

(2009) 06 GAU CK 0068

In the Gauhati High Court

Case No : Writ Petition (C) No's. 1707, 2143, 2150, 2211, 2328, 2334, 2335, 2337, 2464, 2465, 2466, 2467, 2481, 2507, 2508, 2510, 2718, 3070, 3724 of 2008, 187, 189, 195 and 1535 of 2009

Herbo Foundation (P.) Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-06-2009

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 — Section 3
Central Excise Rules, 1944 — Rule 173G, 22, 23, 24, 25
Central Excises and Salt Act, 1944 — Section 5A
Central Sales Tax Act, 1956 — Section 8(5)
Constitution of India, 1950 — Article 14, 226, 299
Customs Act, 1962 — Section 25, 25(1)
Evidence Act, 1872 — Section 115
Sales Tax Act — Section 4A

Citation : (2011) 1 GLR 781

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : A.K. Saraf, D. Baruah, M.L. Gope, S. Chetia, Satyen Sarma, Jayanta Deka, Amlan Sarma, Tarun Krishna Bhuyan, R.K. Choudhury, A.K. Gogoi, A. Roy, S. Bhuyan, S.K. Medhi, R.K. Bharali, A. Asiam, S. Shyam, R.B. Deka, M.P. Devnath and D. Sarma, for the Appellant; K.N. Choudhry, R. Dubey and R. Deka, Asst. Solicitor General of India; Government Advs. G.A., Assam and B. Sarma, for the Respondent

Final Decision : Allowed

Judgement

I.A. Ansari, J.—By this common judgment and order, I propose to dispose of all these writ petitions Inasmuch as all these writ petitions, Involving identical facts and having raised same questions of law for determination, have been heard together on the request made by the learned Counsel for the parties.

2. In order to correctly appreciate as to what the grievances of the Petitioners are, what reliefs they have sought for and on what basis, the Respondents resist

the writ petitions, certain material facts, not being in dispute, are set out as under:

(i) Taking into account the continuing backwardness of the North-Eastern region, it was felt by the Government of India that a new synergetic incentive package would stimulate development of industries, for, such incentive package would attract Investors. Thus, with a view to fostering industrial growth in North-Eastern region, the then Prime Minister of India made, on 27.10.1996, at Guwahati, a statement that new incentives would be announced for industrial development of the North-Eastern Region. Expert groups/ committees were accordingly constituted to controller the initiatives. By a notification, dated 24.12.1997, Government of India, eventually, announced a new Industrial Policy Resolutions ("1997 IPR") containing a package of incentives and concessions for the investors in the North-Eastern region. As a measure of fiscal incentives, Government approved conversion of the growth centers into total tax free zones for a period of ten years. All industrial activities, in these zones, were to be, under the 1997 IPR, free from payment of income tax and excise duty for a period of ten years from the date of commencement of production and the State Governments were to be requested to grant exemptions In respect of sales and municipal taxes. The 1997 IPR also announced that the Ministry of Finance, Government of India, would be moved to amend the existing rules/ notifications for giving effect to the decisions embodied in the IPR, Apart from exemption from, inter alia, payment of income tax and excise duty, the 1997 IPR envisaged various other incentives and concessions like capital investment subsidy, interest subsidy, assistance in obtaining term loan as well as working capital, etc.

(ii) In terms of the promises made by the Government of India under the 1997 IPR, various notifications conferring benefits, in tune with the promises made in the 1997 IPR, were issued by various departments of the Central Government. In so far as exemption from payment of central excise duty was concerned, Ministry of Finance, Department of Revenue, Government: of India, brought out notifications No. 32/99-CE and 33/99-CE, both dated 8.7.1999, granting exemption In respect of certain specified excisable goods from a unit located in the Growth Center or Integrated Infrastructure Development Center or Export Promotion Industrial Park or Industrial Estates or Industrial area or Commercial Estate, as the case may be. The exemption from payment of excise or additional excise duty was to be equivalent to the amount of duty paid by the manufacturer of goods horn the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1944. The exemption, contained in the said notifications, were made applicable to new industrial units, which commenced their commercial production on or after 24.12.1997. The excise duty exemption, as declared under the said notifications, were also to be applicable to those industrial units, which existed even before 24.12.1997, but which undertook substantial expansion by way of increase in the installed capacity by not less than 25% on or after 24.12.1997. The exemption, contained in the said notifications, were made applicable to the industrial units of such descriptions, as

mentioned hereinbefore, for a period of 10 (ten) years from the date of publication of the notification in the official gazette or from the date of commencement of commercial production, whichever was earlier.

(iii) Some of the writ Petitioners, in the present set of writ petitions, claim to have set up, acting upon the promises made in the 1997 IPR and taking into account the relevant notifications issued in this regard, industries for manufacture of various commercial products, which the said notifications, granting exemption from payment of excise duty, had envisaged. Another set of writ Petitioners plead that their industrial units had already existed, when the 1997 IPR came into force and, acting upon the incentives promised, they made substantial expansion by increasing the installed capacity of their respective industrial units to the extent as mentioned in the relevant notifications.

(iv) In course of time, the Petitioners were granted certificates of eligibility showing that they were entitled to receive various exemptions from payment of excise duty, which was, otherwise, leviable on their products. In fact, many of the Petitioners, having set up their industries, started receiving refund of central excise duty in terms of the notifications issued in this regard. Those, who claim to have expanded the Installed capacity of their respective industrial units, in terms of the relevant notifications, too claim that they are entitled to receive refund of excise duty in terms of the notifications aforementioned.

(v) Be it mentioned that the earliest notification No. 32/99-CE, dated 8.7.1999, aforementioned, whereby exemption from payment of central excise duty was granted, underwent several amendments. Notwithstanding such issuance of subsequent notifications, the Petitioners claim that they have had remained entitled to, and had, in fact, been receiving, full excise duty exemption. Thus, the basic incentives, which had, according to the Petitioners, lured the Petitioners to set up their respective industries, in Assam, continued with out any modification.

(vi) As already Indicated, a new industrial unit was, under the Notification No. 32/99-CE, dated 8.7.1999, entitled to refund of excise duty equivalent to the amount of the duty paid by the manufacturer for the finished goods from the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1944. However, in the year 2001, the CENVAT Credit Rules were framed simplifying the credit provisions, and procedure for availing credit of the duty paid on input and capital goods used, whether directly or indirectly, in, or in respect of, manufacture of final products. The credit of the duty, so allowed, could be used for payment of excise duty livable on the finished goods subject to the conditions laid down in the relevant Rules. The basic object of allowing credit on CENVAT was to ensure that there is no cascading effect of levy of excise duty. The Rules framed aimed at collecting excise duty on the finished goods and thereby the manufacturer of finished goods were enabled to take credit of the duty paid on the inputs or the capital goods used in the manufacture of finished products and could utilize the said credit for payment of excise duty on the final finished products.

(vii) Some of the manufacturers did not, however, utilize the CENVAT for payment of excise duty on the finished goods; they rather, continued to make full payment of excise duty on finished products through the account current and claimed refund of the same. Such manufacturers, thus, allowed the CENVAT credit to be accumulated in their books of account with the object of utilizing the same at a latter stage. In other words, instead of utilizing the CENVAT credit, some of the manufacturers continued to make full payment of excise duty on finished products through the account current and claimed refund of the same. They let the CENVAT credit to so accumulate with the object of utilizing the same after expiry of a period of 10 years of exemption. This apart, the manufacturers, who did not use the CENVAT credit, were able to utilize the accumulated amount for payment of excise duty on such products, which were not eligible for exemption under the Notification Nos. 32/99-CE and/or 33/99-CE aforementioned. Since the Inputs, in respect of which CENVAT credit had been taken, were to be utilized in the manufacture of finished goods, which were eligible for exemption as per Notification Nos. 32/99-CE and 33/99-CE, dated 8.7.1999, the CENVAT credit, in respect of such inputs, could not have been utilized for payment of excise duty in respect of finished products, which were not eligible for exemption under the said notifications, dated 8.7.1999. Similarly, the act of accumulating CENVAT credit (in respect of the inputs, used in the manufacture of finished products, eligible for exemption, under Notification Nos. 32/99-CE and 33/99-CE), with the object of utilization the same for payment of excise duty after expiry of the period of ten years of promised exemption, was against the spirit of Notification Nos. 32/99-CE and 33/99-CE aforementioned as well as 1997 IPR. The woe/us operand, so adopted, would have, thus, defeated the aim and objectives of the 1997 IPR. The Notification No. 32/99-CE, dated 8.7.1999, was, therefore, amended by Notification No. 35/2001-CE, dated 29.6.2001. By the notification, dated 29.6.2001, aforementioned, it was made clear that those industries, which were, otherwise, exigible to excise duty, shall be eligible for refund of the amount of duty paid other than the duty paid by utilization of CENVAT credit- under the CENVAT Credit Rules, 2001. The effect of the notification, dated 29.6.2001, aforementioned, thus, did two things, namely, (a) It required the manufacturers to, first, utilize CENVAT credit towards payment of excise duty on the inputs and, (b) it made the eligible industries entitled to receive refund of only such amount of excise duty, which were paid after utilization of the CENVAT credit. Similar amendments were introduced in the Notification No. 33/99-CE too. In course of time, Notification No. 32/ 99-CE was, again, amended by Notification No. 61/2002-CE, dated 23.12.2002, whereby a proviso was added to Clause (b) of the second paragraph making it clear that the refund shall not exceed the amount of duty paid less the CENVAT credit availed off in respect of the duty paid on the inputs used or in respect of the manufacture of goods cleared under Notification No. 32/99-CE. The Notification No. 32/99-CE underwent yet another amendment by Notification No. 65/2003-CE, dated 6.8.2003.

(viii) In the notification, dated 6.8.2003, aforementioned, paragraph 1A was inserted, which read as under:

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

The proviso to Clause (b) of paragraph 2 was also substituted by the following:

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

(ix) The amendments, so introduced, made it mandatory for a manufacturer of those goods, which were made eligible for exemption under Notification No. 32/99-CE, to, first, utilize the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and to pay balance amount only in cash. The substituted proviso further took care to see that refund is not claimed in respect of the duty paid on goods, which were not eligible for exemption.

(x) Before expiry of the 1997 IPR, the Government of India announced a new industrial policy resolution by a Memorandum, dated 1.4.2007, namely, North-East Industrial and Investment Promotion Policy, 2007 (NEIIPP), ("2007 IPR"), where under a package of fiscal concessions and other concessions for the North-Eastern region were promised.

(xi) Under the 2007 IPR too, the incentives were promised in respect of those industrial units, which were to be set up, on coming into force of the 2007 IPR, as well as those industrial units, which had existed before coming into force of the 2007 IPR, but which would undertake substantial expansion of their respective industrial units, in terms of the requirement of the 2007 IPR. In terms of the promises made by the 2007 IPR, requisite notification, making the promised excise duty exemption available for the industrial units, was issued on 25.4.2007, the Notification being 20 of 2007, dated 25.4.2007. On the question of excise duty exemption, Clause (v) of 2007 IPR mentions, thus:

Hundred per cent excise duty exemption will be continued on finished products made in the North-Eastern Region as was available in NEIP, 1997.

(xii) The IPR 2007 made it clear that the 1997 IPR and other concessions, made thereunder, in the North-Eastern Region, announced by the Office Memorandum, dated 24.12.1997, would cease to operate with effect from 1.4.2007, but the Industrial Units, which had commenced commercial production, on or before

31.3.2007, would continue to receive benefits/incentives under the NEIP, 1997 (i.e., 1997 IPR) until expiry of the promised period of ten years from the respective date of commencement of their commercial production.

(xiii) In the present set of writ petitions, thus, there are four distinct categories of investors, namely, (i) those, who had set up their industrial units under the 1997 IPR and claim 100 per cent exemption from payment of excise duty; (ii) those, who had in existence such industrial units, as specified under the 1997 IPR, when the 1997 IPR came into force, but undertook substantial expansion as were required under the 1997 IPR and, having made such substantial expansion, they claim to be entitled to the benefits as were promised and assured to them by the 1997 IPR; (iii) those, who have set up their respective industrial units under the 2007 IPR and claim to be entitled to receive such benefit as were promised and assured to them under the 2007 IPR; and (iv) those, who have expanded the installed capacity of their respective industrial units to the extent as were necessary under the 2007 IPR, and claim, therefore, to have become entitled to receive the benefits as were promised and assured to them by the 2007 IPR. All these Petitioners claim to have commenced their commercial production in terms of the relevant IP Rs, namely, 1997 IPR and 2007 IPR, as the case may be. The Petitioners claim that having established their industrial units, or having expanded their industrial units, and having started production from such industrial units within the prescribed period, they had been receiving, without any interruption, 100% refund of the amount of excise duty paid in terms of the Notification Nos. 32/ 99-CE and 33/99-CE dated 25.4.2007.

(xiv) The grievance of the Petitioners is that with the help of the Notification No. 17/2008, dated 27.3.2008, the Ministry of Finance, Department of Revenue, Government of India has amended the notification, dated 32/99-CE, aforementioned and by the notification, dated 27.3.2008, the excise duty refund has been restricted to the maximum limits as specified in the rate column of the table appended to the said notification, whereunder different rates of maximum limits of exemption have been specified in respect of different goods. For instance, the goods produced by the Petitioners, as stated in WP(C) No. 2143/2008, fall under chapter 85 of the Schedule to the Central Excise Tariff Act, 1985. The maximum limits of excise duty refund in respect of such goods would, now, be 31%, whereas, according to the Petitioners, in WP(C) No. 2143/ 2008, they were entitled to receive 100% refund as had been promised under the 1997 IPR and also the subsequent notifications issued in this regard. The Petitioners have, therefore, impugned the notification, dated 27.3.2008, aforementioned by contending, inter alia, that the amendments, which the notification No. 32/99-CE, dated 8.7.1999, had undergone, continued to provide the promised exemption of excise duty without any curtailment except that the Government, with the help of the amendments, which were made, took care to ensure that the benefit of exemption was not used for purposes other than what the 1997 IPR and the exemption notifications had envisaged, but the impugned notification, dated 27.3.2008, has changed the entire scenario by reducing

promised limit of exemption inasmuch the exemptions were, until before the issuance of the impugned notification, available to the extent of 100%, whereas the impugned notification reduces the same to a limited percentage.

3. Before proceeding further, it may be appropriate to point out that justifying the issuance of the impugned notifications, the Respondents alleged that some unscrupulous manufacturers showing bogus production and thereby gaining undue benefit in the form of excise duty exemption and, it was for this reason, that the impugned notifications have been issued without affecting the interest of the genuine manufacturers. The Respondents further clarified by reiterating that the genuine manufacturers would continue to receive exemption from payment of excise duty to the same extent as they were entitled to receive and had, in fact, been receiving under the earlier notifications. The Respondents claim that the 1997 IPR and the notifications, earlier issued there under, all aimed at giving exemption from payment of excise duty to the extent of value addition and not anything beyond and this exemption remains still available with the genuine manufacturers. In this regard, in their affidavit, the Respondents justify the issuance of the Impugned notification in the following words:

7. An analysis of cases booked by the Excise department and the representations received from the Industry Associations has revealed that the following modus operandi is broadly being followed:

(i) Reporting of bogus production by mere issuance of sale invoices without actual production of goods and supply, clearance of excisable goods. This would result in a ailment of CENVAT credit by buyers of such excisable goods in other parts of the country without actual production being carried out and in absence of actual receipt of goods.

(ii) Reporting of bogus production by such units in these areas where actual production takes place elsewhere in the country.

(iii) Over valuation of goods resulting in a ailment of excess of credit by buyer.

(iv) Goods are supplied by manufacturers, importers to these units without issuance of sales invoice and these are backed by bogus sale invoices issued by traders who do not undertake actual supply of goods. The actual supplier of these goods issue bogus duty paid invoices to other manufacturers who take credit based on such invoices without receipt of goods. To elaborate the above modus operandi, I beg to give the following illustration.

Illustration 1: - A Unit in North east reports fictitious production of Rs. 100, which has actually not taken place and pays full duty of Rs. 16 in cash. It is submitted that obviously there is no CENVAT credit available in as much no input or raw material has been purchased by him. Such a purchaser claims full refund from the Government under the scheme. No-doubt one can argue that there is no loss to the Government as the Government has collected Rs. 16 and refunded only the same amount. However, the fact remains that the said manufacturer

issues sales invoices showing excise duty payment to another buyer/ manufacturer in other parts of the country entitling and making the buyer eligible to take CENVAT credit of Rs. 16. The subsequent buyer, manufacturer utilizes this credit of Rs. 16 for payment of excise duty on goods manufactured by him and as a result, he pays excise duty less in cash to the extent of Rs. 16 for which CENVAT credit though ineligible (on account of actual non production of goods) is availed by him. In this way, there is a clear loss to the Government of Rs. 16 and the manufacturer in North East illegally gains that amount as he is recovering this amount from his customers.

Illustration 2: - If an input valued at Rs. 100 is manufactured in Ahmedabad and cleared on payment of duty of Rs. 14 to a unit in the North East, who in turn makes a value addition of Rs. 50, in such a case the Government wants to give excise duty refund of Rs. 7 to the unit in North East on the value addition of Rs. 50 and to this extent the product manufactured in North East should become cheaper by Rs. 7. However, if the same manufacturer in North East shows the purchase of these inputs from a trader on a non duty paid invoice which is in fact a non duty paid invoice, in that case, he pays a total duty of Rs. 21 in cash, i.e., excise duty at 14 per cent on Rs. 150 (the sum total of Rs. 100 because of input and Rs. 50 value addition as mentioned hereinabove) and gets the refund of Rs. 21 after paying duty in cash from the personal ledger account. At the same time, such manufacturer recovers a duty of Rs. 21, from his customers and gives him the net benefit of Rs. 21 entitled to be claimed as CENVAT credit against the intended benefit of Rs. 7 which should be the only entitlement. In other words, the Government has to give refund for the goods manufactured in other parts of the country as a result of manipulation indulged into by such a manufacturer.

8. These are general illustrations of misuse exemption given by the Government, which was meant to be available only for genuine manufacturers.

9. Your humble applicant submits that by adopting such modus operandi, the unit in these areas were wanting to pay maximum amount of duty in cash so that they become entitled to a claim of refund of entire amount of duty paid in cash. In order to verify this aspect, a study has been made by the Excise department on receipt of information from the Director General, Central Excise Intelligence and other such agencies to find out the percentage of excise duty paid in cash and from the CENVAT Credit account by the units availing this area based exemption. On receipt of these details they were compared with the duty payment details of the same industry groups for all the units across the country to find out whether the percentage of duty paid by the units in cash in the specified areas is comparable with the units in the rest of the country. An analysis of these details, clearly shows that the industry sectors in the specified areas were paying a very high percentage of duty in cash, i.e., through Personal Ledger Account in comparison to the all India, payment of duty through PLA on similar goods. It is submitted that had these units in the specified areas paid excise duty without indulging in deliberate manipulations, as referred to

hereinabove, there was no reason why the cash portion of the excise duty in the specified region would be so alarmingly high vis-a-vis the payment of excise duty by cash by in respect of similar product in the rest of the country. The above analysis coupled with the details of the cases booked by the Excise department as well as the details received on representations of industry associations, which were adversely affected due to unfair competition, further prove the fact of general tendency of manufacturer in specified areas who indulge in such manipulative tactics by issuing either bogus production or bogus purchase of raw materials from traders. Such analysis duty exemption which was considered expedient in public interest and given by the Central Government with a laudable object of having genuine industrialization in either backward areas or areas like North East. Misuse of excise duty exemption being rampant and the effect of such manipulative acts which were brought to the notice of the Government was to defeat the purpose, policy and intention of the Government to provide excise duty exemption only in respect of genuine manufacturing activities carried out in these areas. The entire genesis of the policy manifesting the intention of the Government to grant excise duty exemption was to provide such exemption only to actual value addition made in these areas. It is in background of these facts and with a view to give effect to such a policy, the Government in exercise of the powers conferred u/s SA has modified the refund mechanism so as to provide that excise duty refund would be allowed only to the extent of duty payable on actual value addition made by manufacturers undertaking manufacturing activities in these areas. As a result of the above said modification, manufacturers are required to pay duty on the full value of goods manufactured and cleared by them in the same manner as per existing scheme but refund would be granted only to the extent of duty paid on the actual value addition made by them in these specified areas.

10. That as a result of such modification which has been considered by the Central Government to be expedient in public interest and in the interest of the Revenue, such a modification has been brought out. The effect of such modification is as follows:

(i) It is submitted that genuine manufacturers are not likely to be affected inasmuch as they would be getting the refund of same amount under the scheme before and after the modification, because if the inputs are duty paid then the refund under the earlier scheme and modified scheme should be of the same amount.

(ii) Unscrupulous manufacturers reporting bogus production and who are resorting to fictitious purchase of inputs on the strength of invoices which are non duty paid invoices would be getting excise duty refund of duty paid on actual value addition made by such manufacturers who have industries in these specified areas.

(iii) The excise duty exemption would be available only to the extent of actual value addition made in these areas and not for the value of raw material

manufactured in other part of the country, which are received by the units in these areas without cover of duty paying invoices.

4. By way of an additional affidavit, the Respondents have also placed on record the notification, dated 10.6.2008, whereby some further amendments to the earlier Notification No. 31/2008, dated 27.3.2008, has been introduced. In this regard, the Respondents submit that following the impugned notification, dated 27.3.2008, many representations were received from different industrial bodies and associations and, after considering their grievances, Government of India, Ministry of Finance, has issued the notification, dated 10.6.2008, aforementioned, u/s 5A of the Central Excise Act, 1944, modifying some of the clauses of the earlier impugned notification, dated 27.3.2008, to take care of some of the grievances of the industries.

5. It may be pointed out that the subsequent notification, dated 10.6.2008, has, in effect, given liberty to an industrial unit to apply to the Commissioner for determination of the actual value addition if the manufacturer of such an industrial unit does not agree to the rate of excise duty exemption, which has been made available to the manufacturer under the impugned notification, dated 27.3.2008. Under the notification, dated 10.6.2008, the Commissioner can determine the actual value addition in the production or manufacture of goods and, then, refund accordingly the excise duty to the extent of value addition made. The determination of the actual value addition has been termed as "special rate". In effect, thus, what the Respondents contend is that it is only when there is value addition in manufacturing a product that the manufacture would be entitled to exemption of excise duty payable on such a product. The Respondents further contend, (In this regard, and it is this aspect, which is under challenge) that the refund of excise duty would be limited to the extent of value addition and not beyond. In other words, according to the Respondents, the 1997 IPR, and the notifications issued thereunder, entitled a manufacturer to receive refund if there was value addition in the final product and, secondly, (though more importantly), the excise duty refund was available only to the extent of value addition and no more. In short, thus, the Respondents contend that a manufacturer would be entitled to exemption from payment of excise duty only if there is value addition and that the quantum of refund would be limited to the extent of value addition and no more. To put it a little differently, the Respondents' case is that unless there is value addition, there is no entitlement to receive refund and the quantum of refund is limited to the extent of value addition made. Thus, if for instance, excisable input in a finished product is Rs. 10 and the excise duty payable on the finished product is Rs. 50, the refund would be to the extent of Rs. 40 and no more.

6. I may pause here to point out that in some of the writ petitions even the notification, dated 10.6.2008, aforementioned, whereby Commissioner has been given the power to determine the actual value addition has been challenged on the ground that the mechanism, provided thereunder, does not make available to

the Petitioners exemption from payment of excise duty to the same extent as had been promised to them by the 1997 IPR and various notifications issued earlier in this regard.

7. I have heard learned Counsel for the Petitioners and Mr. K.N. Choudhury, learned senior counsel, appearing on behalf of the Respondents. The arguments of Mr. P.K. Goswami, learned senior counsel, who has appeared on the behalf of one of the Petitioners, have been, by and large, adopted by the learned Counsel for the remaining Petitioners, except, to some extent, as would be indicated hereinbelow, the arguments of Dr. Saraf, learned senior counsel, who has also appeared on behalf of some of the writ Petitioners.

8. Pithily speaking, the challenge, posed to the impugned notifications, is based on the doctrine of promissory estoppel. It has been pointed out by Mr. P.K. Goswami, learned senior counsel, that under the 1997 IPR, Union of India had taken a policy decision to grant complete exemption, from payment of excise duty, for a period of ten years, to the eligible industrial units in respect of their, industrial activities and it was to give effect to this policy decision that the Notification No. 32/99-CE, dated 8.7.1999, had been issued granting complete exemption from payment of excise duty, or additional excise duty, on finished products inasmuch as the notification, dated 8.7.1999, aforementioned made it clear that the specified goods stood exempted from payment of so much of duty of excise, or additional duty of excise, as may be leviable on the products, equal to the amount to be paid by the manufacturers of the goods from the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1944. The 1997 IPR, contends Mr. Goswami, clearly held out a promise for grant of complete exemption from payment of excise duty to the industrial units in respect of their specified products. The Petitioners, according to Mr. Goswami, acted upon the promise, so made, inasmuch as they have, lured by the promises, made huge Investments and established industries for production of such goods as make the Petitioners entitled to claim refund. Mr. Goswami submits that the Petitioners have, thus, relying and acting upon the representations made, in the said industrial policy by the Government, have altered their position to their detriment. In such circumstances, submits Mr. Goswami, doctrine of promissory estoppel does not permit withdrawal of promises made under the said industrial policy by issuing a notification, such as, the present one, by the Ministry of Finance, Government of India, which clearly has the effect, according to Mr. Goswami, of reducing the benefits of complete exemption from payment of excise duty inasmuch as the impugned Notification makes exemption available only to the extent of value addition; whereas the 1997 IPR and the earlier Notifications made exemption from payment of excise duty available on the finished products. This apart, points out Mr. Goswami, the exemption has, now, been made available only to the extent of specified rates, which have been fixed by the Government; whereas every industrial unit may pay different cost for raw-materials and it is not necessary that the value addition in a given product, by two different industrial units would be to the

same extent.

9. It is submitted by Mr. Goswami that if the statutory authority or an executive authority of the State, functioning on behalf of the State, in exercise of its legally permissible powers, had held out any promise to a 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 fetter any legislative or quasi-judicial power inhering in the promisor, then, on the strength of the principle of promissory estoppel, the promisor can be pinned down to keep to the promise made by the promisor. Only in the cases, contends Mr. Goswami, where there is supervening public interest that the Government would be allowed to change 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. However, the court must satisfy itself, agrees Mr. Goswami, that such a supervening public interest exists. Determination of the question as to whether there is supervening public interest or not has to be by the court and such determination cannot be ipse dixit of the Government. So contends Mr. Goswami. In support of these submissions, Mr. Goswami has placed reliance on *Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others*, *Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others*, *MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others*, *Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.*, *U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others*, *Shree Sanyeeji Ispat Pvt. Ltd. and Another Vs. State of Assam and Others*, *M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others*, *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, *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 and Others Vs. State of Kerala and Another*, and *State of Bihar and Anr. v. Usha Martin Industries Ltd.* (1987) 65 STC 430.

10. The doctrine of promissory estoppel, insists Mr. Goswami, is squarely attracted to the facts of the present case and no sustainable reason has been assigned by the Respondents, which can justify their departure from the promises made under the 1997 IPR. Though the Respondents have contended, points out Mr. Goswami, that some of the manufacturers had misused the scheme of exemption, granted under the 1997 IPR, by indulging in bogus productions, the fact remains that none of the Petitioners is claimed to have indulged in such illegal or manipulative activities. Hence, the Petitioners, contends Mr. Goswami, cannot be penalized for the unscrupulous activities, if any, of some manufactures other than the Petitioners. If the Government is allowed to withdraw its promise on the ground that some manufacturers have indulged in bogus production, it would, pleads Mr. Goswami, result in great injustice to the Petitioners, particularly, when the manufacturers, as a class, are not accused of having indulged in bogus production. If not restrained, the

Government's action would, according to Mr. Goswami, be tantamount to not taking action against their own departmental personnel and, instead thereof, punishing the genuine manufacturers.

11. Punishing the Petitioners for the acts, if any, of some unscrupulous manufacturers would be, submits Mr. Goswami, nothing, but arbitrary, for, having established their industrial units, the Petitioners had legitimate expectation that so long as they continued to conduct their business in terms of the relevant IPR and various notifications issued thereunder, 100% exemption from payment of excise duty on their finished products, as had been envisaged and promised and had been earlier made available to them would be continued. Such legitimate expectation, contends Mr. Goswami, barred the Government from resiling from their promises on the basis of the alleged bogus production by some unscrupulous manufacturers. Support for his submission is sought to be derived by Mr. Goswami from the case of MRF (supra) and Sant Steel Alloys (P.) Ltd. (supra). The Petitioners, points out Mr. Goswami, are required to file various returns, weekly, monthly, quarterly, half yearly and annually under the relevant Act and Rules, in respect of excise duty payable, and paid, by them as manufacturers and the personnel of the Department of Central Excise monitor and verify these claims. Attention of this Court, in this regard, has been brought by Mr. Goswami to the provisions contained in chapter III of the Central Excise Act and Rules 22, 23, 24, 25 and 26 of the Rules framed there under. In such circumstances, unless the Industrial activities of the manufacturers, as a class, are found to be against the purport and spirit of the 1997 IPR, the genuine manufacturers cannot be penalized for the failure of the officials of the Respondent Department to catch hold of the violators or for connivance of such personnel of the Respondent Department with such violators. So submits Mr. Goswami.

12. It is contended by Mr. Goswami that the Department of Finance, which is a mere administrative wing of the Central Government, has no power and authority to curtail the benefits announced and promised under the 1997 IPR, for, the 1997 IPR was adopted by the Union Cabinet. Without amending the 1997 IPR, submits Mr. Goswami, Department of Finance cannot curtail or withdraw the Incentives promised under the 1997 IPR. In support of this contention, Mr. Goswami has referred to, and relied upon, the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, . The Impugned Notifications, therefore, according to Mr. Goswami, are not sustainable in law and must, therefore, be set aside and quashed.

13. Let me, now, turn to the resistance offered by the Respondents to this set of writ petitions.

14. The Respondents resist the petition, at the very threshold, by contending that at no point of time, the Petitioners had enjoyed complete or 100% exemption from payment of excise duty inasmuch as the excise duty were to remain confined, according to the Respondents, to the value addition made in the

specified areas. Yet another ground of resistance, offered by the Respondents to the very maintainability of the writ petitions, is that none of the writ petitions, contend the Respondents, lay necessary foundation to attract application of the doctrine of promissory estoppel inasmuch as the writ petitions, according to Mr. K.N. Choudhury, learned senior counsel, do not furnish adequate materials warranting application of the doctrine of promissory estoppel. In this respect, Mr. Choudhury seeks to derive support from Union of India (UOI) and Others Vs. Shree Ganapati Rolling Mills (P.) Ltd. and Others,

15. It is further submitted by Mr. K.N. Choudhury that the impugned notifications merely give effect to the real indentment of the Union Government inasmuch as the 1997 IPR, according to Mr. Choudhury, aimed at giving benefit of exemption from payment of excise duty to such value additions, which may be made, in the specified areas, in the north eastern region, but when the Government of India found that some unscrupulous manufacturers had been indulging in bogus productions by misusing the earlier notifications, the impugned Notifications were issued in order to plug the loopholes, in the earlier Notifications, so that the genuine manufacturers continue to receive such degree of exemption as the 1997 IPR had intended to make available to the genuine manufacturers. The genuine manufacturers would, therefore, according to Mr. Choudhury, not suffer, and whatever reliefs they had been receiving, by way of exemption, prior to the Impugned Notifications, would continue to be received by them even under the impugned notifications.

16. It is further submitted by Mr. Choudhury that the 1997 IPR and the Notifications, issued thereunder, did not vest any indefeasible right in any of the Petitioners, as manufacturer, to claim exemption. When the promises, in respect of exemption from payment of excise duty, were made, under the 1997 IPR, in public interest, the Government is not debarred, under the law, from withdrawing such promises if such withdrawal is, contends Mr. Choudhury, in public interest. In the present case, according to Mr. K.N. Choudhury, the activities of some of the manufacturers were defeating the very object with which the exemptions had been granted under the 1097 IPR. In such circumstances, contends Mr. Choudhury, supervening public interest demanded that the Government modifies the exemption notifications in the manner as have been done by the Government. The modification of the exemption notification is, therefore, according to Mr. Choudhury, wholly valid and justified. In support of his submission, Mr. Choudhury places reliance on the case of R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others,

17. It has been contended by Mr. K.N. Choudhury, learned senior counsel, that to the facts of the present case, the decision, rendered in Suprabhat Steels Ltd. (supra), is not at all applicable inasmuch as, in the present case, the impugned notifications have been issued with the approval of the Union Cabinet and not by the Ministry of Finance, Government of India, alone; whereas, in Suprabhat Steels Ltd. (supra), when the industrial policy was still in force, the

administrative wing of the Government, namely, Department of Finance, had interfered with the exemption, which the State Cabinet, in Bihar, had promised.

18. In the present case, points out Mr. Choudhury, not only the IPR, but also the impugned notifications have the approval of the Union Cabinet. Hence, the decision, in *Suprabhat Steels Ltd.* (supra), has no application to the facts of the present case.

19. It is submitted by Mr. Choudhury that exemption from payment of excise duty was made available to the industrial units in terms of the Government Policy. The Government, according to Mr. Choudhury, cannot be made a slave of its policy and if, by virtue of a policy, the Petitioners were receiving some benefits, there is no legal impediment, on the part of the Government, to adopt another policy and withdraw such benefit if withdrawing of such benefit is necessary in Public Interest. When the Government takes a decision, as in the present case, keeping in mind all relevant considerations, such a policy decision, contends Mr. Choudhury, cannot be interfered with and the doctrine of promissory estoppel cannot estop the Government from changing its policy if such change in policy is not irrational or arbitrary. The adequacy of materials, which prompted the Government to resile from its earlier promises, cannot be looked into by the court for the purpose of determining as to whether the changes in policy is justified. In order to show that the equitable doctrine of promissory estoppel is not at all attracted to the facts of the present case, Mr. Choudhury places reliance on *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, , *Shrijee Sales Corporation and Another Vs. Union of India (UOI)*, , *Dai-Ichi Karkaria Ltd. Vs. Union of India and Others*, , *State of Rajasthan and Another Vs. J.K. Udaipur Udyog Ltd. and Another*, , *State of T.N. and Another Vs. Sun Paper Mills and Another*, and *Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others Vs. Dharmendra Trading Company and Others*,

20. In substance, what the Respondents contend is that at no given point of time, there was total exemption from payment of excise duty on the finished products by the manufacturers under the 1997 IPR. The exemption was limited, according to the Respondents, by two factors, namely, that exemption was to be available to only such Industries, which made requisite value addition, and refund was made available to a manufacturer, who makes value addition, while manufacturing the finished products. This apart, the refund has always been made available, according to the Respondents, to the extent of value addition, which the manufacturer may have made and no more.

21. Reacting to the submissions, made on behalf of the Respondents, it has been pointed out by Dr. Saraf, learned senior counsel, that the Respondents do not have a consistent case to resist the writ petitions inasmuch as they claim, on the one hand, that the impugned notifications have not altered the situation and continues to give the benefits, which were intended by the 1997 IPR, and yet, on the other hand, they have failed to show that the Petitioners would receive exemption from payment of excise duty to the same extent as they had been

receiving during the post-impugned notifications period. This apart, points out Dr. Saraf, when, according to the Respondents themselves, the impugned notifications do not take away any benefit, which the 1997 IPR and/or the notifications issued thereunder, had earlier given to the Petitioners, then, the effect would be that the 1997 IPR has remained intact and, if it has remained Intact, then, the Finance Department, Government of India, cannot take away the benefits, which the 1997 IPR had promised, even if such a decision of the Finance Department receives approval from the Union Cabinet.

22. It is pointed out by Dr. Saraf that the notification, dated 8.7.1999, was issued u/s 5A of the Central Excise Act, 1944, to give effect to the 1997 IPR and was not an independent notification. Section 5A, according to Dr. Saraf, does not empower the revenue authorities to curtail or withdraw the benefits given under the policy decision of the Union of India. In the present case, the impugned notifications have curtailed, according to Dr. Saraf, the extent of exemption, which were, otherwise, available to the Petitioners, as manufacturers, and, when the 1997 IPR has remained, even according to the Respondents, unaltered or unchanged, one of the Ministries of the Union of India, such as, the Department of Finance, cannot reduce the extent of exemption, which the 1997 IPR had promised and made available to the present Petitioners, as manufacturers. Even if such a notification, u/s 5A, was issued with the approval of the Union Cabinet, the fact remains that that such exercise of power is, according to Dr. Saraf, not permissible in law. In support of his submissions. Dr. Saraf, besides what Mr. Goswami has relied upon, referred to the case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., to show that when, acting on the basis of the promise made by the Government, the Petitioners have set up their industrial units, the Government cannot withdraw the earlier promise made by it without proving to the satisfaction of the court that it was in overriding public interest that the Government had to withdraw its promise. In the present case, according to Dr. Saraf, an examination of the question, as to whether there was such supervening public interest, which forced the Government to withdraw its promises made under 1997 IPR, is not even necessary inasmuch as the Government's clear stand has been that whatever benefits were available to the genuine manufacturers under the 1997 IPR are, notwithstanding the impugned notifications, still available to them. If this Court finds, points out Dr. Saraf, that this plea of the Government is incorrect, it would be sufficient to set aside the impugned notifications inasmuch as the notifications would, then, in such a case, be held to be suffering from complete non-application of mind inasmuch as the Government does not even know that the impugned notifications have the affect of withdrawing the promises, which the Government had made. Such a decision, which is reached unconsciously and without application of mind to all relevant factors, cannot but be treated, submits Dr. Saraf, as irrational and arbitrary.

23. Extensively reading out the decision, rendered in Ganapati Rolling Mills (P.) Ltd. (supra), Dr. Saraf points out that in Ganapati Rolling Mills (P.) Ltd. (supra), the Petitioners were required to show that they had set up their industries or

extended the capacity of their industries acting on the 1997 IPR. However, specific finding of the High Court, in this regard, in Ganapati Rolling Mills (P.) Ltd. (supra), was that all the Petitioners had established their respective industrial units before the 1997 IPR came into force. In such circumstances, the Petitioners, in Ganapati Rolling Mills (P.) Ltd. (supra), ought to have shown, further points out Dr. Saraf, that they had increased the capacity of their respective industrial units to the extent as the 1997 IPR required, but they had made out no such specific case in their writ petitions inasmuch as none of the writ Petitioners had claimed, in Ganapati Rolling Mills (P.) Ltd. (supra), that they had increased the capacity of their respective industrial units, acting upon the 1997 IPR, to the extent as the 1997 IPR had made it mandatory for an industrial unit to claim exemption from payment of excise duty on their finished products. In such circumstances, the court, in Ganapati Rolling Mills (P.) Ltd. (supra), concluded, points out Dr. Saraf, that the Petitioners had not laid a clear foundation for invoking the equitable doctrine of promissory estoppel. To the case at hand, submits Dr. Saraf, the decision in Ganapati Rolling Mills (R) Ltd. (supra) has no application at all inasmuch as the Respondents have not even cited one case, in the present set of writ petitions, to clearly show as to which writ petition does not lay adequate foundation for attracting the application of the doctrine of promissory estoppel. Thus, a bald assertion by the Respondents that no clear foundation for attracting the doctrine of promissory estoppel has been laid in the writ petitions does not, according to Dr. Saraf, carry any weight.

24. A policy decision, according to Dr. Saraf, may be, otherwise, legal or rational; but if it tends to take away the rights, which an industrial unit has acquired, because of the application of the doctrine of promissory estoppel, the Government cannot use the policy decision as a shield to deny and resile from the promises made by it unless it satisfies the court that overriding public interest requires that the Government should not be held bound by the promise it had made and it is such supervening public interest, which forced the Government to change its earlier policy decision.

25. It is the submission of Dr. Saraf that while dealing with a case, in which involves application of the doctrine of promissory estoppel, it is not enough for the Government to say that there is a change in its policy. It would be, according to Dr. Saraf, the duty of the Government, in such a case, to place before the court all the materials, based on which the decision to withdraw the exemption was taken, and it will be for the Government to satisfy the court that supervening public interest had forced the Government to resile from the promise made earlier. In order to ascertain as to whether supervening public interest protects such an action of the Government or not, the court would have to look, insists Dr. Saraf, on adequacy of the materials to determine, for itself, as to whether it is really supervening public interest, which forced the Government to withdraw from the promise made by it.

26. It is further submitted by Dr. Saraf that the illustrations, given by the

Respondents, in their affidavit-in-opposition, Indicating as to how bogus production have been taking place, are completely illogical Inasmuch as the illustrations have failed to indicate as to what benefit the purchaser would have if he makes bogus purchase from unscrupulous manufacturer. The Respondents affidavit, contends Dr. Saraf, has also failed to indicate that any survey had been conducted by the Government to find out if the industrial activities, in the areas other than the areas, which fall under the domain of the 1997 IPR, are all genuine. Dr. Saraf points out that the Industrial units, established under the 1997 IPR, received full exemption from payment of excise duty and, in such circumstances, their tendency would be to pay excise duty as much as payable in law; whereas no such exemption being available to industrial units, in the areas, which fallout side the 1997 IPR, there is likely to be the tendency to avoid payment of excise duty and pay as less excise duty as possible; hence, it is quite possible, points out Dr. Saraf, that those industrial units, which are covered by 1997 IPR, have been, truthfully and faithfully, paying excise duty, whereas those industrial units, which are not covered by 1997 IPR, would be suppressing the extent of their respective excise duty liability and, consequently, paying less excise duty than the present Petitioners. In such circumstances, further points out Dr. Saraf, the Government's assumption, that the industrial units, not covered by 1997 IPR, have been paying as much excise duty as were payable by them, cannot be readily and safely relied upon. Such a presumptuous approach by the Government is without any rational basis inasmuch as the Government has not placed any material to show, submits Dr. Saraf, that the quantum of excise duty paid by the industrial units, not covered by 1997 IPR, have been correct. When the Government, contends Dr. Saraf, does not claim, on oath, that the industrial units, which fall outside 1997 IPR, have been paying so much of excise duty as are actually payable by them, one cannot, safely and confidently, reach the conclusion that because of the fact that the industrial units, covered by 1997 IPR, have been paying more excise duty through PLA, the have been indulging in bogus production compared to those, which are not covered by 1997 IPR and which pay less excise duty through PLA. Relying upon such inconclusive materials, the Government, contends Dr. Saraf, cannot be allowed to plead that payment of excise duty by the industrial units, in the specified areas, covered by the 1997 IPR, is false or manipulated. This is an essential aspect of the matter, which appears to have, according to Dr. Saraf, wholly escaped attention of the Union Cabinet.

27. From the submissions, made on behalf of the Respondents, what becomes transparent is that the Respondents do not, as contended by Dr. Saraf, have a consistent case. While, on the one hand, the Respondents contend that the impugned Notifications do not reduce the exemption, which the earlier Notification, namely, No. 32/99-CE, dated 8.7.1999, issued under the 1997 IPR, had made available to the manufacturers, the Respondents, at the same time and in the same breath, contend, on the other hand, that the Petitioners cannot be said to have any vested right, by virtue of the 1997 IPR and/or the earlier

Notifications, to claim benefit of exemption other than what the impugned notifications have, now, made available to the Petitioners as manufacturers. This inconsistency is sought to be explained by the Respondents by contending that their scheme of exemption, as provided under various notifications, had some loopholes and that the impugned notifications have been issued merely to plug these loopholes and that even the impugned notifications continue to give to the genuine manufacturers the reliefs, which they were, otherwise, also, entitled to receive and had, in fact, been receiving by establishing their industrial units under 1997 IPR.

28. Let me, therefore, ascertain as to whether the contention of the Respondents that at no point of time, the Petitioners had enjoyed complete or 100 per cent exemption from payment of excise duty and that the excise duty refund, at all stages, had remained confined to the value additions, made in the specified areas, is correct.

29. While considering the above aspect of the case, it is necessary to point out that the 1997 IPR, with regard to the fiscal incentives, read, inter alia, thus:

FISCAL INCENTIVES TO NEW INDUSTRIAL UNITS AND THEIR SUBSTANTIAL EXPANSION.

(i) Government has approved for converting the growth centers and II Ds into a total Tax Free Zone for the next 10 years. All industrial activity in these zones would be free from Income Tax, 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.

(ii) Industries located in the growth centers would also be given Capital Investment Subsidy at the rate of 15% of their investment in plant and machinery, subject to a maximum ceiling of Rs. 30.0 lakh.

30. From a bare reading of the fiscal incentives offered by the 1997 IPR, it becomes clear that the incentive, which the 1997 IPR had promised, was that in the specified zones, which were to be treated as tax-free zones, all industrial activities, for a period of ten years, with effect from the date of commencement of production, would be free from payment of, inter alia, excise duty. In the face of the declaration, so clearly and unequivocally made under the 1997 IPR, there can be no room for doubt that the 1997 IPR did, indeed, promise that the industrial activities, in the specified zones, would remain, for the said specified period, free from payment of, inter alia, excise duty. It is this promise, which was sought to be concretized by issuing the notification No. 32/99-CE, dated 8.7.1999. This notification read as under:

No. 32/99-CENTRAL EXCISE DATED 8TH JULY, 1999

GSR 508(E) - In exercise of the powers conferred by the Sub-section (1) of Section 5A of the Central Excise Act, 1994 (1 of 1944), read with Sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act,

1957 (58 of 1957) and Sub-section (3) of Section 3 of the Additional Duties of Excise (Textile and Textile Articles Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (1 of 1986) and cleared from a unit located in the Growth Centre or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estates or Industrial Area or Commercial Estate, as the case may be, specified in Annexure appended to this notification, from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods from the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1994.

31. The emphasized portions of the above notification, dated 8.7.1999, more than amply demonstrate that what had been made available to a manufacturer, under the 1997 IPR, was exemption from payment of excise duty, additional excise duty, on the specified goods, to the extent of the amount of duty paid by the manufacturer from the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1944. Thus, the 1997 IPR promised to give 100 per cent exemption from payment of excise duty and the Notification No. 32-CE/99, dated 8.7.1999, too (which was published to make the exemption, so promised under the IPR, available) declared, unequivocally, that a manufacturer would be entitled to claim exemption from payment of so much of excise duty (or additional excise duty) as would, otherwise, be payable on the goods manufactured by him if the goods are such, which have been specified for the purpose of granting such exemption. Thus, if a manufacturer produces specified goods, he would be entitled to refund of excise duty to the extent as would be payable on his finished products. It needs to be carefully noted that excise duty is payable on a finished product by the buyer of such a product and when the manufacturer realizes excise duty from the buyer, he is required to deposit excise duty, so collected, in the Government treasury. The benefit; of excise duty exemption mean that though the buyer would pay excise duty and such excise duty is deposited by the manufacturer with the Government, the Government would return, in the form of refund, excise duty, which had been collected by the manufacturer from the buyer and deposited, on such collection, with the Government. There is nothing either in the 1997 IPR or in the notification, dated 8.7.1999, to even faintly indicate that excise duty exemption would be available only to the extent of such value as may be added to the raw materials used by the manufacturer.

32. I have also pointed out above that CENVAT credit rules were framed simplifying the credit provision and procedure for availing credit of the duty paid on input and capital goods used, whether directly or indirectly, in, or in respect of, manufacture of final products. The credit of the duty, so allowed, could be used for payment of excise duty leviable on the finished goods subject to the

conditions laid down in the relevant Rules. The basic object of allowing credit on CENVAT was to ensure that there is no cascading effect of levy of excise duty the Rules framed aimed at collecting excise duty on the finished goods and thereby the manufacturer of finished goods were enabled to take credit of the duty paid on the inputs or the capital goods used in the manufacture of finished products and could utilize the said credit for payment of excise duty on the final finished products.

33. It has also been pointed out as to why and how the changes in the CENVAT rules were made. The final picture, which emerges, in this regard, because of the amendment of the notification No. 32/99-CE, dated 8.7.1999, by the subsequent notification No. 65/2003, dated 6.8.2003, may be considered in the light of paragraph 1A thereof, which reads as under:

1A. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption, contained in this notification, shall be available subject to the condition that the manufacturer first utilize whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

34. The proviso to Clause (b) of paragraph 2 was also substituted with the following: -

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

35. The amendments, so introduced, made it mandatory for a manufacturer of eligible goods to, first, utilize the CENVAT credit available to him on the last day of the month under consideration for payment of excise duty on goods cleared during such month and to pay balance amount in cash. The substituted proviso ensured that refund is not claimed in respect of the duty paid on goods not eligible for exemption. What these amendments, thus, aimed at achieving was to ensure that the amount, accumulated in CENVAT credit, gets exhausted before the manufacturer pays the excise duty in cash, and, secondly, it was also ensured that the refund is not claimed in respect of the duty paid on goods, which are, otherwise, not specified goods and are not eligible for exemption. The amendments, thus, plugged some loopholes, which existed in the notification, dated 8.7.1999. The extent of benefit of exemption was, however, continued to be made available as were available to a manufacturer at the very inception of the scheme of exemption. No wonder, therefore, that Clause (v) of 2007 IPR shows (as will be noticed hereinbelow) that the Government has promised that 100 per cent excise duty exemption will be continued, on finished products, in the North-Eastern region, as was available under the 1997 IPR.

36. Though the contents of the 1997 IPR, the notification, dated 8.7.1999, and the scheme of the subsequent notifications, on the subject of CENVAT credit, as already indicated above, is sufficient to conclude and hold that at all relevant point of time, the Union Government had promised and made available to the manufacturers complete exemption from payment of excise duty, the subsequent industrial policy, namely, 2007 IPR, makes, in fact, the position more explicit and clearer inasmuch the 2007 IPR states:

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

37. A bare reading from what have been quoted above makes it clear that the Government announced that 100 per cent excise duty exemption, on finished products, manufactured in the north eastern region, would be continued, as was available under the 1997 IPR. It is clear from what the 2007 IPR promises that after the experience of one decade of giving incentive by way of exemption, there was no doubt in the mind of the Government, when it published the 2007 IPR, that the manufacturers had been receiving, under the 1997 IPR, complete exemption from payment of excise duty, and, in this regard, the Government made its position clear, in 2007 IPR too, by stating that 100 per cent excise duty exemption, as promised to the manufacturers, under 1997 IPR, would be continued on the finished products. In the face of such a bold, precise and clear declaration by the Government Itself, it does not, now, remain open for the Respondents to even contend that the Petitioners had, at no point of time, enjoyed 100% exemption from payment of excise duty. The conclusion, so reached, is sufficient to reject the Respondents' contention that the Petitioners had, at no point of time, enjoyed complete or 100% exemption from payment of excise duty.

38. Confronted with the promise made under 2007 IPR, Mr. Choudhury agrees that even the 2007 IPR promised to continue to make 100% excise duty available as had been made available under the 1997 IPR. Situated thus, there can be no doubt that until the time the impugned notification, dated 27.3.2008, and/or notification, dated 10.6.2008, were issued, a person, establishing an industry, in terms of the 1997 IPR, had enjoyed 100% exemption from payment of excise duty on the finished products.

39. I may, at this stage, pause and refer to the written submission, submitted on behalf of the Respondents, whereby the Respondents have, inter alia, endeavored to depict the refund mechanism until before issuance of the impugned notifications. The written submission reads like this:

...at the exemption envisaged to the industrial units following the New Industrial Policy and the notification dated 8.7.1999 was granted by way of refund mechanism. The mechanism operates in the following manner. The manufacturer who sets up new unit/undertakes substantial expansion and commences commercial production pays excise duty on the "sale value" of the goods while clearing excisable goods from his factory. The excise duty paid by the manufacturer initially out of the excise duty/CENVAT credit available with him on the purchase of duty paid raw materials and the balance duty is paid in cash. It is only when the balance duty is paid in cash from the Personal Ledger Account (PLA) then the question of paying refund of the duty amount paid in cash in succeeding month arises. It was noticed by the competent authority that some unscrupulous manufacturers were indulging in paying duty in cash without utilizing the CENVAT credit paid on inputs and, thereby, were getting an unintended benefit. Following detection of the aforesaid mischief, the same was sought to be remedied by issuing the aforementioned Notification No. 35/01-CE dated 29.6.2001. It was followed by Notification No. 61/02-CE dated 23.12.2002 and Notification No. 65/03-CE dated 6.8.2003. All these notifications emphasized that the manufacturer first utilizes whole of the CENVAT Credit available to him on the last day of the month under consideration for payment of duty on goods cleared in such month and pays only the balance amount in cash.

40. From the above depiction of the refund mechanism by the Respondents themselves, what becomes clear is that a manufacturer is required to pay excise duty on two distinct occasions, namely, (i) when he uses inputs, which are subject to excise duty payment, and (ii) when, he sells a product, on its being manufactured, which is also subject to excise duty. The excise duty, which such a manufacturer pays on the input, and the excise duty, payable by him on the sale value of the finished goods, are both received by the manufacturer, when he makes sale. The scheme, as explained by the Respondents themselves, shows that on sale being made and excise duty having been realized from the buyer, the manufacturer takes out the amount, which he has paid in the form of excise duty on his input and this amount is accredited as CENVAT Credit, and the remaining amount of excise duty, which he receives from the buyer, on the sale value of his finished products, is deposited by him with the Government treasury, in cash, from his PLA. The amount, which he deposits through PLA, is refunded to him. However, the CENVAT credit takes care of the excise duty, which the manufacturer had paid on his input. Thus, on the sale value of his finished products, the manufacturer receives, in the form of CENVAT Credit, excise duty, which he had paid on the input, and the remaining amount of excise duty paid by him, through the PLA, is refunded to him. Viewed from this angle, it becomes clear that the manufacturer was to receive, even according to the scheme, as depicted by the Respondents themselves, complete exemption from payment of excise duty. When such a manufacturer goes for further production, what the manufacturer does is that while making payment of excise duty on inputs, he is required to, first, exhaust the CENVAT credit available with him and after

exhausting the CENVAT credit, he can pay excise duty, in cash, through PLA.

41. Appearing on behalf of the Respondents, Mr. K.N. Choudhury, learned senior counsel, cites the following table for the purpose of showing that the Petitioners were never entitled to 100 per cent exemption from payment of excise duty:

Value of input finished goods	Excise duty on input Amount to be paid through PLA	Value of finished goods Amount refunded by Excise Deptt.	Excise duty on Excise duty collected from customer
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A B C D E=(D-B) F G

100 10 500 50 40(50-10) 40 50

42. A bare glance, at the table, relied upon by Mr. Choudhury, reveals that if excise duty on the input is Rs. 10 and the excise duty on the finished good is Rs. 50, the manufacture recovers from his customer Rs. 50. Out of recovery of Rs. 50 as excise duty, the manufacturer, admittedly, pays, through PLA, Rs. 40 and retains with him remaining amount of Rs. 10. Thus, the manufacturer recovers Rs. 10 by retaining the said amount with him and the sum of Rs. 40, which was paid by him through PLA, is refunded to him by the Department of Excise. Hence, the manufacturer, in effect, remains completely free from payment of excise duty.

43. In order to correctly appreciate the submissions made by Mr. Choudhury, it is necessary to point out that under the notification, dated 8.7.1999, a manufacturer, under the 1997 IPR, was entitled to the refund of excise duty equivalent to the amount of the duty paid by the manufacturer of the goods from the account current maintained under Rule 9 read with Rule 173G of the Central Excise Rules, 1944. Thus, prior to the amendment, which the notification, dated 8.7.1999, underwent, the scheme of exemption was as under:

Value of finished goods	Excise duty	Amount through PLA	Refund by way of exemption
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(In Rupees) (In Rupees) (In Rupees) (In Rupees)

1000 100 100 100

44. The subsequent amendments, which were introduced to the notification, dated 8.7.1999, by notifications, dated 29.6.2001, 23.12.2002 and 6.8.2003, made it mandatory for the manufacturer to utilize, the CENVAT credit, available with him, for payment of excise; duty and after utilizing the CENVAT credit, available with him, for payment of excise duty, a manufacturer could/pay and can even now, pay the balance amount in cash.

Value of input leviable	Excise duty paid & Cenua-table Excise duty collected from customer	Value of finished goods Amount to be paid through PLA	Excise duty Amount refunded by the Govt.	Amount retained by manufacturer
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A B C D E F=D-B G=F H=E-P

Rs. Rs. Rs. Rs. Rs. Rs. Rs. Rs.

200 20 1000 100 100 100-20=80 80 100-80-20+F=-100 Total =100

45. From the above chart, it becomes more than demonstrative that although after utilization of CENVAT credit, the amount paid, through PLA account, was Rs. 80 only and though the refund to be granted by the Excise Department was Rs. 80 only, the fact remains that the manufacturer had collected Rs. 100 from the customer and thereby retained Rs. 20 with him, while making payment through PLA account.

46. What surfaces from the above discussion is that until issuance of the impugned notifications, the ultimate benefit of exemption, available to the manufacturer, remained the same, i.e., 100 per cent. There is considerable force in the submission of Dr. Saraf that exemption can be granted by prescribing various modes like making payment of the excise duty first and, then, get refund of the amount or by not making payment of excise duty at all and receive remission. It is clear from the scheme, as depicted from the above chart, that while exemption to the extent of Rs. 80 was granted by way of refund, Rs. 20 was by way of remission inasmuch as the manufacturer collected Rs. 100 from the customer, but paid Rs. 80, which too was returned by way of refund.

47. Correctly, therefore, has emphasized Dr. Saraf that excise duty exemption was granted by notification, dated 8.7.1999, on finished products to the extent of 100 per cent and such exemption continued to be 100 per cent, on the finished products, even after the notice, dated 29.6.2001, 23.12.2002 and 6.8.2003, had been issued.

48. Though the above conclusion, reached by this Court is, once again and as before, sufficient to reject the Respondents' contention that even before the impugned notifications, dated 27.3.2008 and 10.6.2008, were issued, a person, covered by the 1997 IPR, had not been receiving 100% exemption from payment of excise duty, this Court, as a measure of abundant caution, made a pointed query from the learned Counsel for the Respondents as to why It had been contended that under the 1997 IPR too, excise duty exemption was available only on value addition. Responding to this query, it has been, somewhat, reluctantly conceded, on behalf of the Respondents, that so far as the 1997 IPR and the exemption notifications issued there under are concerned, these never spoke of value addition and it is the 2007 IPR, which has, for the first time, spoken about value addition.

49. As regards the value addition, 2007 IPR states as under:

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

50. A careful reading of what has been reproduced above shows that in order to ensure genuine industrial activities in the North-Eastern Region, the Government clearly announced that the benefit of exemption would not be available to such finished goods in respect of which only peripheral activities, like preservation during storage, cleaning operations, packing, re-packing, labelling or re-labelling, sorting, alteration of retail sale price, etc., take place.

51. A bare reading of what has been reproduced above, with regard to value addition, appearing in 2007 IPR, clearly shows that value addition is not referable to the quantum of excise duty, but to the industrial activities. Those industrial activities, which were not making any real value addition and which amounted to merely peripheral such as, the ones as mentioned hereinbefore, it was made dear by 2007 IPR that such activities, though may be industrial activities, would not entitle a person to claim the benefit of exemption. Nothing, contained in what has been reproduced above, indicates that if a person is, otherwise, carrying on an activity, which is not excluded from the benefit of exemption, such a person would not be entitled to full exemption of excise duty on his final product.

52. I may pause here to point out that even while packing or repacking, labeling or re-labeling, etc., there is definitely some value added to the goods, but such addition of value, not being significant and material, would not be regarded, under the 2007 IPR, as activities, which would entitle a manufacturer to claim exemption from payment of excise duty on the finished product. But when an activity, which is, otherwise, regarded as an industrial activity, is carried on under the 2007 IPR, the benefit of exemption would be available to the manufacturer. What is, however, of immense importance to note is that the 2007 IPR does not say that the quantum of excise duty exemption is limited to the extent of value addition made. Thus, when there is value addition in manufacturing a product, such a manufacturer is entitled to claim exemption from payment of excise duty on his finished product whatever may be the quantum of such excise duty, but when excise duty refund is limited to the quantum of value addition, then, exemption becomes restricted to the value addition only. This is clearly-not what the 1997 IPR had announced or even the 2007 IPR contemplates.

53. As a matter of fact, R.C. Tobacco (supra) is one of such cases, where Government withdrew the promised exemption from payment of excise duty and this was upheld by the Apex Court. It is noteworthy that the industrial activities, which the cigarette companies were carrying on, in R.C. Tobacco (supra), were under the 1997 IPR and the Government found that the activities of these industries were not yielding desired result of industrial growth in North-Eastern Region and that the manufacturer of cigarette were merely carrying peripheral activities and had been enjoying, in return thereof, benefit of exemption from payment of excise duty. The Government withdrew the exemption. Thus, the cigarette companies were denied the benefit of exemption, because their activities were not meeting the object of 1997 IPR. The case of R.C. Tobacco

(supra) had nothing to do with the percentage of exemption. In R.C. Tobacco (supra), there was no controversy with regard to the percentage of the benefit of exemption, which a cigarette manufacturer was entitled to. What was questioned was whether the Government had the power to withdraw, in the circumstances as it had done, the benefit of exemption, though such a promise for exemption had been made under the 1997 IPR.

54. In the present case, the Respondents do not contend that the industrial activities of the present set of Petitioners are not activities covered by the 1997 IPR. It is, therefore, incorrect to contend that the benefit of exemption perceived and promised under the 1997 IPR, was limited to the extent of value addition made. If there was no value addition, the industrial activities of a manufacturer may not entitle him to exemption at all, for, his activities, in such a case, may not be treated as the kind of industrial activity, which the 1997 IPR envisaged. In 1997 IPR, it had not been clarified as to what activities would amount to industrial activities as envisaged by the 1997 IPR, There was, therefore, a room for controversy, as in the case of R.C. Tobacco (supra), on the question as to whether the activities, which the cigarette manufacturer had been carrying on, in the North-Eastern Region, amounted to the kind of Industrial activities, which the 1997 IPR had aimed at achieving. To set at rest any controversy, in this regard, and in order to make it clear that the peripheral activities would not be treated as activities making any value addition, the 2007 IPR makes it clear that certain, peripheral activities, as mentioned hereinbefore, would not be regarded as activities, which would entitle a manufacturer to claim exemption from payment of excise duty.

55. There is yet another flaw in the submissions, made on behalf of the Respondents, that the excise duty exemption was available only to the extent of value addition. It is not necessary that in every finished product, the input must also involve an excise duty payable item. There may be a finished product, which involves input, which is entirely exigible to excise duty or which is not at all exigible to excise duty or partly exigible to excise duty and partly not. It may, therefore, happen that in a given case, the inputs are totally free from payment of excise duty. If such an input or raw material is used for the purpose of finished product and the finished product, so manufactured, is leviable to excise duty, can it be contended that since no addition of value, in excise duty input, has been made, while manufacturing the final product, the final product, though leviable to excise duty, would not entitle the manufacturer to claim exemption from payment of excise duty. On a specific query made, in this regard, Mr. K.N. Choudhury, learned senior counsel, conceded that even a product, which had not used any excise duty paid input, would also be entitled to exemption from payment of excise duty

56. What emerges from the above discussion is that Clause XIII of 2007 IPR shows that no benefit, including exemption from payment of excise duty, would be made available to an industrial unit, under the IPR 2007, in respect of which

only peripheral activities like preservation during storage, cleaning operations, packing, re-packing, labelling or re-labeling, sorting, alteration of retail sale price, etc., take place. No such restriction, as regards the value addition, had, admittedly, been imposed by the 1997 IPR. Thus, the concept of value addition has come only under 2007 IPR. This apart, it is not the pleaded case of the Respondents that the Petitioners are involved in any of the activities as have been mentioned in Clause XIII.

57. What also emerges from the above discussion is that while a manufacturer may be disentitled to claim exemption from payment of excise duty on his final product if there is no value addition, the exemption from payment of excise duty cannot be limited to value addition. In short, though a manufacturer may be made entitled to claim exemption from payment of excise duty only if there is value addition in the final product, the quantum of refund would not remain limited to the extent of value addition made; rather, the quantum of exemption would be equivalent to the excise duty or additional excise duty payable by the manufacturer on his final product. This is what the 1997 IPR specifically stated and the refund mechanism, introduced by the earlier notifications, until before issuance of the impugned notifications, had perceived.

58. Let me, now, determine if the refund mechanism, which stands introduced by the impugned notifications, dated 27.3.2008 and 10.6.2008, has reduced the quantum of refund payable to a manufacturer, who has established his industrial unit on the promises made by the 1997 IPR and re-assured by the Notification Nos. 32/CE-99, and 33/CE-99, both dated 8.7.1999, issued in this regard. While considering this aspect of the case, it is of paramount importance to recall that in their affidavit-in-opposition, the Respondents have contended, as already indicated in para 3 of this decision, that an analysis of the cases, booked by the Excise Department and the representations received from the association of the industries, revealed bogus production by mere issuance of sale invoices without actual production of goods and supply/clearance of excisable goods. This would result, according to the Respondents, in availing of CENVAT Credit by buyers of such excisable goods, in other parts of the country, without actual production being carried out and also in absence of actual receipt of goods. The Respondents further claim that they have calculated the average excisable duty payable on a product and it is on this basis that they have specified different rates in respect of different specified items under the impugned notification, dated 27.3.2008.

59. Thus, what, eventually, transpires, in the light of the discussions held, as a whole, above, is that the 1997 IPR made an unambiguous promise that 100 per cent exemption from payment of excise duty would be available to a manufacturer, on his goods, in the specified areas. This promise was concretized by issuance of Notification Nos. 32/CE-99 and 33/CE-99, both dated 8.7.1999, whereby it was made clear that excise duty refund would be available equivalent to the amount of duty paid by the manufacturer, but, on the basis of the

experience gathered, the Respondents have assessed average excise duty payable on a given product and have accordingly made entitled every manufacturer to receive exemption from payment of excise duty based on such average.

60. Is it, then, the case of the Respondents that no manufacturer of the specified goods, in the specified areas, would be required to pay, excise duty more than the average rates assessed by the Respondents and announced by the impugned notification, dated 27.3.2008? The answer to this crucial question, has to be an emphatic "no". The impression that the Respondents tacitly acknowledge the fact that the average rate of exemption, which they have introduced, by the impugned notification, dated 27.3.2008, may not, in a given case, be the actual excise duty payable on a final product by a manufacturer, becomes transparent from the fact that the Respondents (as indicated in paragraphs 4 and 5 of this decision) have filed an additional affidavit and placed on record the notification, dated 10.6.2008, whereby some further amendments to the earlier notification, dated 27.3.2008, have been introduced. Apart from the fact that even the subsequent notification, dated 10.6.2008, aforementioned, has been impugned in some of the writ petitions, what is of paramount importance to note is that in their additional affidavit, the Respondents admit that following the publication of the impugned notification, dated 27.3.2008, they had received several representations from different industrial bodies and associations, and, upon considering their grievances, Government of India, Ministry of Finance, has issued subsequent notification, dated 10.6.2008, aforementioned, modifying some of the clauses of the earlier notification, dated 27.3.2008, to take care of some of the grievances of the industries. The averments, so made by the Respondents in their additional affidavit, more than amply demonstrate that taking into account the representations made by, or on behalf of, the industrial units, in the specified areas, some modifications have been made in the earlier impugned notification, dated 27.3.2008. Necessarily, therefore, one has to determine as to what the essential features of this subsequent notification, dated 10.6.2008, are.

61. Without entering into detailed analysis of the refund mechanism, introduced by the subsequent impugned notification, dated 10.6.2008, suffice it to point out, as already indicated at para 5 of this decision, that under the notification, dated 10.6.2008, if a representation is made by a manufacturer, in a specified areas, the jurisdictional Commissioner shall decreeing the actual value addition in the production of the goods and, then, refund accordingly the excise duty to the extent of value addition actually made. The determination of such actual value addition by the jurisdictional Commissioner has been termed as special rate. This concept of special rate takes out the very foundation of the average rates of exemption, which were introduced by the earlier impugned notification, dated 27.3.2008. Had the average rates, mentioned in the impugned notification, dated 27.3.2008, reflected the actual quantum of excise duty payable by a manufacturer on his final product, the question of modification of average rate

and introduction of special rate by the subsequent impugned notification, dated 10.6.2008, would not have arisen at all.

62. It is, therefore, clear, if I may repeat, that the subsequent notification, dated 10.6.2008, is an acknowledgement of the fact that even, in a given case, it is possible that the average rate of excise duty, payable on a finished product, as announced by the impugned notification, dated 27.3.2008, may not be correct and it is this lacuna, which is sought to be cured by the subsequent impugned notification, dated 10.6.2008, by making provisions for special rate.

63. While, however, considering the subsequent notification, dated 10.6.2008, it cannot be ignored and must be borne in mind that in order to make a manufacturer entitled to claim special rate, the manufacturer has to show that actual value addition, in the production or manufacturing of his goods, is, at least, 115 per cent of the rate specified for his product.

64. Hence, those manufacturers, whose actual value addition would be less than 115 per cent of the average specified rate, they will receive less than the amount of excise duty, which would be actually payable on their products, for, their cases would not be governed by the subsequent notification, dated 10.6.2008. The circumstances, culled out above, leave no room for doubt, and lead one to the lone and only conclusion, that the refund mechanism, which has been introduced by the notifications, dated 27.3.2003 and 10.6.2008, are not guaranteeing complete exemption from payment of excise duty contrary to what had been promised by the 1997 IPR and reassured by the earlier Notifications, dated 8.7.1999.

65. No wonder, therefore, that in their affidavit-in-opposition, the Respondents have acknowledged that the effect of the modification, which has been introduced in the refund mechanism by them, are not likely to affect the genuine manufacturers. The averments, made in this regard, read, thus:

(i) It is submitted that genuine manufacturers are not likely to be affected inasmuch as they would be getting the refund of same amount under the scheme before and after the modification, because if the inputs are duty paid then the refund under the earlier scheme and modified scheme should be of the same amount.

66. The expression "genuine manufacturers are not likely to be affected" is an admission of the fact by the Respondents that they are not assuring the court (but hoping) that the refund mechanism, which they have, now, introduced, does not have any room for error and that notwithstanding the subsequent impugned notifications, 100 per cent exemption from payment of excise duty to a manufacturer, in the specified area, would continue. Had the Respondents been sure that 100 per cent exemption for payment of excise duty would remain available to manufacturers, in the specified areas, as had been promised to them under the 1997 IPR, the Respondents could have asserted, on oath, that the genuine manufacturers will not be affected by the changes in the policy. The

Respondents have not done so; rather, they aver, "genuine manufacturers are not likely to be affected". Coupled with this, when one considers the subsequent notification, dated 10.6.2008, in the light of the scheme, embodied therein and discussed above, it becomes transparent that this Notification acknowledges that the rates, specified in the impugned notification, dated 27.3.2008, may not be correct in every case and that even the impugned notification, dated 10.6.2008, does not any longer promise, or assure, the manufacturers, covered by the 1997 IPR, that they would receive complete exemption from payment of excise duty as had been promised and assured to them earlier. In short, thus, the Government has, indeed, resiled from the promises it had made under the 1997 IPR and re-assured by the notification, dated 8.7.1999, that a manufacturer of specified goods, in the specified areas, would receive complete exemption from payment of excise duty on his product.

67. In the backdrop of the fact that the Government has resiled from its promises, it is, now, required to be ascertained if such withdrawal from the promises made by the Government is, in the facts and attending circumstances of the present case, legal and sustainable. Determination of the question, as to whether the act of resiling from the promises made by the 1997 IPR and/or 2007 IPR is valid, brings this Court to the scope and ambit of the doctrine of promissory estoppel.

68. Let me, therefore, deal with the doctrine of promissory estoppel.

69. Put shortly, when a person, acting upon the representation made by another, alters his position, the doctrine of promissory estoppel estops the person making the representation from going back on his words to the detriment of the one, who has altered his position. The doctrine of promissory estoppel was evolved, in England, as a principle of equity to mitigate the rigours of strict law and to prevent injustice taking place from strict adherence to law. The development and expansion of this doctrine, particularly, in the realm of its application against Governments, in India, in the post-independence era of this country, makes a fascinating reading.

70. The first glimpses of the application of this doctrine, in its full vigour, can be noticed, very early in post Independent era, in the decision of the Constitution Bench in *Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others*, The facts giving rise to this case were, in brief, thus: In the year 1865, the Government of Bombay called upon the predecessor-in-title of the Municipal Corporation of Bombay to remove old markets from a certain site and vacate the same. On the application of the Municipal Commissioner, the Government passed a resolution approving and authorising the grant of another site to the Municipality. The resolution adopted by the Government further stated, "the Government do not consider that any rent should be charged to the Municipality as the markets will be, like other public buildings, for the benefit of the whole community". Although possession of the site was made over to the then Municipal Commissioner, no formal grant was, in fact, executed as required

by the relevant statute. Acting, however, on this resolution, the Municipal Corporation gave up the site on which the old markets were situated and spent a sum of Rs. 17 lakh in erecting and maintaining markets on the new site. In 1940, the Collector of Bombay assessed the new site to land revenue and the Municipal Corporation, thereupon, filed a suit for a declaration that the order of assessment was ultra vires and it was entitled to hold the land forever without payment of any assessment. The suit was dismissed, for, notwithstanding the said resolution, the fact remained that no formal grant, in terms of the relevant statute, had been made by the Government. An appeal was preferred before the High Court. The High Court of Bombay held that the Government had lost its right to assess the land, in question, by reason of the equity arising on the facts of the case in favour of the Municipal Corporation. The High Court accordingly reversed the decision of the trial court and held the Corporation entitled to hold the land forever without payment of any rent. The Collector preferred an appeal before the Apex Court. There was no dispute that by reason of non-compliance with the statutory formalities, the Government's Resolution of 1865 was not a formal grant passing title in the land to the Corporation. There was also no dispute that there was, legalistically speaking, no formal enforceable contract between the State Government and the Municipal Corporation. Of the five Judges, Das, J, speaking for the majority, observed that the possession of the Corporation, not being referable to any legal title, was adverse to the legal title of the Government and the right acquired by the Corporation to hold the land in perpetuity included immunity from payment of rent. Patanjali Sastri, J, expressed a contrary view holding that the express provisions of the statute could not be overridden by considerations of equity. Chandrasekhara Aiyar, J, concurred with the conclusion of Das, J, but based his reasoning on the fact that by the resolution, representations had been made to the Corporation by the Government and the accident that the grant was invalid did not wipe out the existence of the representation. The observations, so made by, Chandrasekhara Aiyar, J, in *Municipal Corporation of the City of Bombay (supra)*, have been treated as the single most exposition of law on the doctrine of promissory estoppel involving Governments. The relevant observations may, therefore, be taken note of, which read as follows: -

27... In the present case, the Corporation stands on much firmer ground. They have acquired a title to the and which the Government cannot upset or challenge. This acquisition of title is as a result of the law of limitation. It has nothing to do with any conduct on the part of the Corporation which can be said to have rendered the representation about non-liability to assessment of no legal effect or consequence. The invalidity of the grant does not lead to the obliteration of the representation."

28. Can the Government be now allowed to go back on the representation and, if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed? If the resolution can be read as meaning that the grant was of

rent-free land, the case would come strictly within the doctrine of estoppel enunciated in Section 115 of the Indian Evidence Act. But even otherwise, that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Whether it is the equity recognised in Ramsden's case, or it is some other form of equity, is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power. As pointed out by Jenkins C.J. in *Dadoba Janardhan*'s case, a different conclusion would be "opposed to what is reasonable, to what is probable, and to what is fair."

71. A careful reading of the above observations made by Chandrasekhara Aiyar, J, would indicate that the doctrine was applied, in *Municipal Corporation of the City of Bombay* (supra), without there being any formal contractual or legal relationship existing between the parties concerned, for, the representation sought to be enforced against the Government, in *Municipal Corporation of the City of Bombay* (supra), was legally invalid inasmuch as the representation had not been made in the manner as the statute had prescribed. This apart, the doctrine was resorted to not merely as a shield for defence, but for founding the cause of action against the Government. To this extent, the decision in *Municipal Corporation of the City of Bombay* (supra) deviated from the traditional views of the English Courts and can be treated as the path-breaking judgment on the doctrine of promissory estoppel.

72. What crystallizes from the above discussions is that the observations made by Chandrasekhara Aiyar, J, in *Municipal Corporation of the City of Bombay* (supra), reveal that the doctrine of promissory estoppel, which had long been recognized as legitimate defence in equity, was held to found a cause of action against the Government, even when the representation sought to be enforced against the Government was not strictly in accordance with the statute in the sense that the representation was made in a manner, which was not in conformity with the procedure prescribed by the statute. I may also hasten to point out that though the observations of Chandrasekhara, J, that the invalidity of the grant does not lead to the "iteration of the representation" do not, *stricto sensu*, form in *Municipal Corporation of the City of Bombay* (supra), yet these observations contained the seed and, in fact, laid the foundation for the subsequent development of the scope and ambit of the doctrine of promissory estoppel, in India, particularly, in its application to the promises made by the Government.

73. Disagreeing with the contrary views expressed by Patanjali Shastri, J, in *Municipal Corporation of the City of Bombay* (supra), that the expressed provisions of the statute cannot be overridden by considerations of the equity and, at the same time, approving the views expressed by Chandrasekhara Aiyar, J, in *Municipal Corporation of the City of Bombay* (supra), that courts must do justice by the promotion of justice and good faith as far as it lies within their

power, a three judges Bench of the Supreme Court, speaking through J.C. Shah, J, in *Union of India v. Anglo Afghan Agencies* AIR 1968 SC 718 held, ""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 appraisal of the circumstances in which the obligation has arisen."

74. The decision, in *Anglo Afghan Agencies* (supra), shows that the Supreme Court laid down one of the important principles of good governance, the principle being that the Government, same as any other individual, cannot, be exempted from carrying out its liability, which it has incurred as a result of the representations, which it had made to a person, who, relying on such representations, has altered his position to his detriment. What was also made clear, in *Anglo Afghan Agencies* (supra), was that if questioned in court, the Government cannot, on some indefinite and undisclosed ground of necessity and expediency, decline to carry out its promises. Further, and more particularly, what *Anglo Afghan Agencies* (supra) made clear to everyone was that the Government alone cannot be the judge of its own obligation to the citizen on its ex-parte appraisal of the circumstances, wherein its obligation has arisen, meaning thereby that when questioned in the court, the Government must disclose to the court the grounds of necessity and expediency, which had made it impossible to carry out its promises and it is, then, for the court to decide as to whether such plea of the Government, on the basis of the materials disclosed to the court, is or is not legal and justified. Of course, where the promise is prohibited by law or where the promise, if forced to be carried out, would be against overriding public interest, the Government may not be forced to stand by its promise.

75. It is, however, the decision, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), which has really built a complete structure for application of the doctrine, in India, against the Government, for, this decision lays down the conditions precedent subject to which the doctrine can be resorted to, it also lays down as to when the Government can be forced, with the help of the equitable doctrine of promissory estoppel, to abide by, and carry out, its promises, and as to when this doctrine may not be allowed to prevail upon and shall succumb to the Government's decision not to abide by, or carry out, the promises made by the Government.

76. In *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), the case was that acting on the basis of the representations made by the Government that the sugar factories, if set up, would be exempted from payment of sales tax for a period of three years from the date of commencement of the production, the Petitioners had set up their sugar factories. When the State Government refused to honour its representation and wanted to force the Petitioners to pay sales tax for the

period for which the Government had made such a promise, the Petitioners approached the court, the plea taken by the Government for not keeping to its promises were as follows: -

(1) in the absence of notification u/s 4A, the State Government could not be prevented from enforcing the liability to sales tax imposed on the Petitioners under the provisions of the Sales Tax Act;

(2) that the Petitioners had waived their right to claim exemption; and

(3) that there could be no promissory estoppel against the State Government so as to inhibit it from formulating and implementing its policies in public interest.

77. The Apex Court, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), rejected all the above three pleas of the Government and observed,

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

... If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield, when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the court would not raise an

equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced. In such a case, because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the court would have to balance the public interest, in the Government, carrying out a promise made to a citizen, which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine, which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J, pointed out, in 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 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 fudge for itself which way the public interest lies and what the equity of the case demands. It is only if the court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the Government. The court would not set 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..... It would, therefore, be seen that there is no authoritative decision of the Supreme Court, which has departed from the law laid down in the celebrated decisions in the Indo-Afghan Agencies case and the Century Spinning & Manufacturing Co. case. The law laid down in these decisions as elaborated and expounded by us continues to hold the field.

78. The decision, in Motilal Padmapat Sugar Mills Co. Ltd. (supra), put it beyond

pale of doubt that where the Government makes a promise, knowing or intending that it would be acted upon by the promise, and, in fact, the promise, 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 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. The doctrine of promissory estoppels would be attracted to such a case, because, 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-a-vis the position of the one, who has altered his position, and it is the court, which, has the duty to determine which way the equity lies.

79. Clarified the Supreme Court, in unambiguous words, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), that it would not be enough for the Government merely 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. 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, then, be for the court to decide whether those facts and circumstances are such as would 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 its 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 decide, and not the Government, as to whether the Government should be held exempt from liability. This is, as Bhagwati, J, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), observes, "the essence of the rule of law".

80. What emerges, as the clear position of law, from what have been held, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), Is that It would not be enough for the Government to say that there is a change in its policy, for, a mere change of policy would not be sufficient to exonerate the Government from its liability. The essence of the "rule of law", as observed by Bhagwati, J, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), is that when required, the Government has to disclose to the court not only as to what precisely is its changed policy, but also its reasons, for change in the policy and justification thereof so that the court can judge for itself which way the public Interest lies and what the equity of the case demands. While examining such an issue, the court would not, according to what *Motilal Padmapat Sugar Mills Co. Ltd.* (supra) lays down, 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, eventually, decide and not the Government, whether the Government should be held exempt from liability or not.

81. The principles, deducible from the decision, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), were reiterated by a three Judge Bench, in *Godfrey Philips India Ltd.* (supra). The principles, governing the application of promissory estoppel against the Government, flowing from the decision, in *Godfrey Philips India Ltd.* (supra), are that if the Government possesses a power, it is bound to wield that power to enforce its promise, the limitation on the enforcement of the promise being that when the statute prohibits the exercise of powers necessary for carrying out the representation made by the Government or when the overriding public interest permits the Government not keep itself within the bounds of the promise made by it, the Government has the freedom to resile from the promise made. In short, as long as, by asking the Government to keep to its promise, the court does not force the Government to act contrary to law or against supervening public interest, the court will not be doing anything wrong.

82. Some latter decisions of the Supreme Court, rendered in *Pine Chemicals Ltd. and Others Vs. Assessing Authority and Others*, and *Pournami Oil Mills and Ors.* (supra), make it clear that a mere claim by the Government that larger public interest permits the Government not to abide by its representation will not be enough to free the Government from the commitments that it had made, for, the Government cannot be the judge of its own cause and the Government would have to lay bare all the facts and circumstances, which had induced the Government not to carry out the representation that it had made, and if, on balancing the two competing equities, that is, the commitment made to the promisee, on the one hand, and the public interest, on the other, the court finds that the public interest has the overriding effect, the promise would not be enforced, for, the doctrine of promissory estoppel, being an equitable relief, must yield, when so required.

83. 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 summarized, 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-a-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 would 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 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. 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 if 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.

84. From what has been summarized above, it becomes abundantly clear that the doctrine of promissory estoppel can be applied against the Government on fulfillment of two conditions precedent, namely, (i) a clear unequivocal promise, knowing and intending that the promise would be acted upon by the promisee; and (ii) acting upon such promise, the promisee has altered his position in such a manner that status quo ante cannot be restored and it would be inequitable in

law if the Government go back on its promise. It is no longer *res integra* that the doctrine of promissory estoppel being an equitable doctrine, must yield when the equity so requires. This, in turn, means that this doctrine would yield and allow the Government, as a promisor, to resile from its promise only if the court is satisfied, on examination of adequate materials on record, which may be produced by the Government, that overriding public interest requires that the Government should not be held bound by the promise, which it had made. Yet another reason, which becomes the ground for refusal to enforce the representation against the Government, is that the representation, which is sought to be enforced, is prohibited by law. Hence, in a case, governed by the doctrine of promissory estoppel, the enquiry has to be directed towards the question as to whether the promise, made by the Government, was prohibited by law and, if not, whether supervening public interest compels the Government to withdraw its promise. The policy decision of the Government to withdraw an incentive, when a case is governed by the doctrine of promissory estoppel, cannot be upheld merely because the Government feels it necessary to have a change in its policy. Such change in policy can, however, be allowed if supervening public interest requires that the Government be not compelled to continue to provide the incentive, which it had promised.

85. There can be no dispute, and it is correctly contended by Mr. K.N. Choudhury, learned senior counsel, that judicial opinion has been consistent that if a person has to invoke the doctrine of promissory estoppel, it is necessary that a clear, sound and positive foundation is laid by him in the petition itself. A mere bald assertion, without any supporting material to the effect that the doctrine is attracted, because the Petitioner, invoking the doctrine, has altered his position, relying on the assurances of the Government, would not be sufficient to invoke the doctrine. It is, therefore, duty of the court to examine in a case, such as, the present one, if the Petitioners have laid a clear foundation attracting the doctrine of promissory estoppel.

86. What is, however, necessary to note is that in *Shree Ganapati Rolling Mills* (supra), which Mr. Choudhury relies upon, it has been pointed out that In order to invoke doctrine of promissory estoppel, a clear foundation must be laid in the petition itself by the person invoking the doctrine. The Division Bench, in *Shree Ganapati Rolling Mills* (supra), in this regard, referred to *Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others*, wherein the Apex Court, in paragraph 48 of its decision, held as under:

48...there is preponderance of judicial opinion to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expression, without any supporting material, to the effect that the doctrine is attracted because of the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine.

87. Having referred to the cases of Sharma Transport (supra), and Bannari Aman Sugars Ltd. (supra), wherein also the Apex Court has reiterated the same principle, as in Sharma Transport (supra), the Division Bench, in Shree Ganapati Rolling Mills (supra), framed the questions, which had arisen, and proceeded to decide each appeal on its own merit. The relevant observations, made in this regard, read as under:

49. The question that falls for our consideration is whether the writ Petitioners laid any clear, positive foundations in their writ petitions together with supporting materials? Is there any pleading that the Petitioners have altered their position relying on industrial policy decision? Is there any material made available by the Petitioners to the satisfaction of the court that they have under taken expansion of the installed capacity to the extent of 25% pursuant to the promise/representation made in the Industrial, Policy Resolution dated 24.12.1997? Is there any specific case as such set up by them that based on the promise/representation through the Industrial policy Resolution dated 24.12.1997 they have established, then manufacturing units in the backward region of North East? We shall, therefore, examine each on its own merits.

88. The Division Bench, in Shree Ganapati Rolling Mills (supra), on examination of the writ appeals, found that in most of the cases, there was no clear foundation in order to attract application of the doctrine of promissory estoppel inasmuch as the Appellants had not indicated if they had set up their industries acting upon the incentives promised by the Government and thereby had altered their position to their detriment or had expanded the installed capacity of their respective industries to the extent of 25 per cent as the 1997 IPR required. It was in such circumstances, and in the absence of complete supporting materials, attracting the application of the doctrine of promissory estoppel, that the court dismissed a large number of writ appeals, but allowed the appeal, where clear foundation for attracting the doctrine of promissory estoppel had been laid.

89. Thus, the dismissal of some of the writ appeals by the court, in Shree Ganapati Rolling Mills (supra), was on the basis of the fact that the Appellants, in those appeals, had not been able to lay a clear foundation, which could attract the doctrine of promissory estoppel. The cases at hand, however, are quite different inasmuch as there are adequate pleadings and materials, in the writ petitions, showing that the Petitioners have established their industries, or enhanced the installed capacity of their industries, as the case may be, on the basis of the promises made by the Government and, hence, in such circumstances, the Government cannot withdraw the promises made by it under the said two industrial policy resolutions unless the Government can show that supervening public Interest compels the Government to withdraw its promise. The case of Shree Ganapati Rolling Mills (supra), has, therefore, as already indicated above no application to the present cases.

90. Except making repeated assertions that the present set of petitions do not lay any clear and positive foundation to attract the doctrine of promissory

estoppel, and though reliance, in this regard, is placed by the Petitioners, on Shree Ganapati Rolling Mills (supra), I do not find that to the present cases, the decision, in Shree Ganapati Rolling Mills (supra), has any application inasmuch as the writ Petitioners have made, as already pointed out above, clear averments not only to the effect that the Government had made the promises under the 1997 IPR and/or 2007 IPR, as the case may be but have also made clear averments that on the basis of the promises made by the Government, the Petitioners have established their respective industries and/or carried out requisite expansion in the installed capacity of their respective industries and since the Petitioners have altered, thus, their position, relying upon the promises made by the Government, the Government cannot, now, withdraw the promise, which it had made. The Petitioners have also contended, in their writ petitions, that there is no supervening public interest, which could allow the Government to withdraw the promises, which it had made.

91. What emerges from the above discussion is that the Petitioners have laid clear foundation, in their respective writ petitions, to show that they have, acting on the promises made by the Government, In its industrial policies aforementioned, made huge investments and have thereby altered their position to their detriment, the Government is bound to keep to its promises and may not, therefore, be allowed to resile therefrom.

92. Resisting the writ petitions, it has been contended, on behalf of the Respondents, that a survey, conducted by the authorities concerned, revealed that payment of excise duty, through PLA and CENVAT credit, is much higher in the areas, where the two industrial policies aforementioned are in force, as against the areas, where no such incentive is available. Such higher payment of excise duty is, in the comprehension of the Respondents, due to bogus production, which some unscrupulous manufacturers, according to the Respondents, have been indulging in the specified areas, which are covered by the two IP Rs. It is to obviate such misuse of excise duty exemption, contend the Respondents, that the impugned notifications have been brought into force with the help of the policy decision adopted by the Union Cabinet in its meeting held on 22.1.2008.

93. Thus, according to the Respondents, it is to arrest manipulation of the incentives, promised by the Government, that the impugned notifications have been published. Such change in policy decisions, according to the Respondents, is necessitated by public interest, which must be allowed to override the interest of the manufacturers, such as, the present Petitioners. It is further contended by the Respondents that it was, as a matter of policy, that the Government had made certain incentives available and it is within the domain of the Government to change its policy. It is also contended that the adequacy of materials on which such a change, in the policy decisions, rests, cannot be a subject-matter of determination in a proceeding under Article 226.

94. Let me, first, deal with the question as to whether it is open to this Court to

examine, in a proceeding under Article 226, the adequacy of materials, based on which the Government has, according to the Respondents, made a change in its policy.

95. In the face of the clear and emphatic declaration of the position of law on the doctrine of promissory estoppel applicable to the case of a promise made by the government. In *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), as early as in 12.12.1978, and subsequent decisions referred to above, it does not, now, remain open for the Respondents to contend, before this Court, that it was, as matter of policy decision, that the Government had offered incentives and it is for the Government to decide whether it should continue to provide such incentives or not and that when the Government, on the basis of the materials available, has decided not to keep to the promises, which it had made, adequacy of the materials, based on which such decision is taken by the Government, cannot be examined by court in exercise of its powers under Article 226 of the Constitution of India. It is precisely this proposition of law, which Mr. Choudhury seeks to advance, and it is this proposition of law, which has been completely ruled out as the correct proposition of law, *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), for, it would be against the principle of "the rule of law", as observed in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), to make the Government sole judge of its own cause. No wonder, therefore, that the Supreme Court, in *Motilal Padmapat Sugar Mills Co. Ltd.* (supra), has clearly observed, ".....the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee will alter his position relying upon the promise"; but when the Government makes such a promise and the promisee alters his position relying upon the promise, there is no reason why the Government should not be compelled to make good such promises like any other private individual.

96. Logically, therefore, when the Government cannot become the judge of its own cause, it has the responsibility of not only showing that it has taken the decision to resile from its promises on the basis of some materials, but it would also remain the obligation of the Government to satisfy the court, in this regard, by placing before it all such materials, which it had considered, so as to make the court decide clearly as to whether the materials justify the decision, reached by the Government, to withdraw the promises, which it had made. It, of course, remains true that if, in a given case, there are two possible views and the Government has taken one of such possible views, the court would not substitute its views in place of the views of the Government. However, to say, as contended by Mr. Choudhury, that in the present case, the Government of India has made a change in its policy decision and while the decision-making process is open to examination by the court under Article 226, the adequacy of materials, based on which such a changed policy decision was taken, cannot be examined by the court. To put it a little more clearly, one can say, and not unjustifiably, that when Government cannot be the judge of its own cause and when a decision to withdraw the incentives promised cannot be ipse dixit of the Government, the court is bound, when the promisee approaches the court, to examine if the

materials, considered by the Government, justify the Government's decision to withdraw from its promises made. Determination of such justification would, obviously, demand that the court considers as to whether the materials were adequate to reach such a decision as the Government has reached. The adequacy of materials would obviously mean examination of the question as to whether Government has taken into account all such factors, which are relevant, and eschewed from its consideration all such factors, which were irrelevant. Considered in this light, it becomes clear that if the Government has not taken into account a particular factor, which it ought to have taken note of, such a decision would be nothing, but irrational and arbitrary. As the arbitrariness strikes at the root of the democracy, the court would be bound not to uphold such a decision.

97. Coupled with the above, what can also not be ignored is that it has been correctly pointed out by Dr. Saraf, learned senior counsel, appearing on behalf of some of the writ Petitioners, that the comparison made by the Respondents, in respect of the industrial units, located in with the rest of the country suffers from fundamental infirmity inasmuch as such comparison would not yield any appropriate result as various factors are required to be considered in respect of each manufacturer in order to arrive at the component of excise duty payable by him. Dr. Saraf has pointed out that the difference, if any, between the payment made, through PLA account, in the North-Eastern region, and the other parts of the country can be for a variety of reasons. Dr. Saraf has also pointed that even in the North-Eastern region itself, payment, through PLA, may differ, from industry to industry, in different circumstances. In this regard, Dr. Saraf has presented before this Court the following three charts depicting three distinct instances, where a manufacturer of the same product may pay different amounts, through PLA, in respect of excise duty.

98. The following chart shows that in respect of a given industrial unit, the percentage of payment, through PLA, in case of a specified product, may be 60%.

Input purchased which are all excisable
Excise duty levied and paid
Value of finished goods
Excise duty payable on finished goods
Value addition
Excise duty to be paid by the manufacture on value addition
Amount to be paid from PLA
0% of payment from PLA

(a) (b) (c) (d) (e) (f)=(d)-(b) (g) (h)=(d) -(b) (i)

(Rs.) (Rs) (Rs.) (Rs) (Rs.) (Rs.)

200 20 500 50 300 50-20=30 30 50-20= 30 30*100/ 50=60

99. For the same industry and for the same specified product, the percentage of payment, through PLA, may be 90 per cent when some of the inputs purchased are either non-excitable or purchased from SSI Units. The following chart reflects a case, where excise duty paid, through PLA, on the same product, was 90 per cent of the total excise duty.

Input purchased which are all excisable Excise duty Input purchased on non-excisable or purchased from SSI unit Sale value finished goods Excise duty to finished goods Amount available for CENVAT credit Amount to be paid through PLA 0% of payment from PLA to total duty

(a) (b) (c) (d) (e) (f) (g) (h)

(Rs.) (Rs.) (Rs.) (Rs.) (Rs.) (Rs.)

50 5 150 500 50 5 50-5=45 40*100/50=90

100. By a third chart. Dr. Saraf has depicted a case, where the raw materials, used by an Industrial unit, were from SSI units. In such a case, the percentage of payment of excise duty, through PLA, may be as much as 100 per cent. This becomes evident from the following chart:

Input purchased from SSI Unit Excise duty on input CENVAT credit Sale value of finished goods Excise duty on finished goods Amount paid through PLA 0% payment from PLA to total duty

(a) (b) (c) (d) (e) (f) (g)

(Rs.) (Rs.) (Rs.) (Rs.) (Rs.) (Rs.)

200 Nil Nil 500 50 50 100%

101. The Respondents have not been able to assail the charts, which Dr. Saraf has presented before this Court. There is, therefore, considerable force in the submission of Dr. Saraf that mere comparison of all India figures of the amounts paid, through PLA, in respect of a product, with the figures available, in this regard, in the North-Eastern region, cannot be said to be a rational basis unless the reasons and factors for the excessive excise duty, paid through PLA are, in each given case, are separately and distinctly analysed.

102. That there is no concrete basis for reducing the rate of exemption in respect of specified goods is clear from the fact that in their written submission/ the Respondents contend,

... In the comprehension of the answering Respondents, had the units in the specified areas paid excise duty without indulging in the modus operandi as referred to above, there appears no conceivable reason why the cash portion of the excise duty in the specified areas would be so alarmingly high vis-a-vis the payment of excise duty by cash in rest of the country in respect of similar goods. Having perceived misuse of the excise duty exemption in the specified" areas, the impugned notification, dated 27.3.2008, was issued to effectuate the policy decision of the Union Cabinet taken in its meeting held on 22.1.2008.

103. It is, thus, clear that it is the assessment of the Respondents that the difference, in the quantum of payments made, through PLA, between the manufacturers of a given product in North-Eastern region vis-a-vis the manufacturer of the same product in other parts of the country (where 1997 IPR

is not applicable) reflects bogus production. The Respondents, however, do not claim, on oath, that this assessment, which they have made, is correct.

104. No wonder, therefore, that the Respondents, having by virtue of the notification, dated 27.3.2008, assessed and fixed specified rates, for each of the items, chose to modify the same by subsequent notification, dated 10.6.2008, and prescribed special rates. However, the special rate has been made available only when the manufacturer finds that his actual value addition in the production or manufacture of his goods is, at least, 115 per cent of the rate specified in the table in the said notification. Thus, those manufacturers, whose actual value addition would be less than 115 per cent, will, eventually, receive less than the actual amount of excise duty, which they may pay on their products, because such a manufacturer would not be covered by the impugned notification, dated 10.6.2008.

105. Referring to MRF Ltd. (supra), Mr. P.K. Goswami, learned senior counsel, has submitted that when a person, acting upon the promises made by the Government under its industrial policy, establishes an industry and carries on his business in accordance with the relevant statutory provisions and also in tune with the objectives of the pronounced Industrial policy the must be inferred to have legitimate expectation that so long as he does not behave in a manner, which defeats the objectives of the industrial policy, his interest would be protected by the State. Such protection would demand, contends Mr. Goswami, that the State allows such an investor to continue his business in terms of the promises made by the industrial policy.

106. Though there is, submits Mr. Goswami, no substance in the accusations made by the Respondents that there is some bogus production in the specified areas, which fall under the relevant industrial policy, what needs to be noted is that there is no accusation that the Petitioners were, in any way, involved in bogus production.

107. Hence, merely because of the fact that some persons are indulging in bogus production, and the State's monitoring and inspecting machinery is either incompetent to detect the violators or connive with them, the State cannot punish bona fide investors. Such an approach, according to Mr. Goswami, would be highly unfair and defeat the non-arbitrariness and reasonableness, which Article 14 promises. The legitimate expectation, according to Mr. Goswami, which the Petitioners have, in this case, is a factor, which the State ought to have taken into account before reaching the decision to withdraw the concessions. This has apparently, according to Mr. Goswami, not been done and this, by itself, is sufficient to strike down the withdrawal of concessions as arbitrary.

108. As regards the doctrine of legitimate expectation, which Mr. Goswami has sought to invoke, it needs to be pointed out that every person has a legal right to receive a fair decision from an administrative authority. In our constitutional scheme of governance, every person, who acts on the basis of a policy decision

of the Government, must be held to have legitimate expectation of being treated fairly if his action does not violate the law. Legitimate expectation vests sufficient interest in a person to claim enforcement of his right. The protection of legitimate expectation does not, however, require fulfillment of the expectation, where such fulfillment would be against overriding public interest. Hence, when a person's legitimate expectation is not fulfilled, while taking a decision, the decision-maker, when questioned in the court, must be able to justify the denial of such expectation by showing some overriding public interest, [See *Union of India and others Vs. Hindustan Development Corpn. and others*,

109. The logical extension of the above principle is that it is implicit in Article 14 that a change in policy by the Government is made fairly and must not give the impression that the change, in the policy, was arbitrary. The basic requirement of Article 14 is fairness in every State action. This, in turn, implies non-arbitrariness and obliges the State to act in a manner, which cannot be regarded as arbitrary. If the State has to avoid arbitrariness in its action/it must show that its decision is based by taking into account all relevant factors and by keeping excluded from consideration all such factors, which were irrelevant. Consideration of the relevant factor, in such a case, would also be covered by the legitimate expectation of an investor. [See *Bannari Amman Sugars Ltd. (supra)*].

110. In the present cases too, if some of the manufacturers are indulging in bogus production and when the Petitioners are not accused of any bogus production and when it is not alleged by the Respondents that the manufacturers, as a class, are misusing the concessions by indulging in bogus production and when, as already indicated above, no accusation against any of the present Petitioners of misusing of the concessions has been made by the Respondents, it would be within the realm of Article 14 if the present Petitioners legitimately expect that the Government would protect the interest of the Petitioners and when the Petitioners are showing to have either set up their industries or expanded the installed capacity of their industries acting upon the relevant industrial policy resolutions, the doctrine of legitimate expectation would force this Court to find out from the Government if it has taken into account, while withdrawing the concessions, the expectations of the genuine investors that if they would continue to conduct themselves in tune with law, their interest would be protected by the State.

111. No answer, with regard to the above, is discernible from the materials on record nor have the Respondents even faintly indicated that they took into consideration the interest of the honest investors, while, arriving at the decision to withdraw the concession. This was, undoubtedly, a relevant factor, which the State appears to have completely ignored, though it owes a duty, as a State, to protect the honest investors, punish those, who involve in bogus production, and take action against those departmental persons, who are helping in bogus production, for, no bogus production, in the face of vast enforcement machinery, which the State has, is possible unless their own people are wholly incompetent

or connive in the activities of the" bogus producers or have not been discharging their duties honestly and faithfully. The State, correctly submitted on behalf of the Petitioners, instead of taking action against its own people, cannot punish the honest investors, particularly, when it is not the case of the Government that majority of the investors or a substantial number of the investors have been indulging in bogus production.

112. The impression that the State is conscious of the fact in the facts at of the present case, it cannot reduce the incentives promised under the two IP Rs is reinforced by the fact that it is scared to admit that the incentives promised had been reduced and it is for this reason that it claims, though not boldly, that honest investors would not be adversely affected. The decision to withdraw the concession by the Government is, to say the least, baffling. While the Government makes the quantum of excise duty paid by those industrial units, which fall outside the relevant IPR, as the basis to conclude that the excess quantum of payment of excise duty is due to bogus production, the Government, amazingly enough, does not assert, on oath, or assures the court, or prove before the court, that their basis is correct. The correctness of this basis could have been taken as proved, had the State asserted, on oath, as rightly complained by Dr. Saraf, that the quantum of excise duty paid by the industrial units, which fall outside the two industrial policies, is the correct quantum of excise duty payable by an industrial unit.

113. When the State itself does not know as to which one of the two industrial units, one set up under the IP Rs, and the other, set up in areas outside the IP Rs, is genuinely paying excise duty merely because of the fact that in the areas, covered by the IPR, a higher duty of excise duty is paid, through PLA, the State cannot claim that there is bogus production; if there is bogus production, it is the duty of the State to arrest such bogus producers. It cannot really punish its honest investors, because of the deeds of some, who have been indulging in bogus production (if bogus production is assumed to have been taking place) with the connivance of the administrative machinery or because of the complete incompetence of the administrative machinery. The reference made, in this regard, to the case of MRF Ltd. (supra), by Mr. Goswami, is not misplaced inasmuch as in MRF Ltd. (supra), the Apex Court, referring to Bannari Amman Sugars Ltd. (supra), which dealt with the concept of legitimate expectation, has pointed out that pursuant to the various incentives declared, from time to time, by the Government of Kerala and acting upon the Memorandum of Understanding entered into between MRF and the State of Kerala, MRF invested huge amounts in setting up its Industry and when the State has enjoyed the benefit of such Investment, such as, employment of labour force, the State cannot resile from the promises it has made, for, to do so would be highly unfair, arbitrary and violative of Article 14. The court, pointed out, in MRF Ltd. (supra), that the action of the State cannot be permitted to operate if it is arbitrary or unreasonable. The court has also pointed out, in MRF Ltd. (supra), that equity, which arises in favour of a party as a result of the representation made by the State, is founded

on the concept of justice and fair play and any Bittempt to take away the benefit of exemption, which had been promised to MRF, would be highly unfair, arbitrary and unreasonable and deserves to be quashed. Had it been the case of the Respondents that the investors, as a class, and/or the present Petitioners have been indulging in bogus production and/ or not fulfilling, as in the case of R.C. Tobacco (supra), the objectives of the industrial policy resolutions, the matter would have been different.

114. U.P. Power Corporation Ltd."s case (supra), which Mr. Goswami has relied upon is, I find, quite relevant. In U.P. Power Corporation Ltd."s case (supra), the U.P. State Electricity Board, which subsequently became U.P. Power Corporation, framed its tariffs allowing some hill development rebates to new industrial units for a period of five years. The concession, so granted, was continued by issuing further notifications. Subsequent thereto, the percentage of rebate was reduced. This reduction, in the percentage of rebate, was challenged as arbitrary and barred by the principle of promissory estoppel. As the High court allowed the writ petitions, the Corporation carried the mater to the Supreme Court. One of the justifications offered was that there was large scale theft of energy. Merely because of the fact that there were large scale theft of energy, the State cannot persuade the court to hold that revocation of concession was in public interest so observed the Apex Court.

115. Clarified the Supreme Court, in U.P. Power Corporation Ltd."s case (supra), that since the benefit was given to the units in the hill areas, there should have been overwhelming evidence to show some mala fide on the part of the investors. The court held that if one party abuses the concession, then, it is always open to the other party to revoke such concession. But when one party avails the benefit and is acting upon the same representation made by the other party, then, the other party, who has granted the said benefit, cannot, under the garb of public interest, revoke the same.

116. Though, in U.P. Power Corporation Ltd."s case (supra), as correctly pointed by Mr. Choudhury, the court had not been given adequate data, whereas some data have been made available to this Court, the fact remains that the data, so placed by the Respondents, are wholly Inadequate and inconclusive inasmuch as even a rough estimate of the number of people, indulging in alleged bogus production, is not made known to the court and the Respondents do not claim that the Petitioners have been indulging in bogus production. The respond also do not accuse that the investors, as a class, have been indulging, in the specified areas, in bogus production and, especially, when the State does not affirm, on oath, that the basis, which it has selected for withdrawing the concessions, is correct. In such circumstances, the before the court showing existence of overriding public interest, which compelled the State to withdraw the promises made.

117. At the cost of repetition, this Court must, once again, point out that the State does not claim, in the present case, that less payment of excise duty,

through PLA, in the unspecified areas, is correct. Without asserting that industrial units, in the unspecified areas, are genuine manufacturers and that the industrial units, in the unspecified areas, have been paying as much excise duty as is actually payable by them, the State cannot roll back the incentives, which it had promised. Mere low payment of excise duty, through PLA, by the industrial units, located in the unspecified areas, cannot be made a basis for denying the benefit of exemption to the present Petitioners. In fact, even the percentage of concession, which the impugned notification, dated 26.3.2008, has fixed. Is indefinite as already discussed above inasmuch as the State has itself made special rates to those manufactures, whose production have value addition of more than 115 per cent. In such circumstances, the Respondents cannot be said to have discharged their onus of proving that there was overriding public interest in issuing the impugned notifications. A Government has no obligation to make promises; but if it chooses to make promise, it cannot withdraw, the promise merely because it does not have desirable wherewithal to ensure that its enforcement, machinery functions efficiently and properly. For the failure of its own machinery to check bogus production, a State cannot punish the bona fide investors. Acceptance of such a logic by a court of law would shake not only the credibility of the Government as an executive, but also the courts as the protectors of the rights and legitimate expectations of fair decision by every person in this country.

118. Reminds the Supreme Court, in U.P. Power Corporation Ltd.'s case (supra), that in this 21st century, when there is global economy, the question of faith is very important. When the Government offers certain benefits to attract the investors, it cannot withdraw such benefits, for, such action of the State would shake the faith of the people in governance. The relevant observations, made in this regard, read:

35. In this 21st century, when there is global economy, the question of faith is very important. The Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would, show the short-sighted ness of governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the Appellant Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith.

119. In the present case too, the Government has lured the present Petitioners to invest huge amounts of money in various industrial units. When the Petitioners

are not accused of having indulged in bogus, production, when the accusation of bogus production is devoid of any rational basis, when the State is seen to have not taken in to account the interest of the genuine investors, when the State has failed to place adequate materials justifying withdrawal of its promises and when the State has not taken into account the legitimate expectations of the investors and when the State has failed to galvanize its own enforcement agencies and when, instead of taking action against the wrong-doers, the State is punishing genuine investors, the action of the State cannot but be termed as, arbitrary.

120. Let me, now, turn to yet another crucial aspect of the case. What now, needs to be noted is that there is, indeed, a clear distinction between an exemption which is granted in exercise of the State's sovereign power, by taking resort to some provisions, and an exemption, which is granted, pursuant to any policy resolution, but exemption being nevertheless faceable to some statutory power. Though in both the cases, exemptions are granted or are traceable to statutory provisions there is, one case, exemption due to promises made by the State and, in the other, the exemption is granted, not because of promises made but because of the" fact that the State considers granting of such exemption necessary to meet exigency of a situation in public interest. In the case of the former, there is no inducement; whereas, in the latter case, there is an element of inducement. When there was inducement, the State can resile from the promises made by it only when it establishes, to the satisfaction of the court, that overriding public interest so requires. Only when such a nature of public interest is established by the State can the State be allowed to withdraw the concessions, which might have lured the investors. However, even in the case of statutory exemption, which was granted by the State not pursuant to any promises made but under its sovereign power, the State, if it choses to withdraw exemption, has the obligation to satisfy the court that its act of withdrawing the concession is fair and just.

121. Let me, now, turn to the decision. In *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, which the Respondents have relied upon, to show that an exemption granted does not vest any indefeasible right in an investor and that the Government can withdraw exemption, whenever it so feels necessary. In *Kaniska Trading (supra)*, the Apex Court was required to consider the question as to whether the notification issued, u/s 25 of the Customs Act, 1962, granting complete exemption from payment of customs duty to PVC resin imported into India by manufactures of certain products requiring the said resin as one of the raw materials, which was issued in public interest and which had stated that the exemption would remain in force up to 31.3.1981, could have been withdrawn before the expiry of the said period by a fresh notification issued by the Government in exercise of the very same power u/s 25 of the customs Act. The Apex Court took the view that while issuing the notification, in question, no promise can be said to have been held out or no representation can be said to have been made to the importers, in general, on the basis of which they could insist, on the strength of the doctrine of promissory estoppel, that the customs

duty exemption, granted earlier by the first notification, could not have been reduced by the second one and since the said notification granting exemption, was issued in public interest, it could be withdrawn, in public interest, even before the time fixed therein for its operation, if the Government was of the view that necessity of granting exemption no longer survives.

122. It is of immense importance to note that in *Kaniska Trading (supra)*, the court found that the so called exemption notification was actually designed to offset the excess price, which the local entrepreneurs were required to pay for Importing PVC resin at a time, when the difference between the, indigenous product and the Imported product was substantial, for, no, importer could have been expected to import PVC resins after paying duty and incur losses. The said notification was, therefore, according to the Apex Court, issued with a, view to offsetting the losses to the extent possible. The said notification, in the view of the Apex Court, was not issued as a potential source of extra profit for the importer. In fact, the specific finding of the court, in *Kaniska Trading (supra)*, was that the exemption notification did not, in reality, hold out to the Appellants any enforceable promise.

123. Coupled with the above, the specific finding, recorded in *Kaniska Trading (supra)*, was that the Government had presented sufficient materials before the court to show that it was, in the larger public interest, that the exemption be withdrawn. It was, thus, on the basis of twin factors, namely, that there was no promise held out by the notification, in question, and also that larger public interest justified the withdrawal of exemption, that the decision. In *Kaniska Trading (supra)*, was rendered.

124. The decision in *Shirjee Sales Corporation (supra)*, relied upon by Mr. Choudhury, is a case, wherein the correctness of the decision in *Kaniska Trading (supra)*, came to be re-examined by a Bench of three Judges of the Apex Court and the decision, reached in *Kaniska Trading (supra)*, came to be affirmed therein. In *Shirjee Sales Corporation (supra)*, too, the specific finding of the court was that there is a supervening public interest and, hence, it should not be mandatory for the Government to give a notice before withdrawing the exemption and it was, in these circumstances, that the court, in *Shirjee Sales Corporation (supra)*, declared that the decision, in *Kaniska Trading (supra)*, has been correctly reached.

125. In *Shirjee Sales Corporation (supra)*, the Apex Court has reiterated its earlier decision that in case there is supervening public equity, the Government would be allowed to change its stand. What the court, however, made it, once again, clear that the court must satisfy itself that such a supervening public interest exists before it upholds Governments decision to withdraw the incentive. The three Judges bench, in *Shirjee Sales Corporation (supra)*, approved the position of law, propounded in *Motilal Padmapat Sugar Mills Co. (supra)* to the effect that "It is only if the court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the

Government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against the Government."

126. The decision, in *Kaniska Trading (supra)*, therefore, cannot be of any assistance to the Respondents. In the present case, the 1997 IPR as well as 2007 IPR made unequivocal promises by providing a clear-cut scheme of incentives for the establishment of new industries as well as expansion, modernisation and diversification of the existing industries, and when the Petitioners are found to have, acting on the said promises, established their respective industrial units, the decision, in *Kaniska Trading (supra)*, cannot be pressed into aid, for, the decision, rendered in the factual setting of *Kaniska Trading (supra)*, has, thus, no application to the facts of the cases at hand.

127. In the case at hand, the Respondents have not been able to disclose and establish any overriding public interest, which would make it inequitable to enforce the doctrine of promissory estoppel against the State Government. Thus, with the help of the decision, in *Shirjee Sales Corporation (supra)* too, the Government cannot resile from the promises that it had made in the 1997 IPR and/or as 2007 IPR.

128. I may point out that the decisions, in *Kaniska Trading (supra)* and *Shirjee Sales Corporation (supra)*, were considered by the Apex Court, in the case of *Pawan Alloys & Casting (P.) Ltd. (supra)*, and the court has held that the notifications, impugned therein, were not designed or issued to induce the Appellants to import PVC resin; hence, strictly speaking, the notifications could not have been said to have extended any "representation", much less a "promise", to anyone enabling him to invoke the doctrine of promissory estoppel against the State. It must, therefore, be held, in the light of the decision, in *Pawan Alloys & Casting (P.) Ltd. (supra)*, that the decision, in *Kaniska Trading (supra)*, had clearly proceeded on the basis that by issuing the earlier notification, u/s 25 of the Customs Act, no promise had been held out to any of the importers that the notification's life would not be curtailed earlier.

129. The Apex Court has, however, clarified, in *Pawan Alloys & Casting (P.) Ltd. (supra)*, that the decision, in *Kaniska Trading (supra)*, is not an authority for the proposition that even if a claim of exemption from import duty was resorted to in public interest by way of an incentive for a class of importers, though such public interest continued to subsist during the currency of such exemption notification, and even though the promisee, for whose benefit such exemption was granted, had changed their position, relying on the said exemption notification, if could still be withdrawn before the time mentioned therein.

130. In *Pawan Alloys & Casting (P.) Ltd. (supra)*, the court's specific finding, based on the given fact situation, was that the notification, in question, had, indeed, held out promises and made representations to the general public inviting them to set up industries on the basis of the said representations and it

was, acting upon such promises, that the industries had, in fact, been set up.

131. I may pause here to point out that in Shrijee Sales Corporation (supra), the court had quoted, with approval, the observations made in Motilal Padmapat Sugar Mills Co. Ltd. (supra) that "even where there is no such overriding public interest, it may still be within the competence of the Government to resile from the promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, provided, of course, it is possible for the promisee to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable".

132. I may also pause here/to point out that from what was observed in Motilal Padmapat Sugar Mills Co. Ltd. (supra) and approved, as indicated hereinabove, in Shrijee Sales Corporation (supra), makes it clear that even when there is no overriding public interest enabling the Government to resile from the promise, which it has made, yet, if on giving reasonable opportunity to the promisee, it is possible for the promisee, to restore status quo ante, the Government may resile from the promise made by it. If, however, the promisee cannot resume his position, the promise would become final and irrevocable and, thereafter, it would be impermissible for the Government to resile from the promise made by it except if it can plead and prove to the satisfaction of the court that overriding public interest constrains it to withdraw the incentives promised.

133. In the light of the above position of law, the court, in Pawan Alloys & Casting (P.) Ltd. (supra), examined if the promisee could resume the status quo ante and found, on such examination, that it was not possible for the person, who had acted upon the promises made by the Government, to restore the status quo ante. The court, therefore, In Pawan Alloys & Casting (P.) Ltd. (supra), held, by invoking the doctrine of promissory estoppel, the Government bound by the promises that it had made.

134. What follows from a close and combined reading of the decisions in Kaniska Trading (supra), Shreeji Sales Corporation (supra) and Pawan Alloys & Casting (P.) Ltd. (supra), is that where the Government makes representations inviting investments against incentives promised by it and a person acts on such a promise, yet the Government may, even where no overriding public interest so demands, resile from such promise by giving reasonable notice or opportunity to the promisee to resume his original position; but if it is impossible for the promisee to resume his original position or restore status quo ante, the promise would become final and irrevocable. To put it differently, the Government can, even in the absence of supervening public interest, resile from its promise until such a stage is reached, when the promise becomes irrevocable due to the fact that the promisee cannot resume his original position or that the status quo ante cannot be restored. In the present cases, it is not even contented by the Respondents that status quo ante can be reached by the investors even if the impugned notification are taken to have withdrawn or reduced the promises

incentives.

135. Before proceeding further, it needs to be pointed out that in terms of the provisions of a fiscal statute, a State or Central Government may, grant certain exemptions. Exemption from certain fiscal obligations may also be granted, because of the promises, which the Government may have made in its industrial policy. These two cases of exemption are not one and the same. In the former case, the Government has the freedom of withdrawing the exemptions without the doctrine of promissory estoppel stepping in; whereas, in the later case, the Government can withdraw the exemption only if it can show that the promises made and the exemptions granted were prohibited by law or that the withdrawal of the exemption by the Government is in larger public interest.

136. When an exemption of any fiscal obligation is under an industrial policy and such a policy is implemented by issuing necessary statutory notifications, such a notification, in the light of the decision in *State of Jharkhand and Others Vs. Tata Cummins Ltd. and Another*, has to be not only read in the context of the industrial policy, but also must be considered liberally bearing in mind the objectives envisaged by the industrial policy. As against such a liberal approach, when an exemption from fiscal liability, is granted by the Government under a fiscal statute, in exercise of its sovereign power, but without offering any inducement, such as, the case of *Kaniska Trading (supra)*, the fiscal statute will have to be strictly construed.

137. The Supreme Court has, thus, drawn a clear line of distinction between an exemption notification issued by Government in exercise of its statutory powers and an exemption notification issued to give effect to an industrial policy resolution provided, of course, that the exemption notification, issued to implement the industrial policy resolution, is statutorily permissible. This distinction is, in fact, also discernible from the decisions in *Pawan Alloys & Casting (supra)*, wherein the Supreme Court, while distinguishing the decision, in *Kaniska Trading (supra)*, clearly held that the decision, in *Kaniska Trading (supra)*, is not an authority for the proposition that even if a claim of exemption from import duty was resorted to, in public interest, by way of an incentive for a class of importers and even though such public interest continued to subsist during the currency of such exemption notification and that promisee, for whose benefit such exemption was granted, had changed their position, relying on the said exemption notification, it could be still withdrawn before the time mentioned therein even though public interest did not require the said exercise to be undertaken and even though there were subsisting equities in favour of the promisee. The Apex Court, in *Pawan Alloys (supra)*, also distinguished its decision, rendered in *Kaniska Trading (supra)*, by holding that in *Kaniska Trading's* case (*supra*), exemption notification was issued in exercise of statutory powers vested in the Government and the Government could exercise such powers, from time to time, in public interest and that the notification, in *Kaniska Trading (supra)*, was in exercise of sovereign taxing power of the State and had

created no relationship between the authority, which issued the notification, and the prospective importers.

138. In the present case too, the notifications, u/s 5A of the Central Excise Act, 1944, was admittedly, issued to give effect to the Industrial Policy Resolutions, and the public interest, which had inspired the Government to announce the Industrial Policy and issue notifications, for implementing such a policy, continued to subsist inasmuch as the said exemption and incentives were also promised to be continued under the 2007 IPR, for, it was promised, even in 2007 IPR, that an industrial unit, which commenced its commercial production on or before 31.3.2007, would continue to receive benefit incentives as had been promised under 1997 IPR. Even in the 2007 IPR, incentives, by way of excise duty exemption, for a period of ten years, has been granted to the new industries established after 1.4.2007, or whose capacity has been expanded to the extent as the 2007 IPR requires, Consequently, the industrial units, which have either been established or expanded acting upon the 2007 IPR or even continued on the basis of the promises made under the 1997 IPR, have a right to claim to continue to receive complete exemption from payment of excise duty unless the Government, by putting adequate materials on record, show that It is in overriding public interest that the Government should not be held bound by its promises.

139. As regards the case of Dai-Ichi Karkaria Ltd. Vs. Union of India and Others, which the Respondents rely upon, it is necessary to bear in mind that the case of Dai-Ichi Karkaria (supra) is not a case of exemption having been granted pursuant to any promise made under any industrial policy. It was a case, wherein the government had granted, same as in the case of Kaniska Trading (supra), exemption from payment of customs duty on all raw materials and components imported for the manufacture of goods to be supplied to various organizations, such as, International Development Association, etc., for a specified period, but the government chose to withdraw the said exemption before completion of the period for which the exemption had been granted. In view of the fact that the Apex Court found that government's withdrawal from the promises had not been proved to be overriding public interest, the court held that the withdrawal of exemption by the government was not sustainable. The case of Dai-Ichi Karkaria (supra), therefore, does not at all help the stand of the Respondents; rather, the case of Dai-Ichi Karkaria (supra) helps the case of the Petitioners, for, what the Supreme Court has laid down, in Dai-Ichi Karkaria (supra), is that when exemption is granted by the Government, in exercise of its sovereign power, by taking resort to statutory provisions and not as a result of any promises made, such exemption, promised by the Government, would not be allowed to be withdrawn unless it is proved by the government that public interest requires such withdrawal of the promise made, while issuing the statutory notification, that such exemption would continue for a specified period. The relevant observations made, in paragraph 6 of Dai-Ichi Karkaria (supra), reads as under:

6. The law on the matter is now well settled that even in respect of exemptions that may have been made by the Government the doctrine of promissory estoppel will not be applicable if the change in the stand of the Government is made on account of public policy. This position has been explained in detail by this Court in *Kaniska Trading* and reiterated in *Shrijee Sales Corpn. v. Union of India*. In both these cases this Court is concerned with notifications issued u/s 25 of the Customs Act. In *Kaniska Trading* case it is stated that the exemptions granted u/s 25(1) of the Customs Act in public interest is designed to offset the excess price which the local entrepreneurs were required to pay for importing PVC resin at a time when the difference between the indigenous product and the imported product was substantial and at a time when the notification was withdrawn by the Government there was no scope of any loss to be suffered by the importers and, therefore, the change of policy was permissible. This decision is the same as in *Shrijee Sales Corpn.* wherein it was noticed that once public interest is accepted as the superior equity which can override individual equity, the principle would be applicable even in cases where a period has been indicated for which period the notification would remain in force and the Government is competent to resile from a promise. It was further noticed therein that the Government can resile from a promise even if there is no manifest public interest involved provided, of course, that no one is put in any adverse situation, which cannot be rectified.

140. It may be noted that on the finding, reached by the court, that the Appellants could not misutilise the exemption granted, the court struck down the withdrawal of the notification, whereby the exemption, earlier granted, had been withdrawn. On the basis of the facts placed before it, as already indicated above, the Apex Court came to the conclusion that the factors, taken into account by the government, did not serve public interest. The relevant observations, made in paragraph 11, in *Dai-Ichi Karkaria* (supra), reads as under:

In the present case, by issuing a different set of notifications and granting exemption at different stages and limiting only to the extent of 75% (sic 25%) for the period from 30.12.1986 to 10.9.1987 and for the reasons stated earlier in the manner set out in the counter-affidavit clearly indicate that the Government has not taken into account off the relevant factors while issuing the impugned a notifications reducing the exemption to 25% for the aforesaid period.

We may state that the Government has failed to discharge its statutory obligations while issuing the impugned notifications. Justifications offered, to say the least, is far too naive to be accepted. The reasons set out does not carry the case of the State Government further at all.

141. From the decision, rendered in *Dai-Ichi Karkaria* (supra), what also becomes transparent is that even in a case of statutory exemption, granted by the government, in exercise of its sovereign power and not pursuant to the promise made in any industrial policy, the government shall take into account all relevant factors, while Issuing the notification, in this regard, and if it is not so

done the withdrawal would be treated as not sub serving the public interest.

142. J.K. Udaipur Udyog (supra) is yet another case, which Mr. Choudhury, learned senior counsel, for the Respondents, relies upon. In J.K. Udaipur Udyog (supra), on examination of the State Government's power to withdraw or modify the exemption, granted u/s 15 of the Rajasthan Sales Tax Act, and Section 8(5) of the Central Sales Tax Act, 1956, the court held that the State Government is competent to modify or revoke the grant of exemption, if public interest so require, unless the government is shown to be precluded from making such withdrawal on the ground of promissory estoppel inasmuch as the doctrine of promissory estoppel is, again, subject to considerations of equity and public interest. It is in this context that the Apex Court observed that vesting of indefeasible right in such a case is contradiction in terms. The relevant observations, made, in this regard, in J.K. Udaipur Udyog (supra), read as under:

In this case the scheme being notified under the power in the State Government to grant exemptions both u/s 15 of the RST Act and Section 8(5) of the CST Act in the public interest, the State Government was competent to modify or revoke the grant for the same reason. Thus, what is granted can be withdrawn unless the Government is precluded from doing so on the ground of promissory estoppel, which principle is itself subject to considerations of equity and public interest. The vesting of a defensible right is therefore, contradiction in terms. There being no indefeasible right to the continued grant of an exemption (absent the exception of promissory estoppel), the question of the Respondent companies having an indefeasible right to any facet of such exemption such as the rate, period, etc. does not arise.

143. From what have been held, in J.K. Udaipur Udyog (supra), it becomes, once again, clear that exemption granted can be withdrawn unless the government is precluded from doing so on the ground of promissory estoppel. With this proposition of law, there can be, and there is, in fact, no dispute. The Petitioners, in the present set of writ petitions, do not claim that they have any indefeasible right to continue to enjoy the exemption, which had been granted. What they contend is that the curtailment of percentage of the exemption is hit by the doctrine of promissory estoppel. Therefore, when this Court has found that the subsequent notifications, which are under challenge, have the effect of reducing the extent of exemption promised, assured and guaranteed, the court is bound to examine, as is being done, if the doctrine of promissory estoppel is attracted to the facts of the cases in hand. In view of the fact that the writ petitions lay clear foundation, as already discussed above, as regards the application of the doctrine of promissory estoppel to the cases at hand, there can be no room for doubt that this Court is, now, bound to examine if it is the supervening public interest, which has compelled the Government to issue the impugned notifications. For determination of the question aforementioned, it is imperative that this Court is satisfied by the Respondents contention that all the factors, which were relevant in the context of the present cases, had been taken into

account by the Government at the time of issuing the impugned notifications, and, at the same time, the Government had eschewed, while taking the decision, all such factors, which were irrelevant. If, on the basis of the materials placed before this Court, the court comes to the conclusion that there is overriding public interest in favour of withdrawing the exemption promised and guaranteed, the writ petitions have to be dismissed. However, if the finding of the court is otherwise, then, the writ petitions have to be allowed.

144. Turning to the case of Sun Paper Mills (*supra*), which the Respondents rely upon, it may be pointed out that this case too is a case, where the exemption was granted not due to a promise made in an industrial policy, but in exercise of the statutory powers of the Government. This case is, therefore, same as the case of Dai-Ichi Karkaria (*supra*). This apart, in Tata Cummins Ltd. (*supra*), the Apex Court has clearly indicated that when a notification, granting exemption, is issued pursuant to any promise made, in any industrial policy, such implementing notification has to be interpreted bearing in mind the objective set forth by the industrial policy concerned, and not strictures, as one may do in the case of exemption, which is granted by the government in exercise of its statutory powers. To the cases at hand, I do not find that the decision, in Sun Paper Mills, (*supra*), has any application.

145. Reverting to the decision, rendered in Dharmendra Trading Company (*supra*), it needs to be noted and reiterated that, in this case, the Supreme Court clearly held that if the government wants to resile from its promise or assurance on the ground that undue advantage had been taken from the concessions granted, the court has to be satisfied that the allegations, made by the Government, about misuse, were reasonable and well established. The relevant observations, made in Dharmendra Trading Company (*supra*), at paragraph 4, read as under

4... 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 reasonably well established....

146. From the decision, in Dharmendra Trading Company (*supra*), what becomes clear is that it is not unreasonable for the Government to say, or, even place on record, materials before the court, that there was misuse of the concession granted, or that undue advantage was being taken of the concessions granted; but, it would, then, be the duty of the court to examine the materials to its satisfaction that the Government has reasonably established its plea of misuse of the concessions granted. If, on such examination, the court finds that the Government has reasonably established its case, the government would not be held bound by the promise. Embedded in the decision rendered, in Dharmendra

Trading Company (supra), is the reiteration by the Apex Court that when supervening public interest requires the government to resile from the promise, the Government must be allowed to do so. However, while examining the Government's plea of misuse of the concession granted, or that undue advantage was being taken of the concessions granted, the court must bear in mind that mere misuse of the concessions, granted under a policy, may not be, in a given case, regarded as a circumstance establishing supervening public interest unless the Government is proved to have taken all relevant factors into account.

147. I have already pointed out above that R.C. Tobacco (P.) Ltd. (supra), is a case, where the finding of the court was that the manufacturers of cigarette, as a class, had not been conducting themselves in a manner, which would have subserved the objective with which the relevant industrial policy had been announced. In such circumstances, the overriding public interest, undoubtedly, was that the government be allowed to withdraw the concessions granted, when the cigarette manufacturers, as a class, were not satisfying the objectives with which the concessions had been granted. The relevant observations made, in R.C. Tobacco (P.) Ltd., (supra), in this regard, read as under:

24. The particular context of the section impugned in this case was the industrial policy formulated by the Central and the State Government of Assam for the development of that State. The obvious intention behind the grant of the package of incentives including an exemption from payment of excise duties was to stimulate further industrial growth in the area with enduring benefits not only to the local populace by way of employment opportunities but also to the economic welfare of the State. The State Government's insistence from the very outset on the need to regulate the industries which were claiming the benefit of the exemption was to ensure that these objects were attained. According to the Union of India the exemption notification, at least as interpreted by the High Court, did not effectuate that intent. As it transpired, none of the industrial units manufacturing cigarettes were prepared to contribute to this object and their investment in the manufacture of cigarettes was coextensive with the period of the exemption. The loss of revenue suffered by the Union and the State by the various subsidies and exemptions granted was the quid in return for which the Petitioners were not prepared to suffer any quo. With the withdrawal of exemption, all of them without exception immediately closed down their cigarette manufacturing units and large majority have shifted out of the State. Clearly, if the grant of the exemption had operated as it was intended to, it would have been unnecessary to enact Section 154.

148. From the observations made above, it becomes clear that the specific finding of the court, in R.C. Tobacco (P.) Ltd. (supra), was that the industrial units, manufacturing cigarettes, were not prepared to contribute to the objectives with which the relevant industrial policy had been announced. In such circumstances, the government was correct in inking the view that the

exemptions granted, even if continued, would not achieve the objective. When the conduct of the cigarette-manufacturing units did not effectuate the objectives of the industrial policy, the Apex Court upheld the Government's decision to withdraw the concessions. The relevant observations, made in *R.C. Tobacco (R) Ltd.*, (supra), read as under:

26. The exemption notifications were issued u/s 5A of the Central Excise Act, 1944 as a delegate of Parliament. In a cabinet form of Government, the executive is expected to reflect the views of the legislature. It would be impossible for the Legislatures to deal in detail and cater to the innumerable problems, which may arise in implementing a statute. When the power of subordinate legislation is conferred by Parliament in certain matters it can only lay down the policy and guidelines and expect that what is done by the executive is in keeping with such policy. It does of course retain control over its delegate and can exercise that control by repealing the action of delegate. Consequently, if the executive has failed to carry out the object of Parliament, such control may be exercised by introspect very enacting what the executive ought to have achieved.

149. In the present case, unlike *R.C. Tobacco (supra)*, the Respondents have not been able to show that the investors, as a class, have defeated the object of the 1997 IPR and/or the 2007 IPR. It is not the Respondents case, as already pointed out above, that the manufacturers, as a class, or that the Petitioners have indulged in bogus production, in fact, the basis for determining the question as to whether there is bogus production or not is, as already discussed above, wholly incorrect inasmuch as the basis for determination is the quantum of excise duty, paid through PLA, in the areas, where the two Industrial Policy Resolutions are not in force. The Government, however, does not assert, on oath, that the quantum of excise duty, which the manufacturers, in the said areas, pay, through PLA, is the quantum of excise duty, which is actually payable by them. When the correctness of the quantum of excise duty paid by the said manufacturers are not claimed, on oath, to be correct, such quantum of payment of excise duty could not have been made a basis for reaching the conclusion, which the Respondents have reached, that as the quantum of excise duty paid by the manufacturers in the specified of areas, where the two Industrial Policy Resolutions are in force, is higher, such higher payment is due to their Indulging. In bogus production. This apart, the fact that there is bogus production could not have been made, in the facts of the present case, as discussed above, a ground for reducing the percentage of excise duty refund to the manufacturers in the specified areas,

150. Another important question, which falls for consideration, in the present set of writ petitions, as raised by Mr. Goswami, is this: when the Union Government or Government of a State announces an industrial policy and Invites Investors to make Investments so as to receive the benefits and Incentives promised under the Industrial policy, including complete exemption from payment of excise duty,

sales tax, etc., can another Department of the same Government, namely, Department of Finance, while preparing, in exercise of its relevant statutory powers, refuse to grant exemption from payment of excise duty or sales tax to an industrial unit, which is, otherwise, eligible to receive benefits of the industrial policy announced by the Government or withdraw the exemption, which the Industrial unit is, otherwise, entitled to receive under the relevant industrial policy?

151. While considering the question, so posed, it is important to bear in mind that a Government, perceived under the Constitution of India, runs as an organized, harmonious, orderly coherent, systematic and homogenous body and it functions on the principles of collective responsibility. Two different Departments of a Government cannot adopt policies, which are contrary to, and inconsistent with, each other, for, the citizens must know what the policy of the Government concerned. The Government must, therefore, as warranted by the Constitution, behave with such responsibility as is conceived under the Constitution and eschew such a course, which would make its functions impossible to be carried out in accordance with the provisions of the Constitution, for, collision between two departments of a State will reveal arbitrary manner of functioning of the Government and such arbitrary functioning will jeopardize rule of law and make a mockery of the Constitution, which perceives a coherent functioning of various organs or departments of the Government in the spirit of collective responsibility. Bearing in mind this subtle, but definite pre-requisite for effective functioning of the Government, let me, now, turn to the 1997 IPR.

152. There is no dispute, in the case at hand, that certain promises were made by the Union Government under the 1997 IPR as well as the 2007 IPR. Not withstanding what the Respondents have contended, the conclusion, reached above, clearly shows that the Government has assured the investors that 100 per cent exemption from payment of excise duty would be available, on the specified products, in the specified areas. Since this decision has been taken as matter of policy by the Union Cabinet, the Department of Finance, Government of India, could not have acted in a manner, which would set at naught the said promises made by the Union Cabinet. This proposition of law could not be disputed and is, in fact, not in dispute. What is, however, of great significance to note is that it is not in dispute that it is not the Department of "Finance, Government of India, alone which has issued the impugned notifications, withdrawing the promise made earlier. Far from this. It is the Union Cabinet, once again, which has decided to withdraw the promise made by the industrial policies aforementioned. In such circumstances, I do not find any substance, in the submissions made, on behalf of the Petitioners, that the impugned notifications are bad inasmuch as it denies the promises made under the 1997 IPR and or 2007 IPR and/or that such denial of promise is by the Department of Finance, which is only one of the wings of the Union Government. Though there is no formal modification or withdrawal of the 1997 IPR and/or the 2007 IPR, the fact remains that the said industrial policies and the promises made thereunder were the result of the decisions of

the Union Cabinet and the impugned notifications are also the result of decision of the Union Cabinet, in such a situation, it cannot be held that the impugned notifications are the result of the unilateral decision of the Department of Finance, Government of India; rather the decision to withdraw the promises, as reflected by the impugned notifications, is a decision of the Union Cabinet and is, therefore, the decision of the Government of India and not of its any particular department. I, therefore, find considerable force in the submissions made by Mr. Choudhury that in the facts of the case at hand, the decision in Suprabhat Steels Ltd. (supra), has no application at all, for, Suprabhat Steels Ltd. (supra), is a decision rendered in a different fact situation.

153. In Suprabhat Steels Ltd. (supra), the State Government issued notification, on 4.4.1994, in exercise of the powers u/s 7 of the Bihar Finance Act, where under the old Industrial Units, which had started production prior to 1.4.1993, but whose investments in the plants and machinery had not exceed Rs. 15 crore on 1.4.1993, were denied the benefit of sales tax exemption on the purchase of raw materials. In other words, the Industrial Units, which were, otherwise, entitled to the sales tax exemption on the basis of the industrial policy of 1993, were denied the exemption on the basis of the fact that those industries had already taken some benefits under the prior industrial policy of 1986. The notification, dated 4.4.1994, aforementioned, issued by the State Government was challenged before the High Court and the High Court struck down the notification. The State of Bihar carried the matter to the Supreme Court. While dealing with the said notification, the Apex Court observed and held as under: -

7. Coming to the second question namely, the issuance of notification by the State Government in exercise of power u/s 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power, it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive policy itself. The industrial incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification u/s 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 government order in exercise of power u/s 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 4.4.1994 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 u/s 7 of the Bihar Finance Act, which may override 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 4.4.1994.

154. What, thus, the decision, in Suprabhat Steels Ltd. (supra), laid down was that when a State Cabinet makes a promise by virtue of its industrial policy, no department of such a State Government, in exercise of its statutory powers, either refuse to give effect to the industrial policy declared by the State or publish a notification, which sets at naught the industrial policy, which was approved, decided and announced by the State Government. To the facts of the case at hand, as already indicated above, the decision, in Suprabhat Steels Ltd. (supra), has no application inasmuch as the 1997 IPR as well as the 2007 IPR stand modified not by one of the Departments of the Union Government alone, but by the Union Government as a whole. Whether the Union Government could have done so or not is a question, which I would deal now.

155. Notwithstanding the fact that the decision, in Suprabhat Steels Ltd. (supra), is not applicable to the facts of the present case, it needs to be noted, as already discussed above, that the Respondents have not been able to show any supervening public interest, which could warrant reduction in the quantum of refund of excise duty.

156. As already indicated above, in the present case, when the Government, after a decade of experience, announced its industrial policy in the year 2007, it chose to promise the investors complete exemption from payment of excise duty, in respect of specified goods, if a manufacturer, in the specified areas, carries on industrial activity, which is not peripheral in nature. Thus, the Government has reiterated, in the IPR 2007, the promise of complete exemption from payment of excise duty, as the Government had announced and promised in the 1997 IPR. Hence, when the Government had chosen to reiterate its promise of complete exemption from payment of excise duty in the year 2007, and when the Petitioners claim to have altered their position, to their detriment, relying upon the promise made by the Government in the 1997 IPR and/or 2007 IPR, it no longer remains open to the Government to withdraw the incentives so promised unless it can show that public interest, supervening in nature, requires that the Government, notwithstanding the promises made by it, be held not bound by its promise. In the present case, though the Government has not, even for a moment, categorically admitted that the impugned notifications have reduced the promised incentives and though the Government still insists that whatever incentives were available, in the 1997 IPR, have remained available to an

investor even after the impugned notifications have been issued, this contention of the Government, as already pointed out above, is wholly incorrect. Thus, the Government has not boldly taken the stand that it has withdrawn the incentives, if not completely, at least, partially, the fact of the matter remains that the Government has gone back on its promise made in the 1997 IPR as well as 2007 IPR. The Government's basis for showing overriding public interest in withdrawing the promises have also remained as already discussed above, unproved; rather, the stand of the Government is belied and disapproved as already discussed above. Moreover, the Government has not as already held above, taken into account all relevant factors into consideration before reaching the decision to issue the impugned notifications. In such circumstances, Government cannot be freed from the promises, which it had made in the said two industrial policies.

157. Because of what have been discussed and pointed out above, I hold that the impugned notifications, dated 27.3.2008 and 10.6.2008, are not sustainable in law and must, therefore, be set aside and quashed.

158. In the result and for the reasons discussed above, these writ petitions succeed. The impugned notifications, dated 27.3.2008 and 10.6.2008, are hereby set aside and quashed. The Petitioners are hereby held entitled to receive 100% exemption from payment of excise duty as were available to them in terms of the relevant notifications, dated 8.7.1999 and 25.4.2007, as the case may be.

159. With the above observations and directions, these writ petitions shall stand disposed of.

160. The parties shall bear their own costs.