

(2016) 01 TP CK 0039
In the Tripura High Court
Case No : Writ Petition (C) No. 144 of 2010

Dharampal Premchand Ltd.

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Citation : (2016) 342 ELT 65

Hon'ble Judges : S. Talapatra, J.

Bench : Single Bench

Advocate : S/Shri K.N. Bhattacharji, Senior Advocate, S. Acharji and P. Dutta, Advocates, for the Respondent; Dr. A.K. Saraf, Senior Advocate, S/Shri Biswajit Dubey, Amit Goyal, Nikhil Menon and K. Roy, Advocates, for the Petitioner

Final Decision : Allowed

Judgement

S. Talapatra, J. - By means of this writ petition, the petitioners have challenged the Notification No. 11/2007-C.E., dated 1-3-2007 as that has abrogated the benefits allowed to the petitioners under the Notification Nos. 32/1999-C.E. and 33/1999-C.E., dated 8-7-1999, in furtherance of which the petitioners have made extensive investments in the specified zone, growth centre or the industrial park. The Union of India by its industrial policy embodied in the office Memorandum dated 24-12-1997, issued by the Ministry of Industry, Department of Industrial Policy and Promotion, Government of India, declared certain incentives for those who would establish industries in the North-Eastern Region, in order to give stimulus to the development of industrial infrastructure. Pursuant thereto, a further notification was issued on 8-7-1999 granting new industrial units which would commence commercial production on or after 24-12-1997 and to the category of industrial units those would increase substantially their installed capacity after that date and cleared goods from the units located in the group centre and integrated infrastructure centres. There is no dispute that the said notifications No. 32/99-C.E. and No. 33/99-C.E., dated 8-7-1999 were issued 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 (Textiles and Textile Articles) Act, 1978 by exempting the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act. By the notification under No. 33/1999-C.E., dated 8-7-1999, some amendments in the Notification No. 32/99-C.E., dated 8-7-1999 has been made. "Pan masala" was excluded from exemption.

2. Briefly stated, by the said policy, which is known as North-Eastern Industrial Policy certain incentives were declared for bringing about a breakthrough. The relevant part of the said policy (NEIP), Annexure-A to the writ petition, are gainfully reproduced hereunder :

"C. Fiscal incentives to new industrial units and their substantial expansion. - Government has approved for converting the growth centres and IIDs into a total Tax Free Zone for the next 10 years. All industrial activity in these zones would be free from income-tax and Excise for a period of 10 years from the commencement of production. State Government would be requested to grant exemptions in respect of Sales Tax and Municipal Tax.

Industries located in the growth centres would also be given Capital Investment Subsidy at the rate of 13% of their investment in plant and machinery, subject to a maximum ceiling of Rs. 30.0 lakhs.

The Commercial banks and the North-East Development Financial Corporation (NDFI) will have dedicated branches/counters to process applications to term loans and working capital in these centres. While sanctioning assistance NEDFI and Commercial banks would take a liberal view of the debt equity ratio.

An interest subsidy of 3% on the working capital loan would be provided for a period of 10 years after the commercial production. The working capital requirements would be worked out as per the Nayak Committee.

Similar benefits would also be extended to the new industrial units or their substantial expansion in other Growth Centres or IIDs or industrial estates/Parks/ Export Processing Zones set up by the State in the NE region. New industrial units or their substantial expansion in the specified industries (as at Annexure-A) located outside these growth centres and other identified locations would also be eligible for the similar fiscal incentives."

That apart, by enacting Section 80(1B) and 80(1C) of Income-tax, 1961, 100% Income Tax (IT) exemption was provided for the undertakings including those engaged in manufacturing tobacco products, in an Industrial Estate or Industrial Park in the North-East. Those incentives were for the manufacturing units set up after 24-12-1997.

3. The notifications dated 8-7-1999 were amended by the Notification dated 31-12-1999. The amendment which is relevant for this writ petition is as follows :

"In the said notification, in the opening paragraph, for the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986)", the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986) other than the goods falling under Chapter 24 or Heading No. 21.06 of the said First Schedule or the Second Schedule, as the case may be" shall be substituted."

4. The purport of the said notification dated 31-12-1999 was obvious that the exemption of the central excise as accorded was withdrawn in respect of goods falling under Chapter 24 or Heading No. 21.06 of the First Schedule or the Second Schedule respectively. Those (under Chapter 24 of the First Schedule) include Tobacco substitutes, cigarettes, chewing tobacco, etc., and under Heading No. 21.06 of the Second Schedule, pan masala. Thereafter, by the Notification No. 1/2000-C.E., dated 17-1-2000, the further amendment in the notification dated 8-7-1999 was carried out in the following manner :

"In the said notification, in the opening paragraph, the words, figures and letters "other than the goods falling under Chapter 24 or Heading No. 21.06 of the First Schedule and the Second Schedule, as the case may be" shall be omitted.

In the said notification, in the opening paragraph, the words, figures and letters "other than the goods falling under Chapter 24 or Heading No. 21.06 of the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986), as the case may be" shall be omitted."

Thus, the effect of the original notification dated 8-7-1999 was restituted by taking away the entire effect of the notification dated 31-12-1999. Again by the Notification No. 1/2001-C.E., dated 22-1-2001, further amendment has been sought to be made in the notifications dated 8-7-1999. For purpose of illustration, the table appended below the notification dated 21-1-2001 is reproduced :

SL. No.

Notification No. and date

Amendment

(1)

(2)

(3)

1

32/99-Central Excise, dated the 8th July, 1999

In the said notification, in the first paragraph, for the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the

Central Excise Tariff Act, 1985 (1 of 1986)", the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986) other than cigarettes falling under Chapter 24 of the First Schedule shall be substituted.

2

33/99-Central Excise, dated the 8th July, 1999

In the said notification, in the first paragraph, in item (a), for the words, "specified in the Schedule appended to this notification", the words, figures and brackets "specified in the Schedule appended to this notification" other than cigarettes falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (1 of 1986) shall be substituted.

Thus, by the notification dated 22-1-2001, the incentives as declared by the notifications dated 8-7-1999 was sought to be withdrawn only in respect of cigarettes.

5. Be that strange as it may be, by the Notification No. 6/2001-C.E., dated 1-3-2001, the said Central Excise Tariff notifications were sought to be amended in the public interest, in terms of the table below the said notification dated 1-3-2001. For purpose of reference, only the entry in respect of the notifications dated 8-7-1999 are extracted hereunder leaving aside the entries made against serial Nos. 1, 2, 3, 6 & 7.

SL. No.

Notification No. and date

Amendment

(1)

(2)

(3)

4

32/99-Central Excise, dated the 8th July, 1999

In the said notification, in the first paragraph, for the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986)", other than cigarettes falling under Chapter 24 of the First Schedule" the words, figures and brackets "the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986) other than goods falling under Chapter 24 of the said Schedules" shall be substituted.

5

33/99-Central Excise, dated the 8th July, 1999

In the said notification, in the first paragraph, in item (a), for the words, figures and brackets "specified in the Schedule appended to this notification other than cigarettes falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (1 of 1986)" the words, figures and brackets "specified in the Schedule appended to this notification other than goods falling under Chapter 24 of the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)" shall be substituted.

6. The effect of the said notification dated 1-3-2001 was to withdraw to the benefits granted by the notification dated 8-7-1999 to the extent of Chapter 24 of the First Schedule. It is also not in dispute that by Section 154 of the Finance Act, 2003, the following has been provided by effacing the benefit of the notification dated 8-7-2009 retrospectively. For purpose of reference Section 154 of the Finance Act, 2003 is extracted hereunder :

"154. Amendment of notifications issued under section 5A of the Central Excise Act. - (1) The notifications of the Government of India in the erstwhile Ministry of Finance (Department of Revenue) Nos. G.S.R. 508(E), dated 8-7-1999 and G.S.R. 509(E), dated 8-7-1999, issued under sub-section (1) of Section 5A of the Central Excise Act 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), by the Central Government shall stand amended and shall be deemed to have been amended in the manner as specified against each of them in column (3) of the Ninth Schedule, on and from the corresponding date specified in column (4) of that Schedule retrospectively, and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done under the said notifications, shall be deemed to be and always to have been, for all purposes, as validly and effectively taken or done as if the notifications as amended by this sub-section had been in force at all material times.

(2) For the purpose of sub-section (1), the Central Government shall have and shall be deemed to have the power to amend the notifications referred to in the said sub-section with retrospective effect as if the Central Government had the power to amend the said notifications under sub-section (1) of Section 5A of the Central Excise Act read with sub-section (3) of section 3 of the Additional Duties 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), retrospectively at all material times.

(3) No suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for any action taken or anything one or omitted to be done, in respect of any goods under the said notifications, and no enforcement

shall be made by any court, tribunal or other authority of any decree or order relating to such action taken or anything done or omitted to be done as if the amendments made by sub-section (1) had been in force at all material times.

(4) Recovery shall be made of all amounts of duty or interest or other charges which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, which would have not been refunded if the provisions of this Section had been in force at all material times, within a period of thirty days from the day on which the Finance Bill, 2003 receives the assent of the President, and in the event of non-payment of duty or interest or other charges so recoverable, interest at the rate of fifteen percent, per annum shall be payable from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if the notifications referred to in sub-section (1) had not been amended retrospectively by that sub-section.

(i) the First Schedule shall be amended in the manner as specified in the Tenth Schedule.

(ii) the Second Schedule shall be amended in the manner as specified in the Eleventh Schedule."

7. Section 154 of the Finance Act, 2003 was challenged on the ground of constitutional invalidity. In R.C. Tobacco Private Ltd. and Another v. Union of India and Another, reported in (2005) 7 SCC 725 : 2005 (188) E.L.T. 129 (S.C.), the Apex Court upheld the constitutional validity of the aforesaid provision and repelled the challenge so made. The effect was that the benefits of the notifications dated 8-7-1999 was effaced retrospectively. It created initially a lot of confusion and to dispel such confusion by the communication under No. F. 356/43/2003-TRO, dated 8-8-2003 the Chief Commissioner of Customs and Central Excise, Shillong and the Commissioner of Central Excise, Shillong, Dibrugarh had been apprised in the following manner :

"To

Chief Commissioner of Customs & Central Excise, Shillong.

Commissioner of Central Excise, Shillong/Dibrugarh,

Subject - Retrospective amendment to the North East Excise Duty Exemption, regarding

Section 154 of the Finance Act, 2003, has retrospective amended the North-East Central Excise Exemptions notification No. 32/99-C.E., dated 8-7-99, so as to withdraw the benefit of exemption for cigarettes and pan masala containing tobacco "gutkha" w.e.f. 8-7-99. Such amendments also provides for recovery of amounts, which would not have been refunded out for such amendment, within a

period of thirty days from the date on which the Finance Bill, 2003 got assent of the President. It also provides for charging of interest @ 15% in case of delay in such payments.

2. It has been brought to the notice of the Board that, in cases where the amount recoverable has not been paid by the manufacturers within the prescribed period show cause notices have been issued by the Central Excise Commissionerates at Shillong and Dibrugarh. It has also been brought to the notice of the Board that in some cases, orders for recovery of the central excise amounts refunded to the affected units, have also been issued.

3. In this regard, Finance Minister at the consideration stage of the Finance Bill had made the following statement in the Parliament :

"No industry other than tobacco in the North-East region or Assam is affected by it. What you are now asking about tobacco is to make an exception for chewing tobacco and gutkha. I will consider it fully. I will try and find a suitable legal answer for this purpose."

4. The matter has been examined by the Board and in view of the assurance given by the Hon^{ble} FM, it has been decided to keep all such show cause notices, issued in respect of Chewing Tobacco and Gutkha, pending till a final decision is taken in this regard. In case Adjudication orders for recovery in this regard have been issued, the actual recovery of such amounts may also be kept pending till further orders. Accordingly, you are directed to keep all such show cause notices pending till further orders on the matter. It is however, clarified that show cause notices as necessary may continued to be issued, so that statutory bar on limitation is not attracted.

5. Receipt of this letter may please be acknowledged.

(Gautam Ray)

Joint Secretary (TRU)"

8. Thereafter, other developments had taken place. By the Notification No. 69/2003-C.E., dated 25-8-2003, the Central Government exempted excisable goods of the description as specified in the column (3) of the table below the said notification and falling within the sub-heading number as provided in the column (2) of the said table and falling under the First Schedule to the Central Excise Tariff Act, 1985 in the following manner :

"(a) from so much of the duty of excise specified thereon under the First Schedule to the said Central Excise Tariff Act, (hereafter referred to as the basic excise duty), as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the special duty of excise specified thereon under the Second Schedule to the said Central Excise Tariff Act, (hereafter referred to as the basic excise duty), as is in excess of the amount calculated at the rate

specified in the corresponding entry in column (5) of the said Table;

(c) from so much of the special duty of excise specified thereon under the First Schedule to the said Additional Duties Excise Tariff Act, (hereafter referred to as the basic excise duty), as is in excess of the amount calculated at the rate specified in the corresponding entry in column (6) of the said Table;"

Those benefits would be subject to the following conditions :

"(A) the exemption under this notification shall be available only in respect of a unit which -

(i) is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura;

(ii) had commenced commercial production on or after the 24th day of December, 1997, but not later than the 28th day of February, 2001;

(iii) had availed of the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated the 8th July, 1999] or No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated the 8th July, 1999]; and

(iv) has continued its manufacturing activities after the 28th day of February, 2001;

(B) an amount equal to the difference between the sum of basic excise duty, special excise duty and additional excise duty, payable, but for the exemption in this notification, and the sum of basic excise duty, special excise duty and additional excise duty, paid, shall be utilised by the manufacturer only for investment in plant and machinery in a manufacturing unit which is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura;

(C) the investment in terms of condition (B), shall be made before the expiry of six months from the end of each quarter;

(D) the manufacturer shall provide all details relating to the investment made in terms of condition (B), within one month after the expiry of the period of six months referred to in condition (C), to a Committee consisting of, the Chief Commissioner of Central Excise, Shillong, the Principal Secretary of the Department of Industry of the State concerned in which the investment is made, and shall have to prove to the satisfaction of the said Committee that the investment has been made for the purpose specified in condition (B);

(E) if the Committee referred to in condition (D) is satisfied that the investment as specified in condition (B), has been made, it shall issue a certificate to this effect to the manufacturer within a period of three weeks after the expiry of the one month referred to in condition (D), which shall be produced by the

manufacturer, within a period of two weeks from the date of issue of such certificate, to the jurisdictional Central Excise Officer;

(F) the investment made under this notification shall not be allowed to be withdrawn before the expiry of ten years from the date on which the investment is made except in a case where the investment withdrawn is reinvested in the same manner as specified in this notification, in any one of the States mentioned in condition (A) :

Provided that if the investment made under this notification is withdrawn before the expiry of ten years and is not reinvested as mentioned above, the duty which is equal to the amount so withdrawn and not so reinvested, shall be paid by the manufacturer on the date on which the investment is withdrawn."

The table as referred above is as under :

Sl. No.

Sub-heading No.

Description

Basic excise duty

Special Excise duty

Additional excise duty

(1)

(2)

(3)

(4)

(5)

(6)

1

2401.9

All goods

8.00%

8.00%

5.00%

2

2402

All goods

8.00%

Nil

Nil

3

2404.41

All goods

8.00%

6.00%

6.00%

4

2404.49

All goods

8.00%

6.00%

6.00%

5

2404.59

All goods

8.00%

6.00%

6.00%

6

2404.99

All goods

8.00%

6.00%

6.00%

9. By the subsequent Notification No. 8/2004-C.E., dated 21-1-2004 exemption for the goods falling under sub-heading No. 2401.90, 2402.00, 2404.41,

2404.49, 2404.50 or 2404.99 of the First Schedule to the Central Excise Tariff Act was declared from the whole of the duties of excise and additional duties of excise as leviable under the Central Excise Tariff Act, Additional Duties of Excise (Goods of Special Importance) Act and National Calamity Contingent Duty as leviable under sub-section (1) of Section 136 of the Finance Act subject to the conditions almost similar as provided in the notification dated 25-8-2003. At the cost of repetition the conditions are extracted for showing the additional conditions as well as qualifying clause as regards the notification dated 8-7-1999.

"(A) the exemption under this notification shall be available only in respect of a unit which -

(i) is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura;

(ii) had commenced commercial production on or after the 24th day of December, 1997, but not later than the 28th day of February, 2001;

(iii) had availed of the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated the 8th July, 1999] or No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated the 8th July, 1999]; and

(iv) has continued its manufacturing activities after the 28th day of February, 2001;

(B) an amount equal to the sum of basic excise duty, special excise duty, additional excise duty and National Calamity Contingent duty, payable, but for the exemption in this notification, shall be utilised by the manufacturer only for investment in -

(i) plant and machinery in a manufacturing unit which is located in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura; or

(ii) infrastructure of civil works or social projects in the State of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland or Tripura; or

(iii) the investment in terms of condition (B) shall be made before expiry of six months from the end of each quarter;

(C) the investment in terms of condition (B), shall be made before the expiry of six months from the end of each quarter;

(D) the manufacturer shall provide all details relating to the investment made in terms of condition (B), within one month after the expiry of the period of six months referred to in condition (C), to a Committee consisting of, the Chief Commissioner of Central Excise, Shillong, the Principal Secretary of the Department of Industry of the State concerned, in which the unit is located and the Principal Secretary of the Department of Industry of the State in which the

investment is made, and shall have to prove to the satisfaction of the said Committee that the investment has been made for the purpose specified in condition (B);

(E) if the Committee referred to in condition (D) is satisfied that the investment as specified in condition (B), has been made, it shall issue a certificate to this effect to the manufacturer within a period of three weeks after the expiry of the one month referred to in condition (D), which shall be produced by the manufacturer, within a period of two weeks from the date of issue of such certificate, to the jurisdictional Central Excise Tariff Officer;

(F) the investment made under this notification shall not be allowed to be withdrawn before the expiry of ten years from the date on which the investment is made except in a case where the investment withdrawn is reinvested in the same manner as specified in this notification, in any one of the States mentioned in condition (A) :

Provided that if the investment made under this notification is withdrawn before the expiry of ten years and is not reinvested as mentioned above, the duty which is equal to the amount so withdrawn and not so reinvested, shall be paid by the manufacturer on the date on which the investment is withdrawn."

10. Apparent, it is that certain restrictions and conditions for reinvestment have been enforced for getting the exemption out of the goods falling under the said sub-headings, with further provision that if the investment made is withdrawn before the expiry of ten years and is not reinvested in the manner as laid down, the duty which is equal to the amount so withdrawn and not so reinvested shall be paid by the manufacturer on the date on which the investment is withdrawn. By the Notification No. 28/2004-C.E., dated 9-7-2004 certain amendments had been made in the notification dated 21-1-2004 particularly in the conditions (C), (D) and (E). Those conditions after modification as intended, have been substituted with additional clause namely, Clause E(a).

"(C) the investment in terms of condition (B), shall be made in the following manner :

(i) an amount equal to the sum of basic excise duty, special excise duty, additional excise duty and National Calamity Contingent duty, payable in a quarter, but for the exemption under this notification, shall be deposited by the manufacturer, within sixty days from the end of the quarter, in an escrow account opened by the manufacturer, for this purpose, in a bank authorised for excise duty collection;

(ii) operations including withdrawal from and closure of the said escrow account shall be made with the prior approval of the jurisdictional Commissioner of Central Excise, taking into account the conditions specified in this notification and to safeguard the revenue;

(iii) the manufacturer shall, pending investment in the manner specified in

conditions (B), execute a bond, as may be specified by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, binding himself to pay on demand an amount equal to the amount referred to in clause (i) along with interest thereon at the rate specified under Section 11AB of the Central Excise Act, 1944, and not so invested, in terms of condition (B), with the amount lying in balance in said escrow account as security or collateral.

(iv) the amount deposited in the said escrow account, in terms of clause (i), shall be invested, in the manner specified in condition (B), within two years from the date of its deposit in such account;

(v) the amounts withdrawn from the escrow account shall be invested for the purposes specified in condition (B) within sixty days of its withdrawal from such account;

(D) the manufacturer shall -

(i) submit a quarterly statement, within sixty days from the end of the relevant quarter to a Committee consisting of the Chief Commissioner of Central Excise, Shillong, the Principal Secretary of the Department of Industry of the State concerned in which the unit is located and the Principal Secretary in the Department of Industry of the State in which the investment is being made, giving details of deposits made in and withdrawal made from, the escrow account, along with details of investment, made during the quarter;

(ii) provide all details relating to the investment made in terms of condition (B), not later than one month after the expiry of the period of two years referred to in condition (C), to the said Committee.

(iii) prove to the satisfaction of the said Committee that the investment has been made for the purposes specified in condition (B);

(E) if the Committee referred to in condition (D) is satisfied that the investment as specified in condition (B), has been made, it shall issue a certificate to this effect to the manufacturer within a period of one month from the receipt of the details as referred to in condition (D) and on the issuance of which, the liability of the manufacturer shall stand discharged to the extent of investments so certified;

(EA) if the manufacturer fails to make the deposit or does not invest the amount specified in condition (B), within the stipulated period and in the manner, then, the duty which is equivalent to the amount not so deposited or invested shall be recoverable from the manufacturer along with interest thereon at the rate specified under Section 11AB of the Central Excise Act, 1944, and without prejudice to any action that may be taken under the provisions of the said Act or any other law for the time being in force, by forfeiture of amount in the said escrow account."

11. Not only the procedural stringency, but also imposition of interest at the rate specified under Section 11AB of the Central Excise Act, 1944, that to, without prejudice to any further action that may be taken under the provisions of the said Act has been brought in the domain of the scheme.

12. North-East Industrial Policy (NEIP), 1997 announced on 24-12-1997 has been declared to have discontinued from 1-4-2007 by the office memorandum under No. 10(3)/2007-DBA-II/NER, dated 1-4-2007. In its place, a fresh package of fiscal incentives and other concession for the North-East Region, namely the North-East Industrial and Investment Promotion Policy (NEIIPP, 2007) has been given effect from 1-4-2007. By the said policy, a negative list has been provided. The industries in the said negative list will not be eligible for any benefit under the NEIIPP, 2007. The negative list contains the following industries which are as under :

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

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

(iii) Plastic carry bags of less than 20 microns as specified by Ministry of Environment and Forests Notification No. S.O. 705(E), dated 2-9-1999 and S.O. 698(D), dated 17-6-2003.

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

13. It has been provided that the new industrial policy and other concessions in the North-Eastern Region announced by the office memorandum No. EA/1/2/96-IPD, dated 24-12-1997 (NEIP, 1997) will cease to operate w.e.f. 1-4-2007. Industrial units which have commenced commercial production on or before 31-3-2007 will continue to get benefits/incentives under NEIP, 1997. The benefits as announced are for a period of ten years w.e.f. 1-4-2007. The benefits includes 100% reimbursement on insurance premium, 100% exemption of the excise duty, 100% exemption of income-tax along with capital investment subsidy, interest subsidy, incentive for power generating industries, transport subsidy scheme and all other benefits as available to the IT industry's under Sections 10A and 10AA of the Income-tax Act and under Section 80IC of the Income-tax Act. By the office memorandum No. 10(3)/2007-DBA-II/NER, dated 1-4-2007, formally the benefits of the office memorandum dated 24-12-1997 was discontinued. But by the Notification under No. 11/2007-C.E., dated 1-3-2007, the Government of India has notified as under :

"NOTIFICATION No. 11/2007-Central Excise

10 Phalguna, 1928 (Saka)

New Delhi, the 1st March, 2007

G.S.R. (E) - In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1994), 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 136 of the Finance Act, 2001 (14 of 2001), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 8/2004-Central Excise, dated 21st January, 2004 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 60(E) of the same date, namely :-

In the said notification, after paragraph 1, the following paragraph shall be inserted, namely :-

"2. The exemption contained in this notification shall not be available to goods cleared on or after the 1st day of March, 2007 :

Provided that for the goods cleared on or before 28th February, 2007 in respect of which the exemption has already been availed of the conditions specified in this notification shall continue to apply."

[F. No. 334/1/2007-TRU]

(S. Bajaj)

Under Secretary to the Government of India

Note : The principal notification was published in the Gazette of India, Extraordinary, vide number G.S.R. (E), dated 21st January, 2004 and was last amended by notification No. 28/2004-Central Excise, dated the 9th July, 2004, and published vide number G.S.R. 419(E), dated the 9th July, 2004."

14. The petitioners are the company incorporated under the Companies Act, 1956 and the partnership firm and they are engaged in manufacture of jarda scented tobacco falling under Tariff Item No. 2403.99.30 or 2403.99.10 of the First Schedule to the Central Excise Tariff Act, 1985. They have challenged the Notification No. 11/2007-C.E., dated 1-3-2007, Annexure-L to the writ petition, and sought for a direction to restore the Notification No. 8/2004-C.E., dated 21-1-2004, Annexure-I to the writ petition, as culminated, and Notification No. 28/2004-C.E., dated 9-7-2004, Annexure-J to the writ petition inasmuch as the units of the petitioners have been set up and operated for commercial production before the notification dated 1-3-2007 was issued. The petitioners have further asked for direction to refund the duty that has been deposited by the petitioners after 1-3-2007 with interest @ 18% per annum. The petitioners have further asked for a direction to continue the benefit to the units of the petitioners in terms of the notification dated 21-1-2004, Annexure-I to the writ petition, as culminated and the notification dated 9-7-2004, Annexure-J to the writ petition,

for the remaining period of the total period of 10 (ten) years, in terms of the NEIP, 1997 notified by the office memorandum dated 24-12-1997. The petitioners, as the matter of consequential reliefs, have urged for prohibiting the respondents to act in furtherance of the notification dated 1-3-2007.

15. Dr. A.K. Saraf, learned senior counsel appearing for the petitioners has categorically submitted that immediately after Section 151 of the Finance Act, 2003 was enacted, by the Notification No. 69/2003-C.E., dated 25-8-2003, Annexure-H to the writ petition, there was partial restoration of the exemption that was withdrawn and the exemption as proposed thereby was to the extent of 50% of the duty payable, however, subject to certain conditions as laid therein, for the units located in the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Nagaland and Tripura and for those units that had commenced commercial production on or after 24-12-1997 but not later than 28-2-2001. The further condition that has been laid down in the notification dated 25-8-2003 is that the unit had continued its manufacturing activities after 28-2-2001. This notification is not under challenge rather the petitioners seek to avail the benefits flowing from that notification as modified from time to time. As regards, the exemption through reinvestment and its mode as prescribed by the respondents are also not under challenge by the petitioners. In the words of Dr. Saraf, learned senior counsel, in the present case, the petitioner had not claimed exemption from payment of excise duty for a period prior to 14th May, 2003 (the date on which Finance Act, 2003 was enacted). In fact the benefit of exemption which was taken away from Smoking Tobacco Products and Chewing Tobacco Products by Section 154 of the Finance Act, 2003, was again restored (partially 50%) only to the Chewing Tobacco Products vide Notification No. 69/2003-C.E., dated 25-8-2003 with a condition to invest the entire amount so exempted into Plant & Machineries in the prescribed North-Eastern States for a total period of 10 years. The said exemption was, however, made applicable in respect of units which had commenced commercial production on or after 24-12-1997 but not later than 28-2-2001 and had necessarily availed benefits under the notification of Government of India in the Ministry of Finance (Department of Revenue) vide Notification No. 33/99-C.E., dated 8-7-1999 and had continued its manufacturing activity after 28-2-2001. The said conditional exemption granted by the Notification No. 69/2003, dated 25-8-2003 was made 100% from 50% vide Notification No. 8/2004-C.E., dated 21-1-2004 and investment was also allowed in Civil Projects, Social Projects and Infrastructure categories in addition of Plant and Machineries. The said conditional exemption granted by the Notification No. 69/2003-C.E., dated 25-8-2003 as amended by the Notification No. 8/2004-C.E., dated 21-1-2004 and the Notification No. 28/2004-C.E., dated 9-7-2004 was finally and prematurely withdrawn vide the Notification No. 11/2007-C.E., dated 1-3-2007. In the present case the petitioners have challenged the notification dated 1-3-2007 for premature withdrawal of the exemption, which was restored vide the Notification No. 69/2003, dated 25-8-2003 which culminated in the notification dated 21-1-2004 before the expiry of 10 years" period.

16. Dr. Saraf, learned senior counsel has categorically submitted that the petitioners had not claimed exemption from the period for which the exemption was retrospectively withdrawn by Section 154 of the Finance Act, 2003 and contended that as such the claims of the petitioners are not in conflict with the ratio as culled out in R.C. Tobacco Private Ltd. and Another v. Union of India and Another inasmuch as the claim of the petitioners as projected in this petition is based on the Notification No. 69/2003-C.E., dated 25-8-2003. Having reference to the impugned notification dated 1-3-2007, Dr. Saraf, learned senior counsel, has contended that the grievance is against the premature withdrawal of the exemption. It is apparent on the face of the submission of Dr. Saraf, learned senior counsel that he has structured his submission on the principle of promissory estoppel. Premature withdrawal has adversely affected the petitioners as they had altered their position by investing a huge amount on the clear and fundamental assurance given by the State. He has, therefore, submitted that by the office memorandum dated 1-4-2007, Annexure-K to the writ petition, it has been clearly reassured that the new industrial policy and other concessions in the North-Eastern region, announced by the office memorandum No. EA/1/2/96-IPD, dated 24-12-1997 (NEIP, 1997) will cease to operate w.e.f. 1-4-2007 but in clear terms it has been mentioned that "industrial units which have commenced commercial production on or before 31-3-2007 will continue to get benefits/incentives under NEIP, 1997" (Para 2 of the said office memorandum dated 1-4-2007). Even in the Finance Act, 2007 exemption of the income-tax under NEIP, 1997 under Section 80(1B) and 80(1C) had not been curtailed or taken away. Thus, the impugned notification dated 1-3-2007, Annexure-L to the writ petition, which has provided that the goods cleared on or after 1-3-2007 would not be provided with the benefits of exemption in view of the amendment as incorporated by the Govt. of India in the Ministry of Finance (Department of Revenue) Notification No. 8/2004-C.E., dated 21-1-2004. Para 2, as incorporated by the notification dated 1-3-2007, has further provided that for the goods cleared on or before 28-2-2007 and in respect of which exemption has already been availed of, the conditions specified in that notification shall continue to apply. The State cannot resile from the promise, when such promise has been examined vigorously time and again and consequential modification, amendment and alteration had been made. But the provision as made in Para 1 of the notification dated 1-3-2007 has completely taken away such benefit. The assured benefit as prescribed by the notification dated 21-1-2004 which had consolidated the benefits as declared by the Notification No. 69/2003-C.E., dated 25-8-2003, Annexure-H to the writ petition, has thus been curtailed. At the beginning, Dr. Saraf, learned senior counsel has referred a decision of the Apex Court in Lloyd Electric Engineering Ltd. v. State of H.P. and Others (judgment dated 3-9-2015 delivered in Civil Appeal No. 6838 of 2015 arising from SLP (C) No. 26751/2013) [2015 (324) E.L.T. 248 (S.C.)]. In that case, the appellants had been enjoying the concessional rate in CST @ 1% up to 31-3-2009. The cabinet had taken a policy decision to extend the period of concession up to 31-3-2013 or till the CST is phased out. Due notification was issued in this regard. The State had taken a

stand that the appellants would not be entitled to the said exemptions for the period from 1-4-2009 to 18-6-2009 inasmuch as the notification has provided that it would take immediate effect, meaning from the date of its publication, i.e., 18-6-2009. In the background of that case, the Apex Court has observed as under :

"12. Even otherwise, it is not altogether a new concession that has been notified by the Excise and Taxation Department in the impugned Notification dated 18-6-2009. As we have noted above, it is an extension of the 2004 Industrial Policy and the resultant tax concession to the eligible units which was available upto 31-3-2009. Therefore, for all purposes, what is notified by the Excise and Taxation Department on 18-6-2009 is an extension of the said concession beyond 31-3-2009 and that is why the notification has used the expression "..... for the period ending 31-3-2013" without otherwise indicating the concession already being enjoyed by the eligible units till 31-3-2009.

13. The High Court, with great respect, has gone wrong in not appreciating the background of the case and the decision of the Council of Ministers to extend its own Industrial Policy announced in 2004 and the tax concession beyond 31-3-2009. Once the Council of Ministers takes a policy decision, the implementing Department cannot issue a notification contrary to the policy decision taken by the Government. The High Court also erred in analysing and understanding the Notification dated 18-6-2009 as if it introduced the CST concession @ 1 per cent with effect from the date of issuance of notification. As we have already clarified, it is not the introduction of a new policy but an extension of the benefits under the extended policy. It is in this context, the decision of this Court in *Suprabhat Steel Limited (supra)* and *State of Jharkhand and Others v. Tata Communications Limited and Another - (2006) 4 SCC 57* become relevant."

17. It is not in dispute that the petitioners are two manufacturing units at Agartala and those were set up in pursuance to that fundamental assurance provide by the Notification Nos. 32/99-C.E. and 33/99-C.E. with their subsequent modification and restitution. As such, since the petitioners is entitled to get the benefit in view of the Notification No. 69/2003-C.E., dated 25-8-2003 they shall continue to get such benefit till the promised years of benefit expired. The impugned notification dated 1-3-2007 has curtailed that benefit and hence this writ petition.

18. Dr. Saraf, learned senior counsel has made extensive reference on promissory estoppel and he has placed his reliance on a series of decisions of the Apex Courts and the high courts.

In *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.* reported in AIR 1979 SC 621, the Apex Court while dwelling upon the doctrine of promissory estoppel as the principle, evolved on equity to avoid injustice, has held that it is neither in the realm of contract nor in the realm of estoppel. The

true principle of promissory estoppels seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relation or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise as made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, it would be inequitable to allow him to do so having regard to the positional change that had taken place between the parties, and this would be so irrespective of whether there is preexisting relationship between the parties or not. The doctrine of promissory estoppel need not be inhibited by same limitation as of estoppel in the strict sense of term. It is an equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence. There is no reason in logic or principle why promissory estoppels should not be available as a cause of action, if necessary to satisfy the equity. The Apex Court has further elucidated the law as under :

"19. When we turn to the Indian law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognised as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negated. It is remarkable that as far back as 1880, long before the doctrine of promissory estoppel was formulated by Denning, J., in England, A Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel and recognised a cause of action founded upon it in the Ganges Manufacturing Co. v. Surajmuli and other - (1880) ILR 5 Cal 669. The doctrine of promissory estoppel was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay v. The Secretary of State - (1905) IIR 29 Bom.

* * *

23. It was also contended on behalf of the Government that if the Government were held bound by every representation made by it regarding its intention, when the exporters have acted in the manner they were invited to act, the result would be that the Government would be bound by a contractual obligation even though no formal contract in the manner required by Article 299 was executed. But this contention was negated and it was pointed out by this Court that the respondents "are not seeking to enforce any contractual right : they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme, and we are of the view that even if the Scheme is executive in character, the respondents who were aggrieved because of the failure to carry out the terms of the Scheme were entitled to seek

resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out."

It was thus laid down that a party who has, acting in reliance on a promise made by the Government, altered his position, is entitled to enforce the promise against the Government, even though the promise is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel against the Government.

24. This Court finally, after referring to the decision in the *Ganges Manufacturing Co. v. Surujmuli* - (1880) ILR 5 Cal 669 (supra). The *Municipal Corporation of the City of Bombay v. The Secretary of State for India* - (1905) ILR 29 Bom 580 (supra) and *Collector of Bombay v. Municipal Corporation of the City of Bombay and Ors.* - AIR 1951 SC 469 (supra), summed up the position as follows :

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen on an ex parte appraisalment of the circumstances in which the obligation has arisen."

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 promises and, in fact, the promise, 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 promises, 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 rule of law that the Government stands on the same footing as a private individual so far as the obligation of 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 negated in the *Indo-Afghan Agencies case* [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 promise and the promise would alter his position relying upon it. But if the Government makes such a promise and the promise 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 legislatures 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 promise 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, 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 after this 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 the Indo-Afghan Agencies case, 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 appraisalment 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 these 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, the over-riding 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 over-riding 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 promise a reasonable opportunity of resuming his position" provided of course it is possible for the promise to restore status quo ante. If however, the promise cannot resume his position, the promise would become final and irrevocable. Vide Emmanuel Ayodeji Ajayi v. Briscoe [1964] 3 All. E.R. 556."

19. In Pournami Oil Mills and Ors. v. State of Kerala and Anr., reported in 1986 Supp (1) SCC 728 : 1987 (27) E.L.T. 594 (S.C.), the Apex Court has held as under :

"7. Under the order dated 11-4-1979, new small-scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialisation, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five-year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small-scale concern have set up their industries within the State of Kerala, they would 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 in the case of M.P. Sugar Mills v. State of U.P. - AIR 1979 SC 621. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in Bakul Cashew Co. v. Sales Tax Officer, Quilon - (1986) 159 ITR 565 (SC). In Bakul Company's (supra) case 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 has 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 (supra). In our view, to the facts of the present case, the ratio of M.P. Sugar Mills" case directly applies and the plea of estoppel is unanswerable."

20. Dr. Saraf, learned senior counsel has quite candidly submitted that after Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors., the Apex Court had the occasions to further brood over the proposition of law as to whether the State is absolutely obligated to go by its assurance irrespective of the conduct of the party to whom the promise was made. Certain principles have been curved out in Assistant Commissioner of Commercial Taxes (Asst.), Dharwar and Ors. v. Dharmendra Trading Company and Ors. reported in (1988) 3 SCC 570 as under :

"4. The first contention of the learned Counsel for the appellants is that the doctrine of Promissory Estoppel was not applicable in the present case because it was found by the Government of Karnataka that the concessions granted under the said order dated 30th June, 1969 were being misused and undue advantage was being taken of the same. It was submitted by him that in view of this, it would not be proper to hold the Government to the promises or the assurances it had given under the said order dated 30th June, 1969. We are afraid it is not possible to accept this submission. No counter-affidavit was filed by the appellants before the Trial Court in the writ petition. Beyond the statement of counsel, there is nothing to show that any misuse was made of these concessions or undue advantage taken of the same. It is true that the preamble to the order dated 12th January, 1977 does recite that the concessions given by the earlier order had given room for many types of misuse but such a recital by itself cannot establish that the concessions were, in fact, misused. If that were so, it was the duty of the Government and the concerned authorities to file a counter-affidavit and place the relevant facts establishing the misuse before the Court. This they have totally failed to do. It is well settled that if the Government wants to resile from a promise or an assurance given by it on the ground that undue advantage was being taken or misuse was being made of the concessions granted the Court may permit the Government to do so but before allowing the Government to resile from the promise or go back on the assurance the Court would have to be satisfied that allegations by the Government about misuse being made or undue advantage being taken of the concessions given by it were reasonable well established. In the present case, there is nothing on record to show that any such misuse was being made or undue advantage taken of the said concessions by the newly established industries. The Government had, therefore, failed to establish the requisite ground or the basis of which it might be allowed to go back on its promise. The first submission of the learned Counsel for the appellants must, therefore, fail."

21. Having referred to Assistant Commissioner of Commercial Taxes (Asst.), Dharwar and Ors. v. Dharmendra Trading Company and Ors., Dr. Saraf, learned senior counsel has submitted that there is no averment in the counter-affidavit to

show that any misuse was made of the concessions or undue advantage had been taken by the petitioners. Therefore, the Govt. cannot be permitted to resile from the promise.

22. Having referred to another decision of the Apex Court in *State of Bihar and Ors. v. M/s. Suprabhat Steel Limited & Ors.* reported in (1999) 1 SCC 31, Dr. Saraf, learned senior counsel has submitted that it would not be permissible for the State to deny any benefit which is otherwise available to an industrial unit under the Incentive Policy itself. In Para 7 of *State of Bihar and Ors. v. M/s. Suprabhat Steel Limited & Ors.*, the Apex Court has observed as under :

"7..... The Industrial Incentive Policy is issued by the State Government after such Policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the Industrial Policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power under Section 7 of the Bihar Finance Act, if is found to be repugnant to the Industrial Policy declared in a Government Resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4th of April, 1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly the Policy engrafted in Clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of Clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may over-ride the incentive policy itself. In our considered opinion the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4th of April, 1994."

Hence, Dr. Saraf, learned senior counsel has contended that the impugned notification dated 1-3-2007 cannot take away the benefits as available under NEIP, 1997.

23. In *State of Jharkhand and Ors. v. Tata Cummins Ltd. and Anr.* reported in (2004) 6 SCC 57, the Apex Court has observed as under :

"16. Before analysing the above Policy read with the notifications, it is important to bear in mind the connotation of the word "tax". A tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from

payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, we have to read the implementing notifications in the context of the Industrial Policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the Industrial Policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute."

24. In *U.P. Power Corporation Ltd. and Anr. v. Sant Steels and Alloys (P) Ltd. and Ors.* reported in (2008) 2 SCC 777, the Apex Court on distinguishing the principle laid down in *STO v. Shree Durga Oil Mills* reported in (1998) 1 SCC 572 : 1998 (97) E.L.T. 202 (S.C.) has streamlined the edges further so far the concept and the operation of promissory estoppel are concerned holding that the principle of promissory estoppel can be applied depending on the facts of each case. But the general principles that emerge are that once representation has been made by one party and the other party acts on that representation and makes investment and thereafter, the other party resiles, such act cannot be stated to be fair and reasonable. When the State Government makes a representation and invites the entrepreneurs by showing benefits for encouraging to make investment for the industrial development of the backward areas or the hill areas and thereafter, the entrepreneurs on the representation so made bona fide make investment and thereafter, if the State Govt. resiles from such promise, then certainly it is an act of unfairness and arbitrariness. Consideration of public interest and the facet that there cannot be any estoppel against the statute are exceptions. By way of further elucidation it has been held by the Apex Court as under :

"28. Learned Senior Counsel for the appellant has cited nine instances which can be loosely categorised into two, i.e. (i) that there cannot be any estoppel against the statute and (ii) overriding public interest. So far as the first part is concerned, i.e., the revocation has the statute flavour, i.e., the benefit which was extended under Section 49 of the Act of 1948 and the notification had been issued revoking the same benefit under Section 49 of the Act of 1948 by invoking the provisions of the General Clauses Act that an authority granting exemption has a right to revoke the same also. It is true that it has a right to revoke the same but if the other party has suffered on that account then such representation will be against the public policy and the morality. Notification issued under Section 49 of the Act of 1948 for giving the benefit of exemption for the hill areas was in the nature of delegated legislation and not an Act framed by the State Legislature. Therefore, a distinction has to be made between the delegated legislation and the primary legislation framed by the Legislature.

29. In Section 49 there is no specific stipulation that the notification issued under Section 49 of the Act of 1948 can be revoked at any time as was in the case of *Shree Durga Oil Mills & Anr.* - (1998) 1 SCC 572 where Section 6 of the Orissa

Sales Tax Act itself provided that the notification is capable of being revoked at any time. Therefore, a distinction has to be made between the delegated legislation and the primary legislation. So far as the primary legislation is concerned, if the Act is passed by State Legislature and denies the benefit by the primary legislation then no estoppel can be applied against that Act but so far as the case of delegated legislation is concerned, where delegated authorities passes certain notification in exercise of his delegated authority there is no contemplation mentioned in the act itself that it is capable of being revoked at any time. Then such acts cannot be treated at par with the primary Act passed by the State Legislature. The State is fully competent to pass an Act prospectively as well as retrospectively but retrospectivity to the extent of aforesaid nature cannot stand. Therefore, this distinction has to be borne in mind.

30. In the present case, the U.P. Electricity Reforms Act, 1999 came into force with effect from 2000. Therefore, if such benefit has not been extended then a different stand will follow but so far as the delegated legislation is concerned, this kind of revocation cannot be sustained. It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behave on the part of the appellant-Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the respondents were legitimately entitled to avail. We fail to understand why the appellant-Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation the principle of promissory estoppel which has been evolved by the Courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

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

record of course could have persuaded the Court to take a different view of the matter. But simply because there was theft of energy allow the State cannot persuade us to hold that the revocation of such concession can be said to be in public interest. Since the benefit was given to these units in the hill areas, there should have been overwhelming evidence to show some mala fide on the part of these consumers which have persuaded the Corporation to revoke it. If there was no misuse of the energy by these units in the hill areas to whom the concession had been granted then in that case it cannot be taken that there was really public interest involved which persuaded the Corporation to revoke the same.

32. No person can be permitted to misuse the concession or benefit and invoke promissory estoppel. Promissory estoppel is not one sided affair, it is rather two sided affair. If one party abuses the concession then it is always open to the other party to revoke such concession but if one party avails the benefit and is acting on the same representation made by the other party then the other party who has granted the said benefit cannot revoke the same under the garb of public interest. Therefore the grounds that the revocation notification was issued in public interest and that same has the flavour of the statute, cannot persuade us to uphold it sustained.

33. It is true that a detailed statement was given in various paragraphs of the written statement filed by the appellant-Corporation before the Allahabad High Court and unfortunately, the High Court did not advert to these details but we have examined all these details and found that all the nine points raised by Dr. Singhvi does not persuade us to take a contrary view from the view taken by the High Court. There is no gain saying that the public interest is paramount and the private interest has to be sacrificed for the larger interest. But, after survey of all these cases on the subject, the judicial consensus that emerges is that whenever the State has made a representation to the public and the public has acted on that representation and suffered economically or otherwise, then in that case the State should be estopped from withdrawing such benefit to the detriment of the such people except in public interest or against the statute. So far as the public interest as involved in the present case is concerned, we have found that there was no overwhelming evidence to revoke the benefit granted to the industrial units in the hill areas. So far as the statute is concerned, the notification was issued under Section 49 of the Act of 1948 and the same was revoked under Section 49 of the Act of 1948 though there was no such provision contained in Section 49 that it will be open to the Corporation to revoke the same but could be possible by invoking the principle of General Clauses Act. But in such delegated legislation such withdrawal could only be permitted if larger public interest is involved or if the Act is passed by legislature."

25. Dr. Saraf, learned senior counsel has contended that there is no element of public interest for issuing impugned notification dated 1-3-2007. Even the respondents did not disclose any public interest and as such, all the benefits which the petitioners were getting or are entitled to, is required to be protected

by invoking the principle of promissory estoppel. In order to keep the faith and maintain good governance it is necessary that whatever representation is made by the State which induced the other party to act, the State cannot be permitted to withdraw from that. This is a matter of faith.

26. Dr. Saraf, learned senior counsel appearing for the petitioners has placed his reliance on *M/s. Unicorn Industries v. Union of India*, reported in 2013 (290) E.L.T. 33 (Sikkim), *Shree Sanyeeji Ispat Pvt. Ltd. and Anr. v. State of Assam and Ors.*, reported in (2006) 3 GLR 870 and *Sunrise Biscuits Co. Ltd. and Anr. v. State of Assam and Ors.*, reported in (2006) 148 STC 587 (Gauhati) for further streamlining his submission. From reading of those reports the common enunciation that emerges can be found in the passage as reproduced hereunder :

"The true meaning and scope of the doctrine of promissory estoppel, in the realm of governmental promises and application of this doctrine to the facts of the present case, may be summarised thus : Where the Government makes a promise knowing or intending that it would be acted upon by the promisee and, in fact, the promisee, acting upon the promise, 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 the fact that there was no consideration for the promise and the promise was not recorded in the form of a formal contract as required by Article 299 of the Constitution or in accordance with the procedure prescribed by the relevant statute. The doctrine of promissory estoppel would be attracted in such a case, for, on the facts, equity would require that the Government should be held bound by the promise made by it. When the Government is able to show that public interest would be prejudiced if the Government were required to carry out the promise, the court would have to balance the public interest vis-à-vis the position of the promisee, who has altered his position, and it is the court, which has to, eventually determine which way the equity lies. It would, however, not be enough for the Government merely to contend 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 its promise. 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 exempted 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. The court would not act on the mere ipse dixit of the Government, for, the Government cannot be the judge of its own cause and it is the court, which has to, ultimately decide and not the Government whether the Government should be held exempt from liability. The doctrine of promissory estoppel would apply even when the promise

would, if acted upon, give rise to a legal relationship in future. The doctrine of promissory estoppel would not be attracted if the promise made by the Government is barred by law. However, when the law does not bar the Government from making the promise, as might have been made by the Government, or when making of the promise itself is not contrary to law, the Government would be required to abide by the promise. The Government has to function as a cohesive body and its different organs or departments have to act in tandem with each other and in harmony with each other on the principles of collective responsibility. The Constitutional Scheme of governance of the Government does not permit the Government to work in violation of the principles of collective responsibility. It will, therefore, be no defence for the Finance Department, in a case of the present nature, to merely contend that until the time requisite notification, in terms of the relevant statute, is published, the promise for tax exemption made by the Government under its industrial policy cannot force the Government to grant such exemption, for, there is no estoppel against the statute. In a case of this nature, if the promise made by the Government is not barred by law, though the same might not have been made strictly in accordance with the relevant statute, yet it will be the duty of the court to trace out the source of power of the Government and if the power is found to exist with the Government, the Government cannot be allowed to resile from its promise by merely citing lack of issuance of appropriate notification(s) in terms of the relevant statute. Since the doctrine of promissory estoppel can be used not merely as a shield but also as a sword and for forming cause of action, it would be permissible for the court to insist upon the Government to issue requisite notification or, conversely, not to demand payment of taxes contrary to the promises made by the Government. If the industrial policy invites investment made by making promises of exemption from payment of sales tax, neither the Finance Department can levy sales tax on the ground that until necessary notifications in terms of the relevant statute is issued, the industry, in question, would be liable to pay sales tax nor would it be permissible for even the Government to say that until the notification in terms of the relevant statute is brought out or published, the promise cannot be enforced against the Government. In a given case, however, even when the promise is not barred by law and there is no supervening public interest permitting the Government to resile from the promise, it will be still permissible for the Government to resile from the promise made by it. It is possible for the promisee to resume its original position or to restore status quo ante if, on a reasonable opportunity being given to the promisee, the promisee can resume his original position. If the status quo ante cannot be restored, the promise would become irrevocable and can be enforced against the Government. It will be no defence for the Government to say that the promisee ought to have known the position of law that without issuance or publication of the requisite notification under the relevant statute, the promise would not be binding."

Even the State cannot be allowed to rely on its lapses in implementing its policy

and plead that notification could not be brought out as the industrial policy had lapsed in the meanwhile. In this regard, reliance has been placed on the following passages of *State of Bihar and Ors. v. Kalyanpur Cements Ltd.*, reported in (2010) 3 SCC 274, where it has been enunciated by the Apex Court as under :

"4. The Company in order to rehabilitate itself sought the assistance from financial institutions for restructuring package. The Company's proposal for financial assistance and restructuring has been approved by various financial institutions, in principal. However, the same has been made conditional on certain preconditions being met. One of the conditions imposed by the financial institutions was that the restructuring package would be made available only on the Company obtaining a Sales Tax exemption for a period of 5 years from the State Government, in terms of Industrial Policy, 1995.

5. Accordingly, Company submitted an application to the State Government on 21-11-1997 for grant of Sales Tax exemption under the Industrial Policy, 1995 for a period of 5 years w.e.f. 1-1-1998. Thereafter, the matter remained pending for consideration by the State Government and the Financial Institutions. There were a series of joint meetings of the Government, Financial Institutions and the Company, over the next three years. In all these meetings, as well as correspondence categoric assurances were given that the necessary Sales Tax exemption notification would be issued shortly. However, no such notification was issued causing great hardship to the Company. It was, therefore, constrained to file writ petition (CWJC No. 6838 of 2000) in the High Court at Patna. In this writ petition, the prayer was for issuance of the writ in the nature of mandamus directing the State of Bihar to issue necessary Notification under Clause 24 of the 1995 Policy. The claim of the Company was that Notification under Clause 24 of the Industrial Policy, 1995 ought to have been issued within one month of the release/publication of the Policy in September, 1995. Voluminous record was produced before the High Court in support of the submission that the Company is entitled to exemption under the 1995 Policy.

9. The High Court considered the entire issue. The Company as well as the State made detailed reference to the documents which were placed on the record. Ultimately, the writ petition has been allowed. The decisions dated 6-1-2001 and 5-3-2001 have been quashed. Further directions issued to the State Government are as follows :

"The concerned departments and organisations are hereby directed to issue follow up notification to give effect to the provisions of the policy within one month from today. After the notification is issued a Committee headed by the Industrial Development Commissioner would be constituted to evolve suitable measures for potentially viable non-BIFR sick industrial unit (the present petitioner) and the said Committee would submit its recommendations before the State Level Empowered Committee which in its turn shall place the said recommendations before the Government. After receiving the said

recommendations from the State Level Empowered Committee, the Government shall take final decision in the matter. The petition is thus allowed."

85. Even if we are to accept the submissions of Dr. Dhawan and Mr. Dwivedi that the provisions contained in Clause 24 was mandatory the time of one month for issuing the notification could only have been extended for a reasonable period. It is inconceivable that it could have taken the Government 3 years to issue the follow up notification. We are of the considered opinion that failure of the appellants to issue the necessary notification within a reasonable period of the enforcement of the Industrial Policy, 1995 has rendered the decisions dated 6-1-2001 and 5-3-2001 wholly arbitrary. The appellant cannot be permitted to rely on its own lapses in implementing its policy to defeat the just and valid claim of the Company. For the same reason we are unable to accept the submissions of the learned senior counsel for the appellant that no relief can be granted to the Company as the Policy has lapsed on 31-8-2000. Accepting such a submission would be to put a premium and accord a justification to the wholly arbitrary action of the appellant, in not issuing the notification in accordance with the provisions contained in Clause 24 of the Industrial Policy, 1995."

27. While closing the submission, Dr. Saraf, learned senior counsel appearing for the petitioners has submitted that the petitioner No. 1 commenced the commercial production on 8-8-2000 and the petitioner No. 2 commenced the commercial production on 24-12-1997 and as such, in terms of the Notification No. 69/2003-C.E., dated 25-8-2003 read with Notification Nos. 32/99-C.E. and 33/99-C.E., dated 8-7-1999 the petitioners are entitled to have the benefits irrespective of the lapse in issuing the notification in terms of the NEIP, 1997.

28. It is to be noted that by the order dated 5-4-2010 delivered in C.M. Application No. 119/2010, arising from this writ petition, the following direction or interim prohibitory order was passed :

"This Court has gone through the order dated 9-3-2000 passed by the Co-ordinate Bench at the Principal Seat in WP (C) 750/2010. It appears from the said order that this Court has passed an order, inter alia, the documents annexed and the rival pleas have generated contentious issues demanding a more extensive and in-depth scrutiny thereof for effective and complete adjudication of the same. In the said order it is also stated that on a cumulative consideration of all above, this Court is of the view that the petitioner has been able to make out a prima facie case justifying the interim relief limited by time. It is therefore provided that till the next date fixed the operation of the impugned notification dated 1-3-2007 would remain stayed vis-à-vis the petitioner. Mr. Bhattacharya, placed an order of this Court dated 22-3-2010 wherein the aforesaid interim order was subsequently extended, which is kept in the file for future reference.

In view of the aforesaid position, this Court is of considered opinion that the present petitioner also deserves the same order.

Accordingly, the impugned notification dated 1-3-2007 (Annexure-L to the writ petition) shall remain stayed till the returnable date."

29. The respondent Nos. 4 and 5 by filing the counter-affidavit have made a robust endeavour for defending the impugned notification dated 1-3-2007. In brief, they have stated that for purpose of development of any region certain incentives were declared in the public interest by the Notification No. 11/2007-C.E., dated 1-3-2007. This notification cannot be stated as arbitrary, illegal, etc., inasmuch as the said notification was issued as per provisions of Central Excise Act, 1944. They have further asserted that earlier by the Notification Nos. 32/99-C.E. and 33/99-C.E., dated 8-7-1999 the Central Government had extended certain incentives including exemption of tax and duty for setting up of new industries. But those privileges/benefits were withdrawn by the Notification No. 11/2007-C.E., dated 1-3-2007. Such withdrawal was also based on Government policy. In Para 9 of their counter-affidavit they have asserted that "under some circumstances Central Government became compelled to withdraw the benefit/incentives by issuing notification. As per Notification No. 11/2007, dated 1-3-2007 exemption benefit was not allowed on or after 1-3-2007 and this was done in public interest." Withdrawal of any exemption benefit by issuing the notification in the public interest is lawful and within the ambit of the provisions of Central Excise Act, 1944. In Paras 14, 15, 16, 17 and 18 those respondent Nos. 4 and 5 have asserted as under :

"14as per provisions of Section 5A(4) of Central Excise Act, 1944, every notification issued under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, in force immediately and shall continue to have the same force and effect after commencement until it is amended under the provision of this section. Under Section 5A(4) of the Central Excise Act, 1944, force and effect of the Notification shall be continued until it is "amended". So, provision for amendment of Notification is also there within the provision of Section 5A under CEX Act, 1944 if the Central Govt. is satisfied that it is necessary in the public interest to do so. Subject to this nothing stated by the petitioners is admitted. Amendment has been made considering the Govt. Policy, public interest and all relevant considerations.

15. That with reference to Para 46 of the writ petition, I humbly submit that the withdrawal of any benefit of exemption granted earlier by issuing respective Notification is also within the provision of section 8 under C EX Act, 1944, so that overall public interest of the country as a whole is ensured, subject to which nothing stated by the petitioners is admitted.

16. That the averments in Para 47 of the writ petition that as per section 38A(c) of the Central Excise Act, 1944, right, privilege accrued cannot be taken away by issuing any notification, it is humbly submitted that this provision is subject to condition that unless a different intention appears. Since Central Government is the supreme decision making authority, so, under certain circumstances privilege/incentive granted earlier may be disallowed by issuing respective notification

under the provision of the section. Subject to this nothing stated by the petitioners is admitted.

17. That the averments made in Paras 48 to 49 to the writ petition, I humbly submit that these are all matters relating to question of law and the answering respondents crave leave to make submission in this regard before this Hon"ble Court through our engaged counsel.

18. That regarding the averments made in Para 50 of the writ petition, I humbly state it is a fact that incentive is granted by the Government basing on the Government Policy decision but contention of the same depends upon the reconsideration of the Government in view of the public interest and as such granting of incentive may be stopped."

30. Those respondents have also asserted that sometimes the Government is compelled to adopt some unpalatable decisions considering the changed situation of the economy and other factors and there is no road block in taking a decision of withdrawing the exemptions so granted considering the public interest or on considering other circumstances which might require withdrawal of such benefit. However, they have denied the claim of the petitioners that they undertook substantial expansion by making huge capital investment. In Para 27(iv), those respondents have stated that the Central Govt. issued another notification after issuing the notifications dated 8-7-1999 and that notification being No. 45/99, dated 31-12-1999 under sub-section (1) of Section 5A of Central Excise Act, 1944 read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), by which the Notification No. 32/99-C.E. and the Notification No. 33/99-C.E. both dated 8-7-1999 have been amended w.e.f. 31-12-1999 to the extent that all tobacco related products including pan masala falling under Chapter 24 or Heading No. 21.06 of the First Schedule or the Second Schedule from the purview of exemption granted by the Notification No. 32/99-C.E. and the Notification No. 33/99-C.E. both dated 8-7-1999. In this regard, it may be noted that Heading No. 21.06 relates to pan masala and Chapter 24 relates to pan masala containing tobacco. They have also admitted that by the Notification No. 1/2000, dated 17-1-2000 the notifications dated 8-7-1999 were restored to the extent of the goods falling under Chapter 24 or Heading No. 21.06 of the First Schedule and the Second Schedule respectively of the Central Excise Tariff Act by making necessary amendments. They have asserted that the Central Govt. in exercise of powers conferred by or under sub-section (1) of Section 5A of Central Excise Act, 1944 read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) withdrew the exemption on cigarettes falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 by making necessary amendments in the notifications dated 8-7-1999 and 22-1-2001. They have further asserted that the exemption as provided to the goods falling under Chapter 24 of the First Schedule or under the Second Schedule of the Central Excise Tariff Act, 1985 as stated was withdrawn by the

Notification No. 6/2001-C.E., dated 1-3-2001. In Para 27(viii), those respondents have asserted as under :

"That the Govt. of India after due consideration of mushroom growth of tobacco related company in the region and also the aspect of heavy refunds, inserted Section 154 in the Finance Act, 2003, whereby benefit granted under exemption Notification No. 32/99-C.E., dated 8-7-99 and Notification No. 33/99-C.E., dated 8-7-99 were withdrawn retrospectively as specified therein along with the 9th Schedule of the said amendment.....

In the aforesaid situation, it can be easily discernable that the exemption (a) on cigarette falling under Chapter 24 of the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985; (b) Pan Masala falling under sub-heading No. 2106.00; and (c) Pan Masala containing Tobacco falling under sub-heading No. 2404.49 of the First Schedule or the Second Schedule to the said Central Excise Tariff Act, granted under the notification No. 33/99-C.E., dated 8-7-99 in the light of the Industrial Policy Resolution, 1997, has come to an end on the strength of the section 154 of the Finance Act, 2003 as well as 9th Schedule contained therein"

31. In R.C. Tobacco Private Ltd. and Another v. Union of India and Another, the Apex Court held the constitutional validity of Section 154 of the Finance Act, 2003 and allowed recovery of the amount which was refunded in terms of the exemptions. According to the respondents, on the persistent demand of the industrial units, the notification dated 25-8-2003 was issued granting exemptions to the extent of 50% of Central Excise Duty subject to certain terms and conditions. It has been clearly mentioned in the said notification dated 25-8-2003 that such exemption would only be available to the industrial units which had availed the benefit of exemption under the Notification No. 32/99-C.E., dated 8-7-1999 and the Notification No. 33/99-C.E., dated 8-7-1999 and further that those units continued manufacturing activities on and after 28-2-2001. The respondents in Para 27(x) have asserted that in suppression of the notification dated 25-8-2003 another Notification No. 8/2004, dated 21-1-2004 was issued in the public interest exempting all goods falling under sub-heading No. 2401.90, 2402.00, 2404.41, 2404.49, 2404.50 or 2404.99 of the First Schedule of the Central Excise Tariff Act as stated from whole of the excise duties thereby granting 100% exemption under certain conditions that they have to invest in (i) plant and machinery and (ii) infrastructure or civil work or social project retaining other conditions in the Notification No. 69/2003-C.E., dated 25-8-2003. Those respondents have categorically admitted that in pursuance to the notifications dated 25-8-2003 and 21-1-2004 the petitioners are entitled to retain the excise duty and invest at their own volition in the project undertaken by them, subject to verification by the Investment Appraisal Committee (IAC) on whose certification the said exemption can be availed. By another Notification under No. 28/2004, dated 9-7-2004, as stated earlier, it has been provided that the exemptible duty is to be maintained in an escrow account subject to the

conditions as laid down in the Notification No. 8/2004, dated 21-1-2004. Those respondents have asserted that :

".....The Notification No. 11/07-C.E., dated 1-3-2007 has been issued in public interest as there is misuse of the operation of the escrow mechanism by the beneficiary unit investment claimed to have been made in the project by the writ petitioner could not be termed as social project in the nature and many other factors as well as report of the IAC has taken into consideration by the Govt. and accordingly in the public interest, Notification No. 11/07-C.E., dated 1-3-2007 has been issued and issuance of such Notification is not at all tainted with illegality, mala fide or does not have any arbitrariness. It was issued in the public interest with great latitude taking into consideration the concept of utilisation of fund for development ignoring the individual interest thereon. Hence, it cannot be disputed by the writ petitioner that it is not valid for public good.

xiii. That during the period w.e.f. 25-8-2003 to 21-1-2004 i.e. period of operation of Notification No. 69/03-C.E., dated 25-8-2003 and Notification No. 8/04-C.E., dated 21-1-2004 which are known as pre-escrow period, the petitioner shown to have invested an amount of Rs. 100 crore out of which an amount of Rs. 34 crore has been certified by the Investment Appraisal Committee as genuine investment in Plant and Machinery and social infrastructure projects and the amount of uninvested balance are subsequently appropriated by the authority.

That, the Commissioner had rightly initiated recovery measure under Section 11A of the Central Excise Act, 1944 for the period of 25-8-2003 to 8-7-2004, issuing demand notice, as the petitioner failed to utilise the amount within the stipulated period; as there is no provision for carry forward the unutilised amount in the subsequent quarter. The answering respondent submits that it is settled provision of law that each notification is to read on its true spirit, the petitioner has no vested right to withhold the amount to be utilised on their suit will and thereby, there is no violation of fundamental rights of the writ petitioner. In the instant case, in hand the writ petitioner on misrepresentation of original fact has approached this Hon"ble Court and the writ petition of the writ petitioner is not amenable as writ petition, on this account writ petition of the writ petitioner is deserved to be dismissed in its threshold.

The petitioner during the period from 25-8-2003 to 8-7-2004 availed the amount of duty exemption for Rs. 96,61,11,858.00. The writ petitioners were duty bound to produce the investment certificates for the said amount. In fact, the writ petitioners had produced investment certificates only for an amount of Rs. 34 crore. It was the responsibility of the petitioner to voluntarily deposit the unutilised amount to the Government exchequer, immediately and by not depositing the said amount the petitioner acted upon illegally and taken the responsibility in his shoulder for consequences by not investing the amount in the manner specified in the notification. The petitioner has resorted to litigation causing inordinate delay in recovering the Government money. Recovery of such huge money locked in litigation is/was grave concern to the department and also

to the respondent being jurisdictional Commissioner responsible for the safeguard of the Government revenue."

32. Subsequently by the Notification No. 21/2007-C.E., dated 25-4-2007 pan masala and other goods have been deleted from the Chapters 21 and 24 of the First Schedule of the Central Excise Tariff Act, 1985. According to those respondents, all relevant factors including the public interest and the adverse effect of consumption of tobacco and tobacco products were taken care of, while issuing the notification dated 1-3-2007.

33. By filing an additional affidavit on 7-4-2015, those respondents have raised another plea of estoppel by conduct against the petitioners as they have been depositing the excise duty in terms of the new policy which has come into effect from 1-4-2007. Mr. Dubey, learned counsel has supplemented that those challans for the period under policy would show that those were deposited under protest. Mr. P. Dutta, learned counsel appearing for the respondent Nos. 4 and 5 while refuting the submissions advanced by Dr. Saraf, learned senior counsel has submitted that the doctrine of promissory estoppel no more binds the State absolutely. Mr. Dutta, learned counsel has submitted that the petitioners had filed two writ petitions in the Gauhati High Court and those writ petitions were dismissed by the Gauhati High Court by rejecting the pleas as raised by the petitioners herein. He has referred the following passages of *Dharampal Satyapal Limited and Ors. v. Union of India (UOI) and Anr.*, reported in 2011 (1) GLT 625 : 2015 (328) E.L.T. 56 (Gau.) to draw some nourishment for his submission :

"64. By a legislative mandate, therefore, the notifications No. 32/99-C.E. and 33/99-C.E., dated 8-7-1999 corresponding to G.S.R. 508(E) and G.S.R. 509(E) stood amended retrospectively in the manner as specified in the Ninth Schedule with the predication that notwithstanding anything contained in any judgment, decree, or order of any Court, tribunal or other authority, any action taken or anything done or purported to have been taken or done under the said notifications would be deemed to be and always to have been, for all purposes, as validly and effectively taken or done as if those notifications as amended had been in force at all material times. Sub-section (4) of that section also authorised recovery of all amounts of duty or interest or other charges which have not been collected or refunded but which ought to have been collected and ought not to have been refunded had the new section been enforced at all material times within a period as specified therein.

65. The Ninth Schedule adumbrated in Section 154 so newly inserted withdrew w.e.f. 8-7-1999 from the purview of exemption of payment of excise duty (a) cigarettes falling under Chapter 24 of the First Schedule or the Second Schedule to the Tariff Act and (b) pan masala containing tobacco under subheading Nos. 2106.00 and 2404.49 in the First Schedule or the Second Schedule of the said Act. Further w.e.f. 1-3-2001, the incentives by way of exemption from payment of excise duty was rescinded vis-à-vis goods falling under Chapter 24. The combined effect thus in view of this statutory precept was that whereas

cigarettes falling under Chapter 24 and pan masala containing tobacco falling under sub-heading 2106.00 and 2404.49 of the First Schedule or the Second Schedule to the Tariff Act, 1985 were denied the exemption from payment of excise duty w.e.f. 8-7-1999, all goods falling under Chapter 24 were dislodged from the benefit of exemption on and from 1-3-2001. This progression of events teed off (sic) by the notification dated 31-12-99 and culminating with the introduction of Section 154 by the Finance Act, 2003, by no means can be disregarded vis-à-vis the Policy, 1997 which otherwise was then in force. That the validity of Section 154 of the Finance Act, 2003 had been upheld by the Apex Court negating a challenge to the vires thereof by the manufacturer of cigarettes falling under Chapter 24 of the Tariff Act, 1985, permitting recovery of the arrear duty is an unassailably admitted fact. This verdict which holds the sway as on date, not only did uphold the constitutional validity of this legal provision, it neutered the existence and the dominion of the Policy, 1997 vis-à-vis the prescriptions thereof as manifest in the Ninth Schedule. The determination in R.C. Tobacco (supra), therefore, visibly truncated the extent and expanse of the application of the Policy, 1997 and rendered it non-est so far as the representation thereunder for exemption from payment of excise duty on cigarette, pan masala containing tobacco falling under sub-heading 2106.00 or 2400.49 on and from 8-7-99 as well as goods falling under Chapter 24 on and from 1-3-2001. It is in this premise that the notifications that followed would have to be analysed.

66. By notification No. 69/2003-C.E., dated 25-8-2003 issued under Section 5A of the Act and other cognate enactments, a few of the goods falling under Chapter 24 were thus exempted from payment of excise duty subject amongst others to the condition that the units so identified had commenced commercial production on or after 24-12-1997 but not later than 28-2-2001 and had already availed the benefit of the notifications dated 8-7-1999 and had been continuing with the manufacturing activities after 28-2-2001.

67. The conditions of eligibility to avail the benefit of partial exemption thus granted are noticeable. The date of commencement of commercial production tallies with the one as mentioned in the Policy, 1997 with the deadline therefore, i.e., 28-2-2001 being on the eve of 1-3-2001 on and from which the embargo had been imposed by Section 154 of the Finance Act, 2003 read with Schedule 9 thereto. By this notification, the rigour of the denial of the benefit of exemption from payment of excise duty as enjoined by Section 154 of the Finance Act, 2003 read with Schedule 9 was partially relaxed to the extent as embodied therein. Though the notification inter alia reveals that the exempted amount of excise duty would have to be utilised by the manufacturer only for investment in its plants and machineries located in the North-Eastern States and will not be allowed to be withdrawn before the expiry of 10 years, there is nothing decisive therein to indicate that it was in extension of the incentives conceived of and hitherto granted by the Policy, 1997. The Respondents' plea that this notification is thus independent of the Policy, 1997 in the narrated background of facts and

more particularly in view of Section 154 of the Finance Act, 2003 along with Schedule 9 thereto thus commends for acceptance. The benefit of partial exemption from payment of excise duty vis-à-vis some of the goods under Chapter 24 of the Tariff Act, 1985, as indicated in the said notification thus cannot be construed to be under the Policy, 1997 as insisted upon by the Petitioner. The notification No. 8/2004-C.E., dated 21-1-2004 appearing in the scene thereafter exempted all goods falling under sub-heading 2401.90, 2402.00, 2404.41, 2404.49, 2404.50 or 2404.99 of the First Schedule and Second Schedule to the Tariff Act, 1985 from whole of the duties of excise, additional duties of excise leviable under the Tariff Act, 1985, etc., as mentioned therein. The benefit again was limited to the identified manufacturing units that had commenced commercial production on or after 24-12-1997 but not later than 28-2-2001 and had continued its manufacturing activities thereafter. Thereby the exempted amount of duty was to be invested in the plants and machineries and for other works as referred to therein. The Notification No. 28/2004-C.E., dated 9-7-2004 introduced further amendments in the one dated 21-1-2004 more particularly detailing the manner in which the investment as required in the latter notification was to be made.

68. It was subsequent thereto that the Policy, 2007 was promulgated by the office memorandum No. 10(3)/2007-DBA-U/NER by the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion. Thereby all new units as well as existing units which would go in for substantial expansion unless otherwise specified and which would commence commercial production within 10 years from the date of the notification, i.e., 1-4-2007 were construed to be eligible for the incentives mentioned therein including 100% excise duty exemption on finished products made in the North-Eastern Region as was available under the Policy, 1997 for a period of 10 years from the date of commencement of commercial production. The incentives on substantial expansion were to be given to the units effecting an increase by not less than 25% in the value of fixed capital investment in plant and machinery for the purpose of expansion of capacity/modernization and diversification as against an increase by 33% as prescribed by the Policy, 1997. 100% excise duty exemption as assured under the Policy, 1997 was to continue as well. The Policy, 2007 in Clause (x) contained a negative list of industries ineligible for benefits thereunder. For ready reference, the same is extracted herein below.

(x) Negative List :

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

- (i) All goods falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which pertains to tobacco and manufactured tobacco substitutes.
- (ii) Pan Masala as covered under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

(iii) Plastic carry bags of less than 20 microns as specified by Ministry of Environment and Forests Notification No. S.O. 705(E), dated 2-9-1999 and S.O. 698(E), dated 17-6-2003.

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

69. Clause (2) of the Policy, 2007 however provided that the Policy, 1997 would cease to operate on and from 1-4-2007 and the industrial units, which had commenced commercial production on and from 31-3-2007, would continue to receive the benefits/incentives under the earlier Policy. While reserving to the Government the right to modify any part of the Policy in public interest all concerned Ministries/Departments of the Government of India were requested to amend their respective Acts/rules/notifications etc. and to issue necessary instructions for giving effect to the decisions engrafted in the Policy, 2007. The office memorandum No. 10(3)/2007-DBA-II/NER, dated 1-4-2007 also of the same Ministry in substance reiterated the cessation of the effect of the Policy, 1997 on and from 1-4-2007 with the rider that the industrial units which have commenced commercial production on or before 31-3-2007 would continue to receive the benefits/incentives thereunder. Much emphasis has been laid by the petitioner on Clause (2) of the Policy, 2007 to impress upon this Court that having regard to the date(s) of commencement of commercial production by its manufacturing units qua the goods involved, it was entitled to be endowed with the benefits/incentives as available under Policy, 1997, the negative list notwithstanding. The respondents to the contrary have pleaded that in the face of the intervening events as well as on a close reading of the Policy, 2007, this contention is wholly misplaced.

70. Having regard to the series of events subsequent to the promulgation of the Policy, 1997 and reading between the lines of the Policy, 2007, I am inclined to sustain the resistance offered by the respondents. Clause (ii) of the Policy, 2007 with the caption "Duration" indicates that all new units as well as existing units which go in for substantial expansion unless otherwise specified and which commence commercial production within 10 years from the date of the notification would be eligible for incentives for a period of 10 years from the date of commencement of commercial production. The Policy did contemplate only new units as well as existing units venturing out for commercial production within 10 years from the date of issuance thereof unless otherwise specified. The negative list provided by the Policy, 2007 spells out the industries, which are ineligible for the benefits thereunder. In the estimate of this Court, these are the industries contemplated to be excepted from the purview of the Policy, 2007. Clause (2) thereof when viewed in this context refers to the industrial units, which have commenced commercial production on or before 31-3-2007, i.e. those not contemplated in Clause (2). Having regard to the background that had preceded the Policy, 2007 and the curtailment of the benefits of exemption earlier granted by the Policy, 1997 through various instruments of law in the

form of Section 154 of the Finance Act, 2003 read with Schedule 9 thereto as well as the notifications under Section 5A of the Central Excise Act and other related legislation" it would be in defiance of logic to conclude that all these notwithstanding, with the specific intention of excluding the industries engaged in the manufacture of goods under Chapter 24 and pan masala under Chapter 21 of the First Schedule to the Tariff Act, 1985, these would still continue to avail the benefits/incentives under the Policy, 1997 only because the units concerned had commenced commercial production on and from 31-3-2007. As it is, the Policy, 2007 has not been assailed by the petitioner and the reliefs sought for by it are wholly founded on the assumption that it has by Clause (2) thereof assured the continuance of the benefits/incentives of exemption from payment of excise duty as promised by the Policy, 1997. As a matter of fact, all its formulations qua the various legal principles highlighted stem from such a notion. If the interpretation of Clause (2) of the Policy, 2007 as intended by the petitioner is accepted, the negative list for all intents and purposes would be rendered redundant and otiose. Further it would signify effacement of the march of events prior thereto ending with Section 154 of Finance Act, 2003, the vires whereof has been upheld by the Apex Court in *R.C. Tobacco*, supra.

71. The Apex Court in *Novopan India Ltd., Hyderabad v. Collector of Central Excise and Customs, Hyderabad and Tata Iron and Steel Co. Ltd.* (supra), negated the plea that the benefit of an ambiguity in the language in an exemption notification ought to be construed in favour of the assessee. By recalling its earlier decision in *CCE v. Parle Exports (P) Ltd.* : (1989) 1 SCC 345, it was held that the principle that in case of ambiguity, the taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exemption provision, which has to be construed strictly. It was underlined that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, the benefit of it must go to the State.

The power to lay down a policy by an executive decision or by legislation includes the power to withdraw the same unless in the former eventuality it is afflicted by a mala fide exercise of power or if the action taken is in abuse of power. It is judicially recognised that a authority has to be left to decide its full range of choice within the executive or legislative power and more particularly in matters of economic policy, the Courts have conceded greater leeway to the executive and the Legislature. If the Government is satisfied that change in the policy is warranted in public interest it would be entitled to revise it and herald a new one and the Court would prefer to permit a free play to it in fiscal matters and to act upon the same. This discretion to alter the policy in exercise of executive power is however neither unqualified nor unfettered and such an action is amenable to judicial review. The Apex Court in *Bannari Amman Sugars Ltd.* (supra) emphasised that the State to this effect has to act validly on discernible reasons and not whimsically for ulterior purposes. This view reverberated in *Dhampur*

Sugar (Kashipar) Ltd. (supra) wherein while affirming the discretion and dominion of the executive to alter its policy in public exigency underscored, the indispensable essentiality of bona fide and good faith as validating imperatives. It marked the constricted contours of judicial review of such matters by extracting its following observations in Nandalal Jaiswal : (1986) 4 SCC 566 (Para - 34).

34 ...We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any strait jacked formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or "play in the joints" to the executive....

...Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void....

The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

72. In the above view of the matter, on a totality of the aforementioned considerations, the challenge to the notifications dated 1-3-2007 and 25-4-2007 based on Policy, 1997 cannot be sustained. A contrary intention being apparent from Section 154 of the Finance Act, 2003 read with Schedule 9 thereto as well as the notifications issued after the Policy, 1997 curtailing/regulating from time to time the exemptions from payment of excise duty as contemplated by the said Policy, I am of the unhesitant opinion that the petitioner too is not entitled to any protection under Section 38A of the Act. The decisions relied upon by it qua promissory estoppel and legitimate expectation are thus of no avail to it in this perspective. There is no discernible conflict in the approach of the respondent authorities in promulgating the Policy, 2007 or issuing the impugned notification. No mala fide or extraneous consideration is also decipherable. The petitions therefore lack in merit and are dismissed. No costs."

34. Mr. Dutta, learned counsel appearing for the respondent Nos. 4 and 5 has reiterated that when someone is invoking an exemption or an exemption provision to relieve him of tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity the benefit must go to the State. He has submitted that power to lay down a policy includes power to withdraw the same unless in the former eventuality it is afflicted by a mala fide exercise of power or the action taken is an abuse of power. In this regard, Mr. Dutta, learned counsel has relied on a decision of the Apex Court in Orient Traders v. Commercial Tax Officer, Tirupati, reported in (2008) 14 SCC 440 : 2009 (237) E.L.T. 447 (S.C.), where it has been enunciated as under :

"It is well established principle that the exemption notifications are to be

construed strictly, reference may be made to State of Jharkhand and Ors. v. Tata Cummins Ltd. and Anr. : (2006) 4 SCC 57 and Kartar Rolling Mills v. Commissioner of Central Excise, New Delhi - (2006) 4 SCC 772. If the intention of the Legislature is clear and unambiguous, then it is not open to the courts to add words in the exemption notification to extend the benefit to other items which do not find mention in the notification. In the present case, there is no ambiguity in the expression used in the G.O. The intention of the State Government is clear that only gold bullion and specie is entitled to the concessional rate of tax. Under the circumstances, the same cannot be extended to the silver as claimed by the assessee."

35. Mr. Dutta, learned counsel has submitted that there is no ambiguity in the said notification. That apart, withdrawal of exemption benefit prematurely is a policy decision of the Government which might appear resiling from the promise, but in the circumstances under which the said policy has been adopted cannot be held unsustainable.

36. What has emerged from the contention and counter contention calling for response from this Court may briefly be formulated as under :

(i) Whether the impugned notification dated 1-3-2007, Annexure-L to the writ petition is hit by promissory estoppel by restraining premature withdrawal of the benefits?

(ii) Whether the Notification No. 69/2003-C.E., dated 25-8-2003, Annexure-H to the writ petition has been completely eclipsed by the Notification No. 8/2004-C.E., dated 21-1-2004, Annexure-I to the writ petition? And

(iii) Whether there is any misuse of process or public interest element justifying the withdrawal of benefits as granted by the NEIP, 1997 by virtue of the notification dated 1-3-2007, Annexure-L to the writ petition?

37. There cannot be any amount of dispute that by the Notification No. 69/2003-C.E., dated 25-8-2003 the Central Government had reintroduced in the public interest exemption of excisable goods of the description specified in the Column 3 of the table appended below the said notification and falling within the sub-heading mentioned therein of the First Schedule to the Central Excise Tariff Act, 1985 subject to the conditions as stated. There is no challenge by the petitioner against the said notification. Even Dr. Saraf, learned Senior Counsel appearing for the petitioner has clearly stated that the petitioners are not claiming any benefit which has been taken away by Section 154 of the Finance Act, 2003. As such it is abundantly clear that the relief as claimed by the petitioners are based on the notification dated 25-8-2003, Annexure-H to the writ petition or the subsequent amendments and modification as made thereof. The challenge is against premature withdrawal of those incentives provided by the notification dated 25-8-2003 and as modified by the Notification No. 8/2004-C.E., dated 21-1-2004, Annexure-I to the writ petition. It is required to be mentioned that the petitioners have not thrown any challenge against the Notification No.

28/2004-C.E., dated 9-7-2004 Annexure-J to the writ petition whereby conditions as laid down in Paras (C), (D) and (E) had been modified by way of substitution as stated. These changes are as to the modality of refund of the duty keeping the refundable duty in an Escrow Account as security or collateral. Elaborately the method of investment certification by the designated committee, etc., has been provided. The modified condition also provides the consequence of failure in deposit or investment of the amount specified in the condition (B) within the stipulated period. The duty, which is equivalent to the amount, not so deposited or invested in the prescribed manner shall be recoverable from the manufacturer along with interest thereon at the rate specified under Section 11AB of the Central Excise Act, 1944, and without prejudice to any action that may be taken under the provisions of the said Act or any other law for the time being in force, by forfeiture of the amount in the said Escrow Account. The question therefore, is whether the petitioners are entitled to get the benefits in terms of the notification dated 25-8-2003 read with or without notification dated 21-1-2004 for 10 years as promised by the NEIP, 1997, or in other words whether the impugned notification dated 1-3-2007, Annexure-L to the writ petition in respect of premature withdrawal of the benefits is hit by promissory estoppel?

38. To a larger extent, law of promissory estoppel has been crystallised without leaving even a thin penumbra. In the case in hand, the representation or the promise is unequivocal and the petitioners have altered their position acting on such promise or assurance, even though the respondents have averred whether the petitioners have invested huge amount or not is highly questionable but they have not denied that both the units of the petitioners availed the incentive. If incentives were not availed, but they are covered by the notifications dated 25-8-2003 and 21-1-2004 conjointly, they are entitled to get such incentives in the form of exemption subject to their compliance of the conditions as laid down therein, till withdrawal or expiry of the promised period.

39. G. Spencer Bower in his celebrated treatise, *The Law Relating to Estoppel by Representation* (London: Butterworths, 2004, 4th ed., Para 1.2.2) has observed that :

".....where one person ("the representor") has made a representation of fact to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto."

It has been clearly observed that the representor is estopped as against the representee from making or attempting to establish by evidence, any averment

substantially at variance with his former representation, if the representee at the proper time and in proper manner, objects thereto. The promissory estoppel basically prevents a party to a contract from acting in a certain way because it was promised not to act in that way and the other party to the contract relied on that promise and acted upon it. The licence is fundamentally, when is accepted, a contract though its execution might flow from any statutory power. The doctrine therefore applies even to the licence agreement.

40. Lord Cairns in *Hughes v. Metropolitan Railway Co.* (1877), has spoken as under :

"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

These principles were applied in *Central London Property Trust Limited v. High Trees House Ltd.* (1947) by Denning J. to found the modern doctrine of promissory estoppel. Even Denning, J. was attempting to arrive at a fair solution to the problem to part payment of debt and in doing so the precedent created by *Foakes v. Beer* (1884), it appears thus, the judicial innovations have taken place in finding fair solution to a dispute so far those relate to applying the doctrine of promissory estoppel and that is the reason why it has been held that whether the doctrine of promissory estoppel would apply or not, it depends on various factual aspects and subject to leeway to the public interest and other conditions such as misuse and garnering undue advantage from the executive promise. In this case also the petitioners have given into the restructured promise and now they have approached this court to enforce their right which according to them is poised against the notification dated 1-3-2007, whereby an inequitable act has been resorted to by the respondents. In this regard, the ratio as laid down in *Sales Tax Officer and Anr. v. Shree Durga Oil Mills and Anr.*, reported in (1998) 1 SCC 572 : 1998 (97) E.L.T. 202 (S.C.) and *Kasinka Trading v. Union of India and Anr.*, reported in (1995) 1 SCC 274 : 1994 (74) E.L.T. 782 (S.C.) is based on the factual aspect that there was no unequivocal representation in respect of exemption and for withdrawal of such promise it would not be necessary for the Government to establish an overriding equity in its favour. In *UP Power Corporation Ltd. and Anr. v. Sant Steels and Alloys (P) Ltd. and Ors.*, the Apex Court has clearly distinguished the ratio on unequivocal representation. In this case, even the respondents have not advanced the plea of absence of unequivocal representation. It is well settled that if the statutory authority or an executing authority of the State, functioning on its behalf, in exercise of its

legally permissible powers had held out any promise to party, who, relying on the same has changed its position to its detriment and when such a promise made to the party does not offend any provisions of law or does not flatter any legislative or quasi judicial power inhering the promise, then on the strength of promissory estoppel the promise can be obligated to perform in accordance with the promise. However, if there is supervening public interest, the Government would be allowed to take its stand and withdraw from the representation made by it, which had induced persons to take certain steps, which might go adverse to the interest of such persons on account of such withdrawal determination. As to whether there is supervening public interest or not, cannot be ipse dixit of the Government. The court can also examine the aspects of the public interest. Hence, the decision in *Dharam Satyapal Limited and Others v. Union of India* rendered by Gauhati High Court has failed to persuade this court to adopt. The following decisions have by and large, dowed upon the said aspect of the matter :

Mahavir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620, *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and Etio and Others*, (2007) 5 SCC 447, *MRF v. Asstt. Commissioner of Sales Tax and Others*, (2006) 8 SCC 702, *Union of India v. Indo-Afghan Agencies Ltd.*, (1968) 2 SCR 366, *U.P. Power Corporation v. Sant Steel Alloys (P.) Ltd.*, (2008) 2 SCC 777, *Shree Sanyeeji Ispat (P) Ltd. and Another v. State of Assam and Others*, 2006 (2)GLT 397, *Pawan Alloys and Casting (P) Ltd. v. U.P.S.E.B.*, (1997) 7 SCC 251, *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.*, (1979) 2 SCC 409, *State of Punjab v. Nestle India Ltd.*, (2004) 136 STC 35, *Shri Guru Ashis Wire Industries v. State of Gujarat*, (1994) 92 STC 286, *Pournami Oil Mills v. State of Kerala*, 1986 (Supp) SCC 728 and *State of Bihar and Another v. Usha Martin Industries Ltd.*, (1987) 65 STC 430.

41. In addition to the decision as already referred by the learned counsel appearing for the parties, in *State of H.P. v. Ganesh Woods Products*, reported in AIR 1996 SC 149, the interplay of the doctrine of promissory estoppel and the public interest has been quite lucidly enunciated in the passages extracted hereunder :

"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) A.C. 741 :

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) 1 K.B. 130 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 Company Limited v. State of Uttar Pradesh*, (1979) 42 SCC 409 : AIR 1979 SC 621), was departed from in certain respects in *Jit Ram Shiv Kumar v. State of Haryana* : (1981) 1 SCC 11 : AIR 1980 SC 1285, which was in turn criticised in *Union of India v. Godfrey Philips India Limited*, (1985) 4 SCC 369 : AIR 1986 SC 806. The divergence in approach adopted in *Sri Bakul Oil Industries v. State of Gujarat*, (1987) 1 SCC 31 : AIR 1987 SC 142 and *Pournami Oil Mills v. State of Kerala* : 1986 (Suppl.) SCC 728 : AIR 1987 SC 590 is another instance. The fact the recent decision in *Kasinka Trading and Anr. v. Union of India and Ors.* : (1995) 1 SCC 274 : 1995 AIR SCW 680, 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 promise... alters his position", in the statement of the doctrine. The doctrine has been formulated in the following words in *Mis. Motilal Padamapat Sugar Mills Co. Ltd.* :

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 Govt. would be held bound by the promise and the promise would be enforceable against the Govt. 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.

What does altering the position mean? Does it mean such a change in the position of the promisee (as a result of acting on the faith of representation of the promisor) that compensating him in money would not be just and equitable to him, i.e., a situation where the ends of justice and requirements of equity demand that the promisor should not be allowed to go back on his representation and must be held to it or does altering his position mean doing of some act, big or small, which the promisee does acting on the faith of the representation which he would not have done but for the representation? In other words, is it enough that the promisee has spent some money or has taken some step acting on the basis of representation, which can be recompensed in money or otherwise? Is it not ultimately a matter of doing equity and justice between the parties - a case of holding the scales even between the parties and deciding whether in the interests of justice and equity the promisor can be allowed to resile from his promise and compensate the promisee appropriately or the promisor ought to be held to his promise and not allowed to go back since such a course is necessary in view of the change in position of promisee? Our view

of the matter is probably evident from the way we have posed the above questions. To wit, the rule of promissory estoppel being an equitable doctrine, has to be moulded to suit the particular situation it is not a hard and fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. If it is more just from the point of view of both promisor and promisee that the latter is compensated appropriately and allow the promisor to go back on his promise, that should be done; but if the Court is of the opinion that the interests of justice and equity demand that the promisor should not be allowed to resile from his representation in the facts and circumstances of that case, it will do so. This, in our respectful opinion, is the proper way of understanding the words "promise altering his position". Altering his position should mean alteration in the position of the promise as it make it appear to the Court that holding the promisor to his representation is necessary to do justice between the parties. The doctrine should not be reduced to a rule of thumb. Being an equitable doctrine it should be kept elastic enough in the hands of the Court to do complete justice between the parties. Now, can the doctrine of promissory estoppel be put on a higher pedestal than the written contract between the parties? Take a case where there is a contract between the parties containing the very same terms as are found in the "approval" granted by IPARA (sub-committee) and then the Government resiles from the contract and terminates the contract. The promisee will then have to file a suit for specific performance of the contract in which case the court will decide, having regard to the facts and circumstances of the case and the provisions of the Specific Relief Act, whether the plaintiff should be granted specific performance of the contract or only a decree for damages for breach of contract. It must be remembered that the doctrine of promissory estoppel was evolved to protect a promisee who acts on the faith of a promise/representation made by promisor and alters his position even though there is no consideration for the promise and even though the promise is not recorded in the form of a formal contract. Surely, a representation made or undertaking given in a formal contract is as good as, if not better than, a mere representation. All that we wish to emphasise is that anything and everything done by the promisee on the faith of the representation does not necessarily amount to altering his position so as to preclude the promisor from resiling from his representation. If the equity demands that the promisor is allowed to resile and the promisee is compensated appropriately, that ought to be done. If, however, equity demands, in the light of the things done by the promisee on the faith of the representation, that the promisor should be precluded from resiling and that he should be held fast to his representation, that should be done. To repeat, it is a matter of holding the scales even between the parties - to do justice between them. This is the equity implicit in the doctrine."

42. In *Bannari Amman Sugars Ltd. v. Commercial Tax Officer and Others* reported in (2005) 1 SCC 625, the Apex Court has again restated the law after making reference to development of doctrine of promissory estoppel in India holding that even the beneficiaries are not entitled to opportunity of hearing

before prematurely withdrawing the incentives. But the State must provide reason that such withdrawal is backed by supervening public interest and the action satisfied the test of fairness and reasonableness. In such case, harshness of the action can be no ground to challenge the premature withdrawal of incentives. In *Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others* reported in (2006) 3 SCC 620, the Apex Court has dispelled the confusion as to the legislative intervention in the promise holding that :

"22. It is not in dispute that when the appellants herein started making investments, Rule 28A was operative. Representation indisputably was made in terms of the said Rules. The State, as noticed hereinbefore, made a long-term industrial policy. From time to time it makes changes in the policy keeping in view the situational change.

23. The State intended inter alia to grant incentive to include industrial units by way of waiver and/or deferment of payment of sales tax where for Rule 28A was made. The sales tax laws enacted by the State, as noticed hereinbefore, contain a provision empowering the State to grant such exemption.

24. The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject, of course, to the provisions of the statute have been framed by several other States.

25. It is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field. Whereas in England the development and growth of promissory estoppel can be traced from *Central London Property Trust Ltd. v. High Trees House Ltd.*, (1947) 1 KB 130, in India the same can be traced from the decision of this Court in *Collector of Bombay v. Municipal Corporation of the City of Bombay and Ors.* In that case the Government made a grant of land (which did not fulfil requisite statutory formalities) rent free. It, however, claimed rent after 70 years. The Government, it was opined, could not do so as they were estopped. It was further held therein that there was no overriding public interest which would make it inequitable to enforce estoppel against the State as it was well within the power of the State to grant such exemption.

26. In *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.* this Court rejected the plea of the State to the effect that in the absence of any notification issued under Section 4A of the U.P. Sales Tax Act, the State was entitled to enforce the liability to sales tax imposed on the petitioners thereof under the provisions of the Sales Tax Act and there could be no promissory estoppel against the State so as to inhibit it from formulating and implementing its policy in public interest.

27. The question came up for consideration before this Court in *Pournami Oil Mills and Ors. v. State of Kerala and Anr.*, wherein it was held : (SCC p. 732, Para 7)

Under the order dated April 11, 1979, new small scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialisation, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small scale concern have set up their industries within the State of Kerala, they would 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 M.P. Sugar Mills. 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. In Bakul Cashew Co. case 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. In our view, to the facts of the present case, the ratio of M.P. Sugar Mills" case directly applies and the plea of estoppel is unanswerable.

28. Yet again in Assistant Commissioner of Commercial Taxes (Asst.), Dharwar and Ors. v. Dharmendra Trading Company and Ors., this Court, on the fact situation obtaining therein, rejected the contention of the State that any misuse was committed by the respondent therein and thus the State cannot go back on its promise."

43. Earlier to Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others, almost an identical question fell for consideration in State of Punjab v. Nestle India Ltd. and Another reported in (2004) 6 SCC 465, where it has been held as under :

"47. The appellants have 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 1st April, 1996 so that the respondents cannot in any event re-adjust 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 1987 decision of the Cabinet."

Though, there may appear some apparent conflicting edges in the decision of Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others and State of Punjab v. Nestle India Ltd. and Another, but a close reading would show that the element of public interest is the ultimate determinant. Even the court may make a comparative assessment of reasons and strike a balance thereof. In this case one important aspect as canvassed by the respondents requires re-look. In Para 27(xiv) the respondents has stated as under :

"That, subsequently the Govt. of India, Ministry of Finance, Department of Revenue issued another Notification bearing No. 21/2007-C.E., dated 25-4-2007 under Section 5A of the Central Excise Act, 1944 amending Notification No. 32/99-C.E., dated 8-7-99 and Notification No. 33/99-C.E., dated 8-7-99 in public interest deleting pan masala falling under Chapter 21 of the said First Schedule and goods falling under Chapter 24 of the said First Schedule of the Central Excise Tariff Act, 1985 from the purview of the exemption notification which is also challenged by the writ petitioner on the ground of promissory estoppel."

44. According to the respondents, the said notification dated 25-4-2007 Annexure-M to the counter-affidavit has been issued solely on consideration of safeguarding public interest having regard to the health hazards relating to consumption of tobacco and tobacco products. It has been implied that the public interest is better served by withdrawing the incentive rather than by continuing with it. The said notification dated 25-4-2007 has not however been challenged in the writ petition. But by filing the rejoinder the petitioners has simply stated that the contents of Para No. 27(xiv) are a matter of record and do not merit a response. The policy change would not absolve the Government from its obligation under the doctrine of promissory estoppel. Whether without raising objection to the notification dated 25-4-2007 the petitioner would still be entitled to get the incentives or not? But the promise has been further extended by the NEIIPP, 2007, vide the office memorandum dated 1-4-2007, by providing that "the industrial units which have commenced commercial production on or before 31-3-2007 will continue to get benefits/incentives under NEIP, 1997." The notification dated 25-4-2007 has amended the Notification Nos. 32/99-C.E., dated 8-7-1999 and 33/99-C.E., dated 8-7-1999. In the said notification dated 25-4-2007, by way of substitution, the following proviso has been added :

"Provided that the exemption contained in this notification shall not be applicable to pan masala, falling under Chapter 21 of the said First Schedule, goods falling

under Chapter 24 of the said First Schedule; and plastic carry bags of less than 20 microns as specified by the Ministry of Environment and Forests Notification No. S.O. 705(E), dated the 2nd of September, 1999 and S.O. 698(E), dated the 17th of June, 2003."

This proviso has been substituted in place of the first proviso appearing in the Notification No. 32/99-C.E., dated 8-7-1999. According to this court, the reasons as provided in the counter-affidavit in support of such deletion and substitution of the first proviso by the Notification No. 21/2007-C.E., dated 25-4-2007 cannot be brushed aside. Pan masala containing tobacco may cause health hazard as claimed by the respondents. As such, even though the petitioners have not thrown the categorical challenge against the said notification dated 25-4-2007, the said notification will not absolve the respondents from its obligation under the promissory estoppel so far the pan masala without tobacco content is concerned. In view of the saving clause as engrafted in NEIIP, 2007, as the petitioners' units have commenced commercial production on or before 31-12-2007 will continue to get benefits/incentives under NEIP, 1997 in terms of the Notification No. 8/2004-C.E., dated 21-1-2004 subject to the notification dated 25-4-2007. For deposit, the petitioner would get relaxation for purpose of counting limitation in terms of Notification 28/2004-C.E., dated 9-1-2004. The limitation would start from this day for compliance of the modality as laid down in the Notification Nos. 8/2004-C.E., dated 21-1-2004 and 28/2004-C.E., dated 9-7-2004. This court, however, has not made any observation consciously as to the petitioners' entitlement under the scheme. The competent authority would decide the same.

45. The other point though has been substantially dealt with in the preceding part but according to this court it requires a specific response. As raised by the respondents that the Notification No. 69/2003-C.E., dated 25-8-2003 has been superseded by the Notification No. 8/2004-C.E., dated 21-1-2004, no relief in terms of the said notification dated 25-8-2003 can be granted to the petitioner. On a comparative study of those notifications, this court finds that the notification dated 25-8-2003 has for all purposes merged with the notification dated 21-1-2004. The fundamental provisions made in the notification dated 25-8-2003 have not been debased by the notification dated 21-1-2004. The notification dated 21-1-2004 has expanded the benefit further but with certain restrictive conditions. The petitioners have not challenged the said notification dated 21-1-2004. As corollary thereof, this court is of the view that there had been no eclipse. However, this court is constrained to note that while drawing up the writ petition, the petitioners acted casually by not seeking the reliefs in terms of the notification dated 21-1-2004. If it was a legal strategy to get the incentives without compliance of the conditions subsequently imposed by the notifications dated 21-1-2004 and 9-7-2004, the same must fail for not challenging the notifications dated 21-1-2004 and 9-7-2004. Hence, the petitioner would continue to get the benefit in terms of the promise re-extended by Para 2 of the Office Memorandum dated 1-4-2007 Annexure-K to the writ

petition for the remaining period in terms of NEIP, 1997.

46. Another question that has fallen for consideration of this court is that whether the notification dated 1-3-2007 Annexure-L to the writ petition can survive. As this has been held that the respondents have failed to show that the petitioner has misused the incentives or taken undue advantage, the said notification dated 1-3-2007 is hit by the promissory estoppel. In this regard it would be apposite to say that the dispute as to whether the petitioner would be entitled to get duty exemption on certification of investment in the social sector in terms of the notifications dated 21-1-2004 and 9-7-2004 is to be verified by the Investment Appraisal Committee (IAC) and on their certification only the exemption can be availed. Hence, absence of "proper investment" as alleged, cannot be termed as misuse or undue advantage. Moreover, the respondents did not assign any public interest for issuing the impugned notification dated 1-3-2007. The cumulative effect is that the notification dated 1-3-2007, Annexure-L to the writ petition, cannot be sustained and accordingly the same is set aside.

47. Having held so, the writ petition stands allowed to the extent as indicated above, leaving the parties to bear their own costs.