petitioner for the construction of the Unit. The Petitioner had also been taking the requisite insurance cover for the workmen required to be engaged for the project work. Further, in total, the Petitioner had invested an amount of Rs.20,41,97,593/- between the period from 2005 to 2008 in various Fixed Assets."*
>
> ***(iv)*** *While things stood thus, vide an Office Memorandum dated 1.04.2007, the Respondent No. 1 notified the North East Industrial and Investment Promotion Policy ("Industrial Policy,* ***2007****") whereby the North East Industrial Policy, 1997 covering States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura stood extended to State of Sikkim. Significantly, the 100% excise duty exemption that was provided under the 2003 Notification (i.e. under the Incentive Scheme, 2003) was also provided for under the Industrial Policy, 2007. A copy of the Industrial Policy, 2007 is annexed herewith as* ***Annexure-P7****.*
>
> ***(v)*** *In line with the aforesaid Industrial Policy, 2007, the Respondent No. 1 issued Notification 20/2007 dated 25.04.2007 whereby goods specified under the First Schedule to the Central Excise Tariff Act, 1985 other than those mentioned in the annexure to the aforesaid Notification and cleared in the State of Sikkim were exempted from*

so much of the duty of excise leviable thereon under the said Act 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. A copy of the Notification No.20/2007 dated 25/4/2007 is annexed herewith as ***Annexure-P8.***

(vi) *In short, the 100% excise duty exemption provided under Industrial Policy, 2007 read with Notification 20/2007 were the same as that provided under the 2003 Notification.*

(vii) *Given the legislative intent behind the continuation of the 100% excise duty benefits for goods cleared in State of Sikkim (including those manufactured by the Petitioner), the Petitioner continued to make its investments in Sikkim for the setting up of Unit. The Petitioner did everything necessary under law so as to allow it to engage people of Sikkim in employment at their plant. Consequently a large number of people from Sikkim are in employment of the Petitioner working at the Unit for the manufacture of the goods. In total, the investments made by the Petitioner from 2005 to 2014 can be summarized as follows,*

(Rs in Lakhs)

Financial Year	***Net Investments in fixed assets & Capital Work in Progress***	***Cumulative Investments in fixed assets & Capital Work in Progress***
2005-06	*50.31*	*50.31*
2006-07	*1799.83*	*1850.14*
2007-08	*191.84*	*2041.98*
2008-09	*2970.81*	*5012.79*
2009-10	*3657.79*	*8670.58*
2010-11	*2523.82*	*11194.40*
2011-12	*2744.04*	*13938.44*
2012-13	*3481.78*	*17420.22*
2013-14	*4012.93*	*21433.15*
Total	***21433.15***	

"

52. In paragraph 6, 7, 8 and 9 of the counter-affidavit filed by the Respondents to W. P. (C) No. 08 of 2017 it is pleaded:-

*"**6.** That with reference to the statements and allegations made at paragraphs 3 (i,ii,iii and iv) are matter of records.*

***7.** That with reference to the statements and allegations made at paragraphs 3 (v) it is submitted that the Respondent No. 1 (Union of India) issued Notification No. 20/2007-CE dated 25.04.2007 for availing area based exemption with certain conditions and the assessee has to fulfil the conditions stipulated in the notification to avail the exemption benefit. The Petitioner cannot be accorded Suo Motto benefit of an exemption notification because it is decided fact of law that "it is the foundation for availing the benefit under notification, it cannot be said that they are mere procedure requirements with no consequences attached for non-observance. The consequences are denial of benefit under notification for availing benefit under exemption notification the conditions are to be strictly complied with."*

***8.** That with reference to the statements and allegations made at paragraphs 3 (vi) it is submitted that the Notification No. 20/2007 is different from the Notification No. 56/2003 in respect of period of commencement of commercial production.*

***9.** That with reference to the statements made at paragraphs 3 (vii) it is submitted that the respondents have no comment."*

53. In paragraph 8 of the W.P. (C) No.27 of 2017 it is pleaded by the Petitioner that:-

***"8.** Based on the aforesaid statutory guarantee of 100% excise duty exemption, the process for establishing a Unit for the manufacture of P & P medicaments, falling under Serial No. 11 of the Schedule to the 2003 Notification was commenced. An area of 1.57 50 hectares (i.e. location of the present Sikkim Unit) was taken on lease. Right from the project stage, nearly 100 direct / indirect workmen were engaged by the Petitioner for the construction of the Unit. The Petitioner had also been taking the requisite insurance cover for the workmen required to be engaged for the project work. Further, in total, the Petitioner had invested an amount of Rs.20,41,97,593/- between the period from 2005 to March 2008 in various Fixed Assets for establishing said manufacturing unit."*

54. In paragraph 8 of the counter-affidavit filed by the Respondents to W. P. (C) No.27 of 2017 it is pleaded:-

> ***"8.*** *That with reference to the statements made at paragraph 8 no comments."*

55. In paragraph 7 of W.P. (C) No.40 of 2017 it is pleaded by the Petitioner that:-

> ***"7.*** *Based on the aforesaid statutory guarantee of 100% excise duty exemption, the Petitioner, in 2005 and thereafter, the process for establishing a New Unit ("Unit-1") for the manufacture of P & P medicaments, falling under Serial No. 11 of the Schedule to the Notification 56/2003 was commenced, including leasing of the land for establishing the said unit, generating employment in the State, etc."*

56. In paragraph 8 of the counter-affidavit filed by the Respondents to W. P. (C) No.40 of 2017 it is pleaded:-

> ***"8.*** *That with reference to the statements made at paragraphs 6 to 9 of the Writ Petition, no comment."*

57. A conjoint and wholesome reading of the pleadings in the present proceedings and specifically those quoted above makes it unequivocally clear that the Petitioner started its investment only in the year 2005 and thereafter. When the Petitioner thus started its investment in the year 2005 the incentive scenario in Sikkim was that under the previous regime Notification No. 56/2003 by which the Industrial Policy, 2003 was operationalized had been amended vide impugned Notification No.27/2004 by making it clear that only those new industrial units which have commenced commercial production on or after 23.12.2002 but not later than 31.03.2007 would be entitled to the exemption. It is an admitted fact that the Petitioner started its commercial production on and from 20.04.2009 for its first unit. However, the intention of the Respondent No.1 to offer central excise duty exemption was unequivocal. The Respondent No. 1 had both knowledge and intention that the said promise would be acted upon. It is evident that the Petitioner could not avail the benefit of Notification

No. 56/2003 as amended by Notification No. 27/2004 as it did not commence commercial production till 31.03.2007 i.e. the cut of date. It is also evident that the Respondent No.1 had made a promise and pursuant thereto the Petitioner had made substantial investments. Between the periods 09.07.2004 i.e. the date of issuance of impugned Notification No. 27/2004 till 01.04.2007 the date on which the Industrial Policy, 2007 was declared the policy continued to be as provided in Notification No. 56/2003 and as amended by impugned Notification No. 27/2004 i.e. that of 100% exemptions from excise duty. Thus the submission of the Petitioner that the investments were made in establishing its unit due to the clear promise held out by the Respondent No.1 is surely not out of place. A reading of the investment chart adverted to by the Petitioner in paragraph 3(vii) of W.P. (C) No.08 of 2017 to which the Respondent No.1 had no comment to offer in the counter-affidavit, it is seen that the Petitioner had made substantial investments between the period of issuance of impugned Notification No. 20/2007 and the issuance of the impugned Notification No. 20/2008. The Petitioner asserts that "*Given the legislative intent behind the continuation of the 100% excise duty benefits for goods cleared in the State of Sikkim (including those manufactured by the petitioner), the petitioner continued to make investment in Sikkim for setting up for unit. The Petitioner did everything necessary under law so as to allow it to engage people of Sikkim in employment at their plant. Consequently a large number of people from Sikkim are in employment of the Petitioner working at the unit for the manufacture of the goods.*" The Petitioner further asserts that the total net investment in fixed assets and capital work in

progress from the year 2005 till the year 2014 is 21433.15 lakhs. The Respondents in its counter affidavit states that they have no comment to make. Thus the investments made by the Petitioner as detailed in the investment chart must be accepted. It is quite evident that the Petitioner had in fact altered its position and made further huge investments to avail of the promise held out by the Respondent No. 1 to its detriment.

58. The Appellant in re: ***Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh & Ors***[15] was engaged in the business of manufacture and sale of sugar. The State Government gave an assurance that new vanaspati units in the State which went into commercial production by 30.09.1970 would be given concession in sale tax for a period of 3 years. The Appellant set up the vanaspati unit and went into commercial production on 02.07.1970 and sought exemption. In August 1970, by which time the Appellant had already gone into commercial production, the Government rescinded its earlier decision taken in January 1970. A Writ Petition filed in the High Court was rejected and the matter travelled to the Apex Court. After a detailed discussion of its authorities the Apex Court would hold:-

> ***"24****. … The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and the rule of law that the Government stands on the same footing as a private individual so far as the obligation of*

[15] **(1979) 2 SCC 409**

the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high 'standard of rectangular rectitude while dealing with its citizens'? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in Anglo-Afghan Agencies case [Union of India v. Anglo-Afghan Agencies, AIR 1968 SC 718] and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in Anglo-Afghan Agencies case [Union of India v. Anglo-Afghan Agencies, AIR 1968 SC 718] , claim to be exempt from the liability to carry out the promise 'on some indefinite and undisclosed ground of necessity or expediency', nor can the Government claim to be the sole Judge of its liability and repudiate it 'on an ex parte appraisement of the circumstances'. If the Government wants to resist the liability, it will have to disclose to the court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability

against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the Government. The court would not act on the mere ipse dixit of the Government, for it is the court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise 'on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position' provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Ajayi v. R.T. Briscoe (Nigeria) Ltd. [Ajayi v. R.T. Briscoe (Nigeria) Ltd., (1964) 1 WLR 1326 (PC)]"

59. In re: ***Pournami Oil Mills & Ors. v. State of Kerala & Anr***[16] under the order dated 11.04.1979 of the Kerala Government, new small scale units were invited to set up their industries in the State of Kerala and with a view of boost industrialisation, exemption from sales tax and purchase tax for a period of 5 years, which was to run from the date of commencement of production, was extended as a concession. By a subsequent notification dated 29.09.2980 the Government withdrew the exemption from sales tax to the limit specified in the proviso of the said notification. The Apex Court would hold thus:-

"7. .....*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 certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of*

[16] **(1986) supp. SCC 728**

M.P. Sugar Mills [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] . On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in Bakul Cashew Co. v. STO [(1986) 2 SCC 365 : 1986 SCC (Tax) 385] . In Bakul Cashew Co. case [(1986) 2 SCC 365 : 1986 SCC (Tax) 385] this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in M.P. Sugar Mills' case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] . In our view, to the facts of the present case, the ratio of M.P. Sugar Mills' case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409: 1979 SCC (Tax) 144] directly applies and the plea of estoppel is unanswerable.

***8.** It is not disputed that the first order namely, the one dated April 11, 1979 gave more of tax exemption than the second one. The second notification withdrew the exemption relating to purchase tax and confined the exemption from sales tax to the limit specified in the proviso of the notification. All parties before us who in response to the order of April 11, 1979 set up their industries prior to October 21, 1980 within the State of Kerala would thus be entitled to the exemption extended and/or promised under that order. Such exemption would continue for the full period of five years from the date they started production. New industries set up after October 21, 1980 obviously would not be entitled to that benefit as they had notice of the curtailment in the exemption before they came to set up their industries."*

60. In re: ***Manuelsons Hotels Private Limited v. State of Kerala & Ors.*** the State Government by a Government Order, on the recommendation of the Respondent No.1, declared tourism as an industry enabling those involved in tourism promotional activities to become eligible for concessions/incentives as applicable. Exemption from building tax levied by the Revenue Department was one such concession. In the said Government Order it was stated that action would be taken to amend the Kerala Building Tax Act, 1975. Persons eligible for such concessions were to be classified starred hotels. A Committee was set up. The Appellant's hotel project was approved vide letter dated 25.03.1997 by the Respondent No.1 to be set up in Calicut. Pursuant

to the Government Order dated 11.07.1986 and the approval, the construction of the hotel began and was completed in 1991. On receipt of a notice for filing returns under the Kerala Building Tax Act, the Appellant replied that under Government Order dated 11.07.1986 they were under no obligation to furnish any return as they were exempt from payment of building tax. The Kerala Building Tax Amendment Act, 1990 was passed w.e.f. 06.11.1990 adding section 3A giving power to the Government to make exemption from payment of building tax for the purpose of promotion of tourism. By a Writ Petition filed in 1989 the notice issued to the Appellant to file returns was challenged which resulted in the Appellant being relegated to the Committee set up. The exemption promised by the Government Order dated 11.07.1986 was denied to the Appellant on the ground that section 3A had been omitted w.e.f. 01.03.1993 and the power to grant exemption having itself being taken away no such exemption could be granted to the Appellant. Thereafter, the Authority required the Appellant to submit a statutory return which was also challenged and ultimately the High Court allowed the Original Petition and directed the Committee to consider the matter afresh in the light of the judgment of the Apex Court in re: ***Motilal Padampat Sugar Mills Co. Ltd. (supra).*** The Authorities however once again rejected the application seeking exemption from property tax which led the filing of another Writ Petition in the High Court which, however, rejected it holding that no exemption notification had, in fact, been issued under Section 3A when it was in existence and therefore no claim for exemption from payment of building tax would be allowed. The High Court also held that mere promise to amend the law does not hold out the promise of

exemption from payment of building tax and further that since Section 3A itself had been omitted the question of exempting the Appellants from building tax would not arise. After examining its authorities as well as various English authorities, the Apex Court would hold:-

> ***"14.*** *It is important to notice that the necessary exemption notification in Motilal Padampat case [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] had not been issued under Section 4 of the U.P. Sales Tax Act, 1948. Yet, this Court held that sales tax for the period in question could not be recovered. This was done presumably because promissory estoppel is itself an equitable doctrine. One of the maxims of equity is that one must regard as done that which ought to be done. In this view of the matter, it is obvious that the High Court judgment is incorrect when it holds that as no exemption notification was, in fact, issued by the Government under Section 3-A, the petitioner would have to be denied relief. This judgment has been followed repeatedly and has been applied to give the benefit of sales tax exemption in similar circumstances in Pournami Oil Mills v. State of Kerala [Pournami Oil Mills v. State of Kerala, 1986 Supp SCC 728 : 1987 SCC (Tax) 134] , Supp SCC at paras 7 and 8."*

Then again

> ***"20.*** *The above statement, based on various earlier English authorities, correctly encapsulates the law of promissory estoppel with one difference—under our law, as has been seen hereinabove, promissory estoppel can be the basis of an independent cause of action in which detriment does not need to be proved. It is enough that a party has acted upon the representation made. The importance of the Australian case is only to reiterate two fundamental concepts relating to the doctrine of promissory estoppel—one, that the central principle of the doctrine is that the law will not permit an unconscionable departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of a course of conduct which would affect the other party if the assumption be not adhered to. The assumption may be of fact or law, present or future. And two, that the relief that may be given on the facts of a given case is flexible enough to remedy injustice wherever it is found. And this would include the relief of acting on the basis that a future assumption either as to fact or law will be deemed to have taken place so as to afford relief to the wronged party.*
>
> ***21.*** *In the circumstances, the High Court judgment when it holds that no notification was, in fact, issued under Section 3-A of the Kerala Building Tax Act, 1975 (which would be sufficient to deny the appellants relief) is, therefore, clearly incorrect in law."*

Then again

> ***"36.*** *In the present case, it is clear that no writ of mandamus is being issued to the executive to frame a body of rules or regulations which would be subordinate legislation in the nature of primary legislation (being general rules of conduct which would apply to those bound by them). On the facts of the present case, a discretionary power has to be exercised on facts under*

Section 3-A of the Kerala Building Tax Act, 1975. The non-exercise of such discretionary power is clearly vitiated on account of the application of the doctrine of promissory estoppel in terms of this Court's judgments in Motilal Padampat [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] and Nestle [State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465] . This is for the reason that non-exercise of such power is itself an arbitrary act which is vitiated by non-application of mind to relevant facts, namely, the fact that a G.O. dated 11-7-1986 specifically provided for exemption from building tax if hotels were to be set up in the State of Kerala pursuant to the representation made in the said G.O. True, no mandamus could issue to the legislature to amend the Kerala Building Tax Act, 1975, for that would necessarily involve the judiciary in transgressing into a forbidden field under the constitutional scheme of separation of powers. However, on facts, we find that Section 3-A was, in fact, enacted by the Kerala Legislature by suitably amending the Kerala Building Tax Act, 1975 on 6-11-1990 in order to give effect to the representation made by the G.O. dated 11-7-1986. We find that the said provision continued on the statute book and was deleted only with effect from 1-3-1993. This would make it clear that from 6-11-1990 to 1-3-1993, the power to grant exemption from building tax was statutorily conferred by Section 3-A on the Government. And we have seen that the Statement of Objects and Reasons for introducing Section 3-A expressly states that the said section was introduced in order to fulfil one of the promises contained in the G.O. dated 11-7-1986. We find that the appellants, having relied on the said G.O. dated 11-7-1986, had, in fact, constructed a hotel building by 1991. It is clear, therefore, that the non-issuance of a notification under Section 3-A was an arbitrary act of the Government which must be remedied by application of the doctrine of promissory estoppel, as has been held by us hereinabove. The ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise. It is also an admitted fact that no other consideration of overwhelming public interest exists in order that the Government be justified in resiling from its promise. The relief that must, therefore, be moulded on the facts of the present case is that for the period that Section 3-A was in force, no building tax is payable by the appellants. However, for the period post-1-3-1993, no statutory provision for the grant of exemption being available, it is clear that no relief can be given to the appellants as the doctrine of promissory estoppel must yield when it is found that it would be contrary to statute to grant such relief. To the extent indicated above, therefore, we are of the view that no building tax can be levied or collected from the appellants in the facts of the present case. Consequently, we allow the appeal to the extent indicated above and set aside the judgment of the High Court."

61. The Industrial Policy, 2003 of the Respondent No.1 had clearly declared that the State of Sikkim lags behind in industrial development and need had been felt for structured interventionist strategies to accelerate industrial development of the State and boost investor confidence. The new initiatives declared by the Industrial Policy, 2003

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. Fiscal incentives to new industrial units and substantial expansion of existing units was declared to be 100% income tax and excise duty exemption for a period of 10 years from the date of commencement of commercial production. The Industrial Policy, 2003 admitted that Sikkim is one of the least industrially developed States in India, heavily dependent on the Respondent No.1 for grants and there was a need to undertake an all round development effort to be at par with other States of the country. Thus, it was felt necessary to identify the priorities and emphasise the significance of the twin objective of speedy industrial development and generation of adequate employment opportunities. It was stated that keeping these objectives in mind, the industrial policy attempts to satisfy the aspirations of the people through economic and industrial development of the State. One of the main strategies for the implementation of the policy of the Industrial Policy, 2003 was to announce attractive package and fiscal objectives. The Respondent No.1 described the current scenario and future prospects in the Industrial Policy, 2003 in the following words:-

> ***"2. THE CURRENT SCENARIO AND FUTURE PROSPECTS.***
>
> 1. *1.80 percent of the population lives in rural Sikkim and agriculture plays a dominant role in the State economy. With the total cultivable land of around 70.000 hectares, the per capita availability of land is a meagre 0.18 hectares. The rugged mountainous terrain, fragmentation of land erosion of the hilly tracts, geographical seclusion of Sikkim from mainland India, bottlenecks transportation, dependence on traditional methods of cultivation, etc, have contributed to the low productivity of agricultural crops and difficulties in undertaking large scale farming. Consequently, there has been very limited improvement in the methods of agriculture over the years.*

2. *The main crops produced area rice, wheat, maize, large cardamom and ginger with potential for the commercialization of large cardamom, ginger, fruits, tea, medicinal herbs and exportable flowers. There are large areas of fallow land available, which can be converted into productive farms for cash crops.*
3. *Sikkim produce 80 percent of India's large cardamom, which enjoys a high value export market in Pakistan, Singapore and the Middle-East. The ginger is also of a good quality and has export prospects. The large cardamom and ginger can hence be converted into value added products. Fruits can be processed for value addition. Exotic flowers can be cultured for export. Honey and tea are other agro-based products that have high potential.*
4. *There is a good market for the minor forest produce of the State. The varied altitude is ideal for the cultivation of a variety of herbs which can be used in the manufacture of medicines, cosmetics and aromatic products. The climate is ideal for the development of mulberry trees and hence, the establishment of a sericulture industry.*
5. *The absence of profitable marketing network and the lack of appropriate processing facilities for manufacturing quality finished products has resulted in most of the produce being sold at uncompetitive prices to other states as raw materials, and their true potential has not been exploited. Therefore, due attention needs to be given for the development of agro-based, food processing and forest based units.*
6. *There are good prospects for setting up dairy and animals husbandry units on a commercial basis. The milk production offers opportunities for developing processed food-products like cheese, butter, etc. The population being predominantly non-vegetarian, meat-processing and packaging units offer promise in the State.*
7. *The State has a good resource base of minerals like zinc, lead, copper, dolomite, coal, quartzite, graphite, talc etc. Commercial exploitation of some of these minerals is being carried out by the Sikkim Mining Corporation.*
8. *The traditional, cottage industries and specially handicrafts enjoy a good national and international market but more needs to be done on upgrading quality and design, as well as production and also improvement in the marketing network.*
9. *The abundant natural beauty of Sikkim offers a good potential to attract foreign and domestic tourists, and is conducive to the setting up of tourist spots, holiday resorts leisure camps of trekking and adventure sports activities. However, to develop and sustain the tourism industry, adequate travel and tourism related infrastructure needs to be created, conference tourism can also be promoted.*
10. *The state is dependent only on a network of roadways for transportation. At present, no air or water transport facilities are available. During the monsoon period transportation is hampered due to landslides etc. Therefore there is an urgent case for upgrading the road transportation network to and from Sikkim to other parts of India.*

11. *Accommodation facilities at present only adequate for tourists and must therefore be enhanced. The overall power situation though comfortable must be suitably enhanced to induce more power intensive industries to the State.*

12. *Human resources need to be developed with the ultimate objective of creating the necessary skills commensurate will the future industry and market requirements.*

13. *The current industrial scenario is not very encouraging. As on 31/03/1996 there were 1683 provisionally registered and 313 permanently registered private sector industrial units, most of which are in the tiny or small sector promoted by first generation entrepreneurs. There are 14 State Public Sector Enterprises but no Central Government Public Sector Units in the State.*

14. *Of the registered industrial units only 225 (two hundred & twenty five) units are functioning while most of the other units are sick. Some of the State Public Sector enterprise are also incurring continuous losses and have accumulated heavy debts over the years."*

62. It was in this background that the Respondent No.1, satisfied that it was necessary in the public interest to issue Notification No.56/2003 exempted, *inter alia,* P & P medicaments falling under sl. No. 11 of the schedule to the Notification No. 56/2003 manufactured by the Petitioner and cleared from the units located in the State of Sikkim from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002. This incentive continued even when the Industrial Policy, 2007 was declared by the Respondent No.1 on 01.04.2007 approving a package of fiscal incentives and other concessions for the North East Region naming it advisedly the 'North East Industrial and Investment Promotion Policy (NEIIPP), 2007'. The coverage of the Industrial Policy, 2007 was declared to be the States of the North East Region of India including Sikkim. In the said Industrial Policy, 2007 all new units as well as existing units which go

in for substantial expansion, unless otherwise specified and which commences commercial production within the 10 year period from the date of notification declaring the Industrial Policy, 2007 will be eligible for incentives for a period of 10 years from the date of commencement of commercial production. As per the said Industrial Policy, 2007 the Petitioner who admittedly commenced commercial production on and from 20.04.2009 for the first unit and 14.04.2014 for the second unit was well within the 10 year period from the date of notification of the declaration of the Industrial Policy, 2007 i.e. 01.04.2007. The said Industrial Policy, 2007 clearly declared that 100% excise duty exemption would be continued, on finished products made in the North Eastern Region, as was available under the North Eastern Industrial Policy (NEIP), 1997 announced on 24.12.1997. It was by this notification declaring the Industrial Policy, 2007 that the NEIP, 1997 and other concessions in the North Eastern Region seized to operate w.e.f. 01.04.2007. The natural corollary to the declaration of the Industrial Policy, 2007 was the issuance of Notification No. 20/2007 on 25.04.2007 which exempted P & P medicaments manufactured by the Petitioner and cleared from the units located in the State of Sikkim from so much of the duty of excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004. The said Notification No. 20/2007 clearly stated that the said exemption shall apply to new industrial units which commence commercial production on or after 01.04.2007 but not later than 01.03.2017. The Petitioner having commenced commercial production admittedly on 20.04.2009 for the first unit and on

14.04.2014 for the second unit was entitled to seek the benefit under the said Notification No. 20/2007. The exemption contained in the said Notification No. 20/2007 was to apply to any of the said units for a period not exceeding 10 years from the date of publication of the said notification i.e. 25.04.2007 or from the date of commercial production i.e. 20.04.2009 for the first unit and 14.04.2014 for the second unit whichever is later.

63. The declaration of the Industrial Policy, 2003 for the State of Sikkim and thereafter the Industrial Policy, 2007 for the entire North East Region including Sikkim makes it clear that the Respondent No.1 was satisfied that it was necessary in the public interest to exempt *inter-alia* excise duty on P & P medicaments manufactured by the Petitioner and cleared from the units located in the State of Sikkim initially in the year 2003 and thereafter again in the year 2007 keeping in mind the fact that Sikkim was one of the least industrially developed States in India. 100% exemption of both income tax as well as excise duty is a definite attractive fiscal incentive strategy which would lure investors to set up units in Sikkim without which, considering the under development of industries and the geographical terrain of the region, industrialist may not find feasible to invest in. Having thus declared such attractive incentives and lured the Petitioner to invest in Sikkim any alteration in the incentive package to the detriment of the investor would definitely attract the doctrine of promissory estoppel. The Respondent No. 1 cannot be allowed the unconscionable departure from the subject matter of the assumptions which has, as seen hereinabove, been adopted by the Petitioner as the basis of the course of conduct which would affect the Petitioner adversely.

64. As the Petitioner had failed to commence commercial production within the period 23.12.2002 to 31.03.2017 as specified by Notification No. 56/2003 as amended by Notification No.27/2004 it was not entitled to claim exemption under the aforesaid notification as held above. Consequently, we shall refrain from examining the challenge to the impugned Notification Nos. 27/2004, 21/2008 and 36/2008.

65. Coming now to the next point canvassed by the Learned Additional Solicitor General that, in fact, the impugned Notification No. 20/2008 does not actually digress from the Industrial Policy, 2007 as put into operation by Notification No. 20/2007 as in actuality, as demonstrated by the chart quoted and adverted to above, the Petitioner would still be entitled to the 100% excise duty exemption. The Notification No.20/2007 was amended by the impugned Notification No. 20/2008. Consequently the preamble to the amended Notification No.20/2007 would read thus:

> "*In exercise of the powers. conferred by sub-section (1) of the section 5A of the Central Excise Act, 1944 (1 of 1944), 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 to the Central Excise Tarrif Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared form a unit located in the State of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or Sikkim, as the case may be, from so much of the duty of excise leviable thereon under the said Act as is equivalent* ***to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit****."*
>
> ***(Emphasis supplied).***

66. The intention of the Respondent No.1 was made clear. After the amendment to Notification No.20/2007 by impugned Notification No.20/2008 the exemption of excise duty equivalent to the amount of

duty paid other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004 was now to be equivalent only to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit.

67. Under the amended paragraph 2A of Notification No.20/2007 as amended by impugned Notification No. 20/2008 the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the excisable goods. For the goods i.e. P & P medicaments falling under chapter 30 of the first schedule, the rate prescribed in the table to the amended paragraph 2A was 56%. Reading of the amended paragraph 2A leaves no room for doubt that the total 100% exemption once declared by the Industrial Policy, 2007 and as put into operation by Notification No. 20/2007 was hugely reduced to only 56% that too only on the value addition undertaken in the manufacture of the said goods. Simply put value addition is the amount by which the value of any good is increased at each stage of its production, exclusive of initial cost. Whereas in the original Notification No. 20/2007, the exemption on payment of excise duty was referable to the excise duty payable on the finished goods in the impugned Notification No. 20/2008 the excise duty was restricted to the quantum of value addition only. This surely was something not promised vide the Industrial Policy, 2007 and Notification No. 20/2007.

68. The learned Additional Solicitor General relying on the amended paragraph 3 of the Notification No.20/2007 as amended by impugned Notification No.20/2008 would argue that the option given to the

manufacturer not to avail the rates specified in paragraph 2A and instant applying to the commissioner for fixation of a special rate would ensure that in genuine cases manufacturers could avail 100% duty exemption. A perusal of paragraph 3 makes it clear that the said fixation of special rate must be representing the actual value addition in respect of any goods if the manufacturer finds that four fifth 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 table expressed as a percentage. The impugned notification therefore substantially curtails the 100% exemption from the whole of excise duty other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004. Notification No. 20/2007 provided exemption of full refund of the actual duty paid less CENVAT credit. The impugned Notification No.20/2008 however did away with full refund of the actual duty paid less CENVAT credit and instead the exemption was now to be based on value addition undertaken by the manufacturer made available product wise on varied rates of exemption. The proviso to paragraph 3(6) of the amended Notification No. 20/2007 as amended by impugned Notification No. 20/2008 which reads *"Provided that the refund shall not exceed the amount of duty paid on such goods, other than by utilisation of CENVAT credit."* perhaps makes it clear that in no case can the exemption of duty as envisaged by the impugned Notification No.20/2008 could actually exceed the exemption granted by Notification No.20/2007. The impugned Notification No.38/2008 which further amends the new paragraph 2A as inserted by impugned Notification No. 20/2008 merely provides now that *"the duty payable*

on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excise 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 first schedule as are given in the corresponding entry in column (2) of the said Table ***when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory,*** *at the rates specified in the corresponding entry in column (4) of the said Table."* ***[Emphasis supplied].*** The Table provided in the new paragraph 2A vide impugned Notification No. 20/2008 to Notification No. 20/2007 has also been replaced with the new Table as provided in impugned Notification No. 38/2008. This Table however continues the rate of exemption of duty payable on value addition undertaken in the manufacture of the said goods by the said unit to the 56% as was prescribed in the impugned Notification No. 20/2008. Thus the intent and purport of whittling down the 100% exemption of excise duty promised, declared and granted vide Notification No. 20/2007 continued vide the impugned Notification No. 38/2008.

69. The learned Additional Solicitor General would also argue that the impugned notification stating clearly that the said notification had been issued in public interest it is for the Court to presume that in fact the impugned notification was issued in public interest and the onus would lie on the Petitioner to show otherwise. The impugned Notification No. 20/2008 was a notification amending the original Notification No. 20/2007 issued in public interest granting exemption of payment of excise duty. In such situation it was incumbent upon the

Respondent No.1 to have shown larger public interest for curtailing/modifying/withdrawing exemption so granted.

70. In re: ***Pawan Alloys & Casting (P) Ltd. v. U.P. SEB***[17].

> ***"10.*** *It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as "State" within the meaning of the said article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.*
>
> ***11.*** *In this connection we may usefully refer to a decision of this Court rendered in the case of State of H.P. v. Ganesh Wood Products [(1995) 6 SCC 363] . B.P. Jeevan Reddy, J. speaking for a Bench of two learned Judges of this Court made the following pertinent observations in this connection in paras 54 and 55 of the Report: (SCC pp. 390-91)*
>
> > *"54. The doctrine of promissory estoppel is by now well recognised in this country. Even so it should be noticed that it is an evolving doctrine, the contours of which are not yet fully and finally demarcated. It would be instructive to bear in mind what Viscount Hailsham said in Woodhouse Ltd. v. Nigerian Produce Ltd. [1972 AC 741 : (1972) 2 All ER 271 : (1972) 2 WLR 1090] —*
> >
> > > *'I desire to add that the time may soon come when the whole sequence of cases based upon promissory estoppel since the war, beginning with Central London Property Trust Ltd. v. High Trees House Ltd. [1947 KB 130 : 62 TLR 537 : 1947 LJR 77] may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that they are to be regarded with suspicion. But as is common with an expanding doctrine, they do raise problems of coherent exposition which have never been systematically explored.'*
> >
> > *55. Though the above view was expressed as far back as 1972, it is no less valid today. The dissonance in the views expressed by this Court in some of its decisions on the subject emphasises such a need. The views expounded in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] was departed from in certain respects in Jit Ram Shiv Kumar v. State of Haryana [(1981) 1 SCC 11] which was in turn criticised in Union of India v. Godfrey Philips India Ltd. [(1985) 4 SCC 369 : 1986 SCC*

[17] **(1997) 7 SCC 251**

> *(Tax) 11] The divergence in approach adopted in Shri Bakul Oil Industries v. State of Gujarat [(1987) 1 SCC 31 : 1987 SCC (Tax) 74] and Pournami Oil Mills v. State of Kerala [1986 Supp SCC 728 : 1987 SCC (Tax) 134] is another instance. The fact that the recent decision in Kasinka Trading v. Union of India [(1995) 1 SCC 274] is being reconsidered by larger Bench is yet another affirmation of the need stressed by Lord Hailsham for enunciating 'a coherent body of doctrine by the courts'. An aspect needing a clear exposition — and which is of immediate relevance herein — is what is the precise meaning of the words 'the promisee … alters his position', in the statement of the doctrine. The doctrine has been formulated in the following words in Motilal Padampat Sugar Mills Co. Ltd. [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] : (SCC p. 442, para 24)*
>
> > *'The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution'."*

We may say at this stage that at the time the aforesaid decision was rendered, judgment of this Court in the case of Kasinka Trading v. Union of India [(1995) 1 SCC 274] was pending scrutiny before a larger Bench. Subsequently the said decision came to be confirmed by the decision of a Bench of three learned Judges of this Court speaking through A.M. Ahmadi, C.J. in the case of Shrijee Sales Corpn. v. Union of India [(1997) 3 SCC 398] . We will refer to these decisions in the latter part of this judgment. Suffice it to say at this stage that if a statutory authority or an executive authority of the State functioning on behalf of the State in exercise of its legally permissible powers has held out any promise to a party, who relying on the same has changed its position not necessarily to its detriment, and if this promise does not offend any provision of law or does not fetter any legislative or quasi-legislative power inhering in the promisor, then on the principle of promissory estoppel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the promisee."

Then again

***"27.** Shri Dave, learned Senior Counsel for the Board, next contended that the Board in exercise of its statutory powers had earlier decided to grant rebate of 10% on the bills of electricity consumed by new industries. In the exercise of the same statutory power it was open to the Board to withdraw the said concession or rebate on the ground of public policy and doctrine of promissory estoppel cannot be pressed into service for thwarting such an exercise by the Board. For supporting this contention he vehemently pressed into service two decisions of this Court in the case of Kasinka Trading v. Union of India [(1995) 1 SCC 274] and in the case of Shrijee Sales Corpn. v. Union of India [(1997) 3 SCC 398]. In fact these two decisions were the sheet-anchor of the challenge mounted by Shri Dave for the Board against the*

finding of the High Court on Issue No. 1. We, therefore, now proceed to deal with these decisions.

28. *In the case of Kasinka Trading [(1995) 1 SCC 274] a Bench of two learned Judges of this Court consisting of M.N. Venkatachaliah, C.J. and Dr. A.S. Anand, J., had to consider the question whether a notification issued under Section 25 of the Customs Act, 1962 granting complete exemption from payment of customs duty to PVC resin imported into India by manufacturers of certain products requiring the said resin as one of the raw materials, which was issued in public interest and which had stated that it would remain in force up to and inclusive of 31-3-1981 could be withdrawn before the expiry of the said period by fresh notification issued by the Government in exercise of the very same power under Section 25 of the Customs Act. This Court speaking through Dr Anand, J., took the view that as the said notification was issued in public interest it could be withdrawn even before the time fixed therein for its operation also in public interest and while issuing such a notification no promise can be said to have been held out or any representation made to the importers in general on the basis of which they could insist on the doctrine of promissory estoppel that the customs duty exemption granted earlier by the first notification could not be reduced by the second one. The following pertinent observations are found in paras 11 and 12 of the Report: (SCC pp. 283-84)*

> *"11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.*
>
> *12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority 'to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make'. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the*

> *doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.*

It may, however, be mentioned that in para 21 of the Report the Court has observed that the notification which was impugned before it was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued by the Central Government "being satisfied that it was necessary in the public interest so to do". Strictly speaking, therefore, the notification could not be said to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It must, therefore, be held that the aforesaid decision had clearly proceeded on the basis that by issuing the earlier notification under Section 25 of the Customs Act no promise was held out to any of the importers that the notification's life will not be curtailed earlier. Nor was the issuance of the notification based on any claim of incentives to be offered to anyone. It was issued in exercise of statutory powers vested in the Government which could be exercised from time to time in public interest. Earlier the public interest might have required issuance of such a notification granting cent per cent exemption from customs duty on import of PVC resin. Under changed circumstances public interest itself required reduction of such an exemption and as no promise was held out that this could not be done at any time the Court on the facts of that case justifiably rejected the plea of promissory estoppel. It is also to be observed that the said notification was issued in exercise of sovereign taxing power and had created no legal relationship between the authority issuing the notification on the one hand and the prospective importers of PVC resin on the other. The said decision is not an authority for the proposition that even if a claim of exemption from import duty was resorted to in public interest by way of an incentive for a class of importers and even though such public interest continued to subsist during the currency of such an exemption notification and that promisees for whose benefit such exemption was granted had changed their position relying on the said exemption notification, it could still be withdrawn before the time mentioned therein even though public interest did not require the said exercise to be undertaken and even though there were subsisting equities in favour of the promisee-importers. As such a situation had not arisen in that case it was not adjudicated upon.

29. *The said decision, therefore, cannot be of any real assistance to learned Senior Counsel Shri Dave for the respondent-Board on the facts of the present group of matters. In the present cases, as we have seen earlier a clear-cut scheme of incentives for new industries was put forward by the Board presumably at the behest of the U.P. Government so that more and more industries could be attracted to State of U.P. The Board also in its*

wisdom adopted the said scheme of incentives while fixing schedule of tariff rates as that was also in the interest of the Board for the obvious reason that thereby more and more new industries as consumers of high-power electricity would be attracted to the region and would be paying higher electricity rates/charges to the Board."

Then again

***"31.** In the light of this settled legal position we, therefore, hold that even though the appellants have succeeded in convincing us that the earlier three notifications dated 29-10-1982, 13-7-1984 and 28-1-1986 did contain a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this incentive rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. We, therefore, now proceed to examine these twin aspects of the controversy."*

71. In re: ***State of Punjab v. Nestle India Ltd. & Anr.***[18] the Chief Minister of Punjab declared in a State level function of dairy farmers that the State Government had abolished purchased tax on milk and milk products in the State which was widely published in newspapers. The Chief Minister reiterated that declaration in his budget speech also and the Finance Minister stated that such exemption would assist the milk producers and milk cooperatives. The circular issued by the Excise and Taxation Commissioner intimated the field officers that the Government had decided to abolish purchase tax on milk. The representatives of the Respondent companies were also informed of the circular. Finally, the Finance Department formally approved the proposal to abolish purchase tax on milk and the council of Ministers

[18] **(2004) 6 SCC 465**

gives his formal approval. Consequently, the Respondent milk producers did not pay the purchase tax for the specific period and this point was clearly stated in the returns of that particular year. The tax authorities did not reject the returns. The Respondents claimed the benefit was passed on by them to the dairy farmers. The State Government did not deny these facts. In the end of the year the State Government in fact published advertisements claiming credit for the abolition. Subsequently in the Minutes of the Meeting of the Council of Ministers it was cryptically recorded that the decision to abolish purchase tax on milk was not accepted. Consequently the ETO issued notices to the Respondents requiring them to pay the amount of purchase tax. A number of Writ Petitions were filed before the High Court challenging the demand. The High Court held that the Respondents had acted on the representation made and could not be asked to pay purchase tax w.e.f. 01.04.1996 but would be liable after the decision of the Government for the subsequent period i.e. from 04.06.1997. The State Government then filed appeals before the Apex Court. In the said facts the Apex Court would hold :-

> ***"47.*** *The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event readjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet."*

72. In re: ***Sal Steel Limited (supra)*** a similar situation had arisen in the State of Gujarat. In the wake of massive earthquake in the Kutch

region of Gujarat the Respondent No.1 notified an exemption scheme exempting goods produced by new industrial units from paying duty of excise by issuing the original notification. By the two offending notifications issued subsequently, the basis of the original notification of granting refund of the amount of duty of excise or additional duty of excise leviable on the goods other than the amount of duty paid by utilisation of CENVAT credit was changed. The impugned notifications substituted the previous exemption by the words *"to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit"*, and further provided that the rate of percentage of the total duty payable at which the relief would be available. These notifications impugned therein were challenged before the High Court of Gujarat at Ahmedabad. There was a conflict of opinion in the Division Bench. **D.A. Mehta J.** held in favour of the Petitioner and set aside the impugned notifications which curtailed/modified/substituted the basis laid down in the original notification declaring it to be bad in law and holding that new industrial units, which have been set up and commenced commercial production within the specified period and by the specified date under the original notification shall be entitled to the benefit of exemption in the form of refund of excise duty payable/paid on the goods manufactured and cleared from such new units set up in the Kutch district without any restriction by operation of the two notifications impugned therein, provided all other condition stands satisfied. **S.R. Brahmbhatt J**. disagreed with the view expressed by **D. A. Mehta J.** the matter was referred to **Jayant Patel J.** who after recording detailed reasons agreed with the final conclusion recorded by **D. A. Mehta J.**

73. In re: ***Reckitt Benckiser (supra)*** the High Court of Jammu and Kashmir would have an occasion to examine a similar issue. In order to boost Industrial activity in the State, Industrial Policy 1998-2003, 2004 was promulgated which remained in operation till 31st of March 2015. The Respondent No. 1 felt the need for structured intervention strategies to accelerate industrial development and boost investor confidence to strengthen and broadened the infrastructure base of the State and also to minimise unemployment problem. Vide a Notification dated 14.06.2002 the Respondent no. 1 declared new incentives to new industrial units as well as existing units engaged in substantial expansion. The Respondent no. 1 approved conversion of growth centre into total tax free zone for a period of ten years from the date of commencement of commercial production entitling 100% excise duty exemption. Pursuant thereto, Notification no. 56/2002 was issued granting such exemption in exercise of the powers under Section 5A of the Central Excise Act, 1944. The said notification exempted goods from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon, as is equivalent to the amount of duty paid by the manufacturer of goods, other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002. The exemption contained in the said notification was to apply to those units who had commenced their commercial production on or after 14.06.2002 as well as those industrial units existing before 14.06.2002, but have undertaken substantial expansion by way of increase installed capacity by not less than 25% on or before the above date. It was also provided that the exemption contained in the said notification shall apply to any of

the aforementioned units for a period not exceeding 10 years from the date of publication of the notification or from the date of commencement of commercial production, whichever is later. The said notification was amended vide Notification No. 05/2003 dated 13.02.2003 by adding a proviso which read: *"provided that such refund shall not exceed the amount of duty paid less the amount of 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."* Vide Notification impugned therein No. 19/2008 dated 27.03.2008 and 34/2008 dated 10.06.2008 further amendments were carried out whereby excise duty refund had been restricted to a maximum limit as mention in the tables appended to the said notification in respect of the different goods. The said notifications change the entire scenario by reducing 100% exemption provided by the earlier notifications to a limited percentage in respect of different goods manufactured by the units. Further, the said notifications also restricted the exemption from duty to value addition undertaken in the manufacture of said goods by the units. The said notifications impugned therein also gave 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 had been made available under the said notifications. The said notifications amending the original notifications were put to challenge before the High Court of Jammu and Kashmir at Jammu. The High Court held 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 manufactured of goods and the cost incurred would be the value addition. After having promised a 100% refund of excise duty it was not permissible for the Respondent no. 1 to deviate from the promise held out by the earlier notification as it cannot be said that the impugned notifications continued to extend the same promise as was intended in terms of the earlier notification. It was also held that the concept of special rate displaces the very foundation of the rate fixed in terms of the original notification. It was further held that there was no supervening public interest in withdrawing the exemption by way of the notifications impugned. Consequently, the Writ Petitions were allowed and the notifications impugned therein quashed.

74. In re: ***Unicorn Industries (supra)*** this Court would examine the legality of Notification No.23/2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 withdrawing the exemption granted in the payment of duty for utilisation towards the CENVAT credit/cash conferred upon the Petitioner therein by Notification No.71/2003 dated 09.09.2003 issued by the Respondent No.1 exercising the powers under Section 5A of the Central Excise Act, 1944. Notification No.71/2003 provided for exempting the goods from so much of the duty of excise or additional duty of excise as was leviable thereon as is equivalent to the amount of duty paid by the manufacturer of the said goods, other than the amount of duty paid by utilisation of CENVAT credit. Both the Industrial Policy, 2003 as well as Industrial Policy, 2007 fell for consideration before this Court. It was not in dispute that based on the statutory guarantee for exemption of excise duty, the Petitioner therein invested and started new units.

Notification No. 23/2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 were challenged before this Court. Notification No.23/2008 amended the earlier Notification No.71/2003 dated 09.09.2003 by amendments identical to the amendments made in the impugned Notification No.20/2008. The preamble to Notification No. 71/2003 was amended substituting for the words *"to the amount of duty paid by the manufacturer of the said goods other than the amount of duty paid by utilisation 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"*. Identically, as in the impugned Notification No.20/2008, Notification No.23/2008 also provided a table in which for goods falling under chapter 33 a rate of 56% was prescribed. Similarly Notification No.37/2008 is identical to the impugned Notification No.38/2008. After examining the matter in detail this Court would hold that once it is established that the exemption had been granted in public interest the same cannot at any stretch be withdrawn unless there is a larger public interest. This Court would further hold that once power under Section 5A of the Central Excise Act, 1944 had 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. This Court would further rely upon the full bench decision of the Gujarat High Court in ***Sal Steel Ltd. (supra)*** holding that withdrawal of exemption without any basis, whatsoever, is arbitrary, unreasonable, illogical and irrational and contrary to the doctrine of promissory estoppel.

This Court would also hold that once the Respondent No.1 had taken a policy decision and exercised power under Section 5A of the Central Excise Act, 1944 in public interest, the same cannot be restricted by way of the Notification No.23/2008 dated 27.03.2008 and Notification No.37/2008 dated 10.06.2008 impugned therein unless a greater public interest required so. Thus holding, this Court quashed the notifications impugned therein without prejudice to the rights of the Revenue to deny duty exemptions in appropriate cases, based on material facts and giving cogent reasons after following due process of law.

75. We are in agreement with the aforestated views expressed by the High Court of Gujarat in re: ***Sal Steel Ltd. (supra),*** the High Court of Jammu and Kashmir in re: ***Reckit Benckiser (supra)*** and this Court in re: ***Unicorn Industries (supra)*** which follows the principles of law laid down by the Apex Court in re**:** ***M/s. Motilal Padampat Sugar Mills Co. Ltd. (supra)*** and in re: ***Pawan Alloys & Casting (P) Ltd. (supra).***

76. In re: ***Modipon Ltd. (supra)*** the Delhi High Court would hold that the Courts have consistently taken the view that the public interest is inherent in issuance of the withdrawal of the notifications. The public interest is the dominant factor in issuance and withdrawal of the notifications what is given in public interest can also be taken away in public interest. Every action of the Government is presumed to be in public interest unless contrary is proved. The Petitioner have failed to demonstrate that the notification dated 21.10.1982 was not issued in public interest. Holding thus, the High Court dismissed the Writ Petition preferred. While holding so the Delhi High Court would

rely upon ***Kasinka Trading & Anr. v. Union of India***[19]. The distinction drawn by the Apex Court in re: ***Pawan Alloys & Casting (P) Ltd. (supra)*** would be squarely applicable to the present case. The said decision, therefore, cannot be of any real assistance to the learned Additional Solicitor General on the facts of the present Writ Petitions. In the present cases, as we have seen earlier, a definite scheme of incentives for new industries was put forward vide Industrial Policy, 2007 which held out a promise by the Respondent No.1 for 100% excise duty exemption so that more and more industries could be attracted to State of Sikkim. The Respondent No.1 translated the said promise declared vide Industrial Policy, 2007 into Notification No. 20/2007 for the obvious reason that thereby more and more new industries would be attracted to the North East Region including Sikkim.

77. In re: ***Kothari Industrial Corporation Limited (supra)*** relied upon by the learned Additional Solicitor General, the Apex Court would hold that a recipient of a concession has no legally enforceable right against the Government to grant or continue to grant concession except to enjoy benefits of concession during the period of its grant.

78. In the present case the Petitioner seeks to enjoy the benefit promised by the Respondent No.1 for the period of 10 years as declared by the Respondent No.1.

[19] **(1995) 1 SCC 274**

79. In re: ***R.C. Tobacco (P) Ltd. (supra)*** relied upon by the learned Additional Solicitor General, the Apex Court would hold that the competence of Parliament and the State Legislature to repeal, amend or supersede an exemption notification is unquestionable. The limitation on this power is that that the legislation must not conflict with other provisions of the Constitution. A law cannot be held to be unreasonable merely because it operates retrospectively. The unreasonability must lie in some other additional factors. The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be so unreasonable as to violate Constitutional norms. The Apex Court would find that the particular context of the section impugned therein was the Industrial Policy formulated by the Central and the State Government of Assam for development of that State. It was held that the obvious intention behind the grant of the package of incentives including an exemption from payment of excise duties was to stimulate further industrial growth in the area with enduring benefits not only to the local populace by way of employment opportunities but also to the economic welfare of the State. It was found that none of the industrial units manufacturing cigarettes were prepared to contribute to that object and their investment in the manufacture of cigarette was co-extensive with the period of the exemption. In the light of the aforesaid facts it was held by the Apex Court that therefore, the Government could contend that the words should have been used in the exemption so as to provide for sufficient safeguards to ensure that the benefit of exemption was granted only to those industries which would in turn permanently invest in the State and by

the retrospective enactment that defective expression of the object of the policy, was rectified.

80. The facts of the present set of Writ Petitions are entirely different than the facts in re: ***R.C. Tobacco (P) Ltd. (supra).*** The Petitioner does not question the competence of Parliament and the State Legislature to repeal, amend or supersede an exemption notification nor is it a case of challenge to a law operating retrospectively. It is nobody's case that the Petitioner was not willing to contribute to the object of industrial growth and their investment in the manufacture of P & P medicaments was co-extensive with the period of the exemption.

81. In re***: DG of Foreign Trade v. Kanak Exports (supra)*** a challenge to a notification issued by the Respondent No.1 making some notes inserted to EXIM Policy, 2002-2007 on the ground that under the guise of the said notes, some benefits which had already accrued to the exporters under the EXIM policy i.e. their vested rights, had been taken away was repelled by the Apex Court holding that the said notification was only clarificatory in nature and valid and did not amount to amendment. It also held that the incentive scheme under the EXIM Policy is in the nature of concession or incentive which is a privilege of the Respondent No.1 and it is for the Government to take the decision to grant such privilege or not and further where there is withdrawal of such incentive and it is also shown that the same was done in public interest, the Court would not tinker with these policy decision. In the facts of the said case it was held that if the status-holders had achieved 25% incremental growth

in exports, they acquired the vested right to receive the benefit under the scheme, which could not be taken away. It was held that the so called targets achieved were only on paper through fraudulent means, and, therefore, it cannot be said that any vested right accrued in favour of the exporters. There was pernicious and blatant misuse of the provisions of the incentive scheme in question. The Supreme Court, or for that matter the High Court in exercise of its writ jurisdiction, cannot come to the aid of such Petitioner exporters who, without making actual exports, play with the provisions of the scheme and try to take undue advantage thereof. In the said case the Apex Court would examine whether the withdrawal notifications were in public interest. It would find that the main objective of the incentive scheme was to achieve the share of 1% of global trade and accelerated growth in exports by India. It would find that immediately after the introduction of the scheme, there was unprecedented sharp rise in the export in gem and jewellery articles and that misuse of the scheme was stated to have come to the notice of the DRI and other intelligence official also and therefore the notifications were issued to curb misuse. On such finding of facts it was held by the Apex Court that the purport behind notification were bonafide which was actuated with the conditions of public interest in mind.

82. The facts and circumstances in the present case is distinctly different from the facts and circumstances in re: ***Kothari Industrial Corpn. Ltd. (supra).*** In the present case no material whatsoever has been placed by the Respondent No.1 to show that the withdrawal was in public interest save stating that the notification itself states that it is in public interest leave alone showing a superior public interest to

resile from the promise held out clearly vide Industrial Policy, 2007 and 100% exemption granted pursuant thereto vide Notification No. 20/2007.

83. Coming now to the point raised by Mr. Vikram Nankani, learned Senior Advocate that the Petitioner having inadvertently sought exemption under Notification No. 56/2003 whereas the Petitioner was in fact eligible for exemption under the Industrial Policy, 2007 and the Notification No.20/2007 the benefit which the Petitioner was otherwise eligible to avail of could not be prohibited from claiming the same.

84. In re: ***Unichem Laboratories (supra)*** the Apex Court would hold:-

> ***"13.*** *For the aforementioned reasons, we are of the view that denial of benefit of the notification to the appellant was unfair. There can be no doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law - no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonable and fairly."*

85. In re: ***Share Medical Care (supra),*** the Appellant society imported certain medical equipments for the use in its charitable hospital. According to the Appellant, under notification in question, exemption were granted to hospital equipments imported by the specified category of hospitals (charitable) subject to certification by Directorate General of Health Services (DGHS). The table in the notification classified hospitals in four categories. According to the Appellant, it fell under Para No. 3 of the table of the said notification. The Appellant, however, along with several other hospitals, had applied for the benefit of exemption notification not

under Para 3 but para 2 of the table. The benefit of exemption was granted. Since the Appellant society was also entitled to exemption under para 3 of the table an application was made to DGHS, highlighting the fact that the Appellant is non-profit organisation and had been permitted to import medical equipments by DGHS by certification. It has been registered as an institution to receive donation in foreign exchange and since the areas of operations of the main hospital at Ghanapur and the Rural Health Hospital are in rural areas, it would be entitled to invoke para 3 of the table of the notification of exemption. The Deputy Director General (Medical), DGHS by an order dated 25.01.2000 rejected the application of Appellant observing therein that initially the request was made by the Appellant for exemption under para 2 of the said notification and accordingly, the institution was granted such exemption. It was, therefore, not open to apply for exemption under para 3 of the table of the exemption notification and the application was liable to be rejected. Being aggrieved, the Appellant Society filed a Writ Petition in the High Court which was dismissed and the matter travelled to the Apex Court. The Apex Court would hold:-

> ***"12.*** *In CCE v. Indian Petro Chemicals [(1997) 11 SCC 318] this Court held that if two exemption notifications are applicable in a given case, the assessee may claim benefit of the more beneficial one. Similarly, in H.C.L. Limited v. Collector of Customs [(2001) 9 SCC 83 : (2001) 130 ELT 405] this Court relying upon Indian Petro Chemicals [(1997) 11 SCC 318] held that where there are two exemption notifications that cover the case in question, the assessee is entitled to the benefit of that exemption notification which may give him greater or larger relief. In Unichem Laboratories Ltd. v. CCE [(2002) 7 SCC 145 : JT (2002) 6 SC 547] the appellant was a manufacturer of bulk drugs. Exemption was granted to him under one item. He, thereafter, filed a revised classification list categorising its bulk drugs under the other head claiming more benefit. The claim was rejected on the ground that the appellant had not claimed the benefit of exemption at the time of filing the classification list and subsequently it could not be done. The appellant approached this Court.*

13. *Allowing the appeal and setting aside the order, this Court held that if no time is fixed for the purpose of getting benefit under the exemption notification, it could be claimed at any time. If the notification applies, the benefit thereunder must be extended to the appellant. The Court held that the authorities as well as the Tribunal were not right in holding that the appellant ought to have claimed the benefit of the notification at the time of filing of classification lists and not at a subsequent stage. The Court then stated: (SCC p. 150, para 12)*

> *"There can be no doubt that the authorities functioning under the Act must, as are duty-bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law—no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonably and fairly."* ***(Emphasis supplied)***

14. *In Kerala State Coop. Marketing Federation Ltd. v. CIT [(1998) 5 SCC 48: JT (1998) 4 SC 145], interpreting Section 80-P(2)(a) of the Income Tax Act, 1961, this Court said: (SCC p. 52, para 7)*

> *"7. We may notice that the provision is introduced with a view to encouraging and promoting growth of cooperative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a cooperative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption. The expression 'marketing' is an expression of wide import. It involves exchange functions such as buying and selling, physical functions such as storage, transportation, processing and other commercial activities such as standardisation, financing, marketing intelligence, etc. Such activities can be carried on by an apex society rather than a primary society."* ***(Emphasis supplied)***

15. *From the above decisions, it is clear that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage."*

86. In view of the above, it is held that the Petitioner which was entitled to exemption benefit under Notification no. 20/2007 but sought benefit under Industrial Policy, 2003 and Notification No. 56/2003 would be entitled for the benefit under the Industrial Policy, 2007 as put into operation vide impugned Notification No. 20/2007.

87. We find that the Respondent No.1, right from the year 2003, had declared a clear policy of 100% excise duty exemption to those new industrial units who would set up industry in Sikkim as well as to those industries who went in for substantial expansion. This policy was put into operation vide Notification No.56/2003. The Respondent No.1 had vide impugned Notification No. 24/2004 limited the period within which new industrial units were required to commence commercial production. The Petitioner started the process of investment in the year 2005 only and could not start commercial production until 20.04.2009 by which time, by the operation of a subsequent impugned Notification No.27/2004, the Petitioner did not qualify to take the benefit of the said Industrial Policy, 2003. The Petitioner therefore, is not entitled to the benefit of Notification No. 56/2003. The industrial policy however, did not change. In 2007 the Respondent No.1 declared the Industrial Policy, 2007 by which identical 100% excise duty exemption was once again promised. This Industrial Policy, 2007 was put into operation vide Notification No.20/2007. The Petitioner's subsequent investments were obviously intended to reap the benefit of the said Notification No.20/2007. The Petitioner having commenced commercial production on and from 20.04.2009 for the first unit and from 14.04.2014 for the second unit were well within the period notified therein. The policy of the Respondent No.1 was clear and cogent. It was intended to draw investors to Sikkim which was industrially backward. Having acted on the said promise made by the Respondent No.1, the Petitioner made huge investments and altered its position to its detriment. Having issued the said

Notification No.20/2007 in public interest it was incumbent upon the Respondent No.1 to place before this Court all materials available to establish a superior public interest which the Respondent No.1 has failed to do. The facts and circumstances of the present writ petitions, therefore, squarely falls within the parameters of the doctrine of promissory estoppel and that it would be unconscionable on the part of the Respondent No.1 to shy away from it without fulfilling its promise. The relief that must, therefore be granted on the facts of the present case is that for the period declared vide Notification No.20/2007 the Petitioner would be entitled to the excise duty exemption as promised therein. Consequently impugned Notification Nos.20/2008 and 38/2008 are liable to be quashed to the extent they curtail and whittle down the 100% excise duty exemption benefit as promised vide Notification No.20/2007 and is hereby quashed. All impugned orders/ demand notices/show cause notices which are against the aforestated declarations of law are also quashed.

88. Writ Petition (C) No. 41/2015, Writ Petition (C) No. 08/2017, Writ Petition (C) No. 27/2017 and Writ Petition (C) No. 40/2017 are disposed accordingly in the aforesaid terms. Rule made absolute to the aforesaid extent with no order as to costs.

Judge
21-11-2017

Chief Justice
21-11-2017

Avi/tp Approved for reporting: yes.
Internet: yes.