(2010) 03 AHC CK 0092

In the Allahabad High Court

Jai Prakash Associates Limited — APPELLANT

Vs

State of U.P. and Another — RESPONDENT

Date of Decision : 29-03-2010

Acts Referred:
Constitution of India, 1950 — Article 14, 226, 301

Citation : (2010) 03 AHC CK 0092

Hon'ble Judges : S.C. Chaurasia, J;Devi Prasad Singh, J

Bench : Division Bench

Judgement

Devi Prasad Singh, J.—Substantial questions of law involved in the present writ petition are:

A. Whether Government may withdraw the rebate granted in pursuance to notification issued u/s 5 of the U.P. Trade Tax Act (in short hereinafter referred as the Act)? In case, Government has got power then under what circumstances?

B. Whether in case industry is established and availing the rebate will entitle to avail the benefit for the remaining period even after withdrawal of notification issued u/s 5 of the Act under the principle of promissory estopple ?

2. Brief facts are as under: Section 5 of the Act is an enabling provision which confers power on the state government to issue a notification in public interest along with rebate up to full amount of tax on sale and purchase of public goods or on sale or purchase of any goods by such person or class of person. The notification is issued in public interest to encourage the establishment of industries as well as to secure public interest.

3. The government had issued the notification dated 18.6.1997 providing for rebate /concession of tax payable on the sale of the manufactured good by using flyash between 10 to 30 per cent by weight. A higher concession in payment of tax has been provided up to 50 per cent, in case, goods manufactured by using flyash existing 30 per cent of the weight.

4. By the subsequent notification dated 27.2.1998 issued in pursuance to power conferred by Section 5 of the Act, the State Government granted benefit of tax rebates to units established within the State of U.P. on the sale of such goods manufactured by using flyash procured or purchased or received from Thermal Power Station situated in the State of U.P. A copy of notification has been filed as Annexure-1 to the writ petition.

5. It has been provided that concession, with regard to trade tax payable on the goods manufactured within the State of U.P. by using fly-ash procured from Thermal Power Stations situated in the State of U.P. Government, shall be available to the tune of 25 per cent on the goods having fly ash contents between 10 to 30 per cent by weight and 50 per cent on goods having flyash contents exceeding 30 per cent by weight in the districts mentioned in column 2 of the Annexure for the period mentioned in column 3. Column 2 contains the names of district which includes Faizabad, Raebareli and several other districts. District Ambedkarnagar where the petitioner had established an industry has been carved from Faizabad District. For Faizabad/Ambedkarnagar the period for rebate has been extended to 10 years and for some other districts it has been made to 8 years and 12 years.

6. It has been stated in para 9 of the writ petition that a writ petition No. 958 (Tax) of 1999 J.P. Cement v. State of U.P. was filed by the petitioner''s unit to avail the benefit of rebate or tax concession in pursuance to government order dated 27.2.1998. A counter affidavit was filed by the State in the said writ petition at Allahabad and in Para 9,10 and 11 it was stated that exemption may be provided only to those goods which have been produced from unit or industry situated in the State of U.P. It was further stated that in case, petitioner wants to avail the benefit of notification it can establish a unit in the State of U.P. According to petitioners keeping in view the averment made in the counter affidavit filed in the writ at Allahabad as well as to avail the benefit of government notification 27.2.1998, the petitioner contacted National Thermal Power Station Tanda to find out the availability of fly ash. After negotiation the petitioner entered into agreement on 23.2.2002 with National Thermal Power Corporation for supply of fly ash to the proposed industry of cement. A copy of agreement has been filed as Annexure-3 to the writ petition.

7. Thereafter, petitioner moved an application dated 22.12.2003 to the Bank of Maharashtra for sanction of loan. A project report was prepared keeping in view the notification dated 27.2.1998 with regard to tax rebate. Thereafter petitioner had invested about 100 crores to establish the unit for manufacture of cement at Tanda now fall in District Ambedkar nagar.

8. No objection certificate was provided by U.P. Pollution Control Board on 29.4.2003 with respect to Tanda Unit (Annexure-5). The Assistant Commissioner Central Excise, Faizabad had also granted registration under the Central Excise Act on 23.8.2004 (Annexure-6). Thereafter, petitioner had started production by using fly ash supplied by the National Thermal Power Corporation, Tanda w.e.f.

18.9.2004.

9. However, the State government by impugned notification dated 14.10.2004 had rescinded the earlier notification dated 27.2.1998 purporting to be issued u/s 5 of the Act read with Section 21 of the U.P. General Causes Act, hence the present writ petition.

10. The submission of Shri Bharat Ji Agarwal learned Senior Counsel is that notification dated 27.2.1998 was issued keeping in view the hazardous nature of fly ash causing climatic pollution and converting fertile land into barren land to check the pollution hazards and also danger to fertility of land. The notification was issued encouraging the industries to use fly ash with consequential tax rebate for the period specified in the impugned notification. It has been stated that the promise made by the State Government once acted upon then it is irrevocable. Government has to abide by its promise by granting tax rebate to the industries which were established keeping in view the notification dated 27.2.1998.

11. It has vehemently been argued that keeping in view the unequivocal promise of the State Government through the notification dated 27.2.1998 the petitioner had established industry at Tanda after investing more than 100 crores. The impugned notification issued by the state government revoking the earlier one is neither in public interest nor in the interest of State. It has been stated that the units which are established before issuance of impugned notification are entitled for the benefits/exemption/concession in trade tax for the period of ten years in the present case as it relates to district Ambedkar Nagar from the date of its production.

12. Learned Counsel for the petitioner had relied upon the judgments reported in

1. Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others,

2. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,

3. MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others,

4. Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others,

5. M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others,

6. Dai-Ichi Karkaria Ltd. Vs. Union of India and Others,

7. 1987 STC 65, Pournani Oil Mills v. State of Kerala and Anr.

13. Shri H.P. Srivastava learned Additional Chief Standing counsel stated that as a policy decision State Government has got right to revoke the earlier notification. It has also been stated that the impugned notification has been issued keeping in view the supervening public interest. It has also been stated

that since the impugned notification has been issued as a matter of policy decision it may not be supplied to judicial review. It has also been stated by learned Additional Chief Standing counsel that respondents State Government or the Trade Tax Department had not issued any formal order with regard to extension of benefit of scheme in pursuance to notification dated 27.2.1998, hence principle of promissory estoppel shall not be attracted.

14. Learned Additional Chief Standing counsel has relied upon the cases reported in

(1) Kasinka Trading and another, etc. etc. Vs. Union of India and another,

(2) Shrijee Sales Corporation and Another Vs. Union of India (UOI),

(3) Arvind Industries and others Vs. State of Gujarat and others,

(4) Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others,

(5) State of Rajasthan and Another Vs. M/s Mahaveer Oil Industries and Others,

(6) Sales Tax Officer and Another Vs. Shree Durga Oil Mills and Another,

(7) Union of India (UOI) and Others Vs. Godhawani Brothers and Another,

(8) Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others,

(9) Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttranchal and Others,

(10) 2008 (13) SCC 213, Kusumam Hotels (P) Ltd. v. Kerala State Electricity Board

(11) State of Arunachal Pradesh Vs. Nezone Law House, Assam,

(12) State of Rajasthan and Another Vs. J.K. Udaipur Udyog Ltd. and Another,

15. As discussed in the preceding para the petitioner submitted that he had open the cement industry at Tanda keeping in view the notification dated 27.2.1998 coupled with statement made in the affidavit filed in Writ Petition No. 958 (Tax) of 1999 by petitioners. Petitioner unit was registered with the Trade Tax Department and production started expecting tax rebate. It shall be appropriate to reproduce the relevant portion of the affidavit filed by the State in the writ petition at Allahabad, which is as under: Exemption has been provided vide notification dated 27.2.1998 by the State of U.P. for increase of productions in the State of U.P. and it is well within the powers of the State. If the petitioner wants to avail the benefits of notification dated 27.2.1998 it can also establish a unit in the State of U.P.

16. The averments contained in para 9 and 10 of the writ petition has not been denied with the remark of needs no comment. It has been further stated that affidavit filed in the Writ petition No. 958 (Tax) of 1999 does not amount to extend an assurance for establishment of unit in State of U.P. Alternatively it has

been stated that authority who sworn the counter affidavit was not vested with right to extend any promise. It shall be appropriate to reproduce para 11 of the counter affidavit.

That the averments of paragraphs 9 and 10 of the writ petition so far it states that by filing writ petition No. 958 of 1999 by the petitioner before this Hon''ble Court at Allahabad and filing of the counter affidavit in the said writ petition need no comments, but rest of the averment which are contrary to the facts stated in preceding paragraphs of this affidavit are wrong, incorrect and are denied. It is further categorically stated here that para 11 of the counter affidavit filed in Writ petition No. 958 of 1999 anyone, whatsoever, had extended the promise to the petitioner to establish a unit in the State of U.P. for utilizing fly ash. It is further stated that even if for the sake of argument it is presumed that there is any promise extended in para 11 of the counter affidavit filed in the writ petition No. 958 of 1999 that in that situation it is submitted that the authority who has sworn the counter affidavit has no authority vested in him to extend any such promise and therefore, the promise if it is there was not by a competent authority.

17. A plain reading of the government notification dated 27.2.1998 reveals that for availing the benefit of the notification it shall not be necessary for the industries to complete any formality or obtain a formal order. In the absence of any provision with regard to formal order from Trade Tax Department to avail the benefit of rebate in pursuance to notification issued u/s 5 of the Trade Tax Act petitioner does not seem to require to apply for the same and in response thereof obtain a formal order from the Trade Tax Department. Whatever right flows from the notification dated 27.2.1998 is self contained and only condition given therein in unequivocal term is establishment of industry in the respective districts given in Column 2. The four conditions given in notification dated 27.2.1998 does not speak to obtain a formal order to avail the benefit of tax rebate. Accordingly, the submission of learned Additional Chief Standing counsel does not seem to correct.

18. Apart from above, the affidavit, in response to writ petition filed by the petitioners unit of Satna in this Court at Allahabad and the response by the affidavit filed by the State Government seems to be an invitation to establish an industry.

19. A petition filed in the High Court under Article 226 of the Constitution of India is decided summarily on the basis of affidavit filed by the parties. The proceeding being summary in nature ordinarily Court while deciding a controversy does not direct to lead evidence. Neither oral evidence is recorded with opportunity to cross examine the witnesses nor ordinarily a party is permitted to establish his claim through production of witness. Affidavit filed by the parties unless repulsed or shown to be false is believed by the Court and accordingly a writ petition is decided.

20. Writ petition filed by the petitioner''s unit situated at Satna M.P. was considered for adjudication keeping in view the affidavit filed by the State Government. The averment contained in Para 11 (supra) of the affidavit was relied upon by the court. In such scenario the state does not have got right to go back from the statement of fact pleaded in its affidavit. Whether the authorities are authorized to file affidavit or not is the internal matter of the State Government. Once the affidavit has been filed by an officer of the State Government representing the State and relied upon by the Court then State cannot go back from the such affidavit, more so when at no stage the State had moved appropriate application for deletion or expulsion of the relevant portion of the pleading. In the present case, nothing has been brought on record that some action was taken against the officer who filed affidavit in this Court at Allahabad or some application was moved that the averments made in the counter affidavit filed by the State was without any authority or incorrect.

21. Accordingly the averments contained in the Para 11 of the affidavit (supra) may be relied upon and may be treated as promise inviting the petitioner or other similarly situated industries to establish their industry using fly ash supplied from the Thermal Power Station situated in the State of U.P.

22. In case, counter affidavit filed by the State does not contain correct fact then that should have been deleted by moving appropriate amendment application as early as possible but that has not been done by the respondents State, hence, also averment contained in Para 11 of the Affidavit has got binding effect. The defence taken seems to be after thought.

23. Apart from above, averments contained in Para 11 of the counter affidavit of the State has been sworn by the officer of the State. In case, a false affidavit is filed then keeping in view the fact that filing of false affidavit is punishable under the Indian Penal Code, such officer may be prosecuted. Filing of false affidavit also makes out a case of ex facie criminal contempt in view of law settled by Hon''ble Supreme Court vide Afzal and another Vs. State of Haryana and others, Dhananjay Sharma Vs. State of Haryana and Others, Dhananjay Sharma v. State of Haryana and Ors.

24. Accordingly, averments contained in Para 11 of the affidavit of the State filed in Writ Petition No. 958 (Tax) of 1999 may very well be considered as a stand of State Government with regard to present controversy. Promissory Estoppel

25. The assurance given by the State through the notification dated 27.2.1998 or by pleading in the counter affidavit in the writ petition filed at Allahabad (supra) whether exempt for payment of trade tax for the period of ten years in spite of revocation of earlier notification by the impugned notification dated 14.10. 2004.

26. The assurance given by the State or a private body while extending certain rights is called by various names like ''promissory estoppel'', ''equitable estoppel'', ''quasi estoppel'', and ''new estoppel''. It is a principle of equity to avoid injustice, known as promissory estoppel. This doctrine is the interposition

of equity. Equity has always been used to stepped in to mitigate the rigours of strict law. It has been involved and extended by Amercian and English courts in past to meet out the ends of justice on equitable grounds.

ENGLISH COURTS

27. In Hughes v. Metropolitan Railway Company (1877) 2 AC 439, Lord Cairns observed, to quote:

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

28. The principle of promissory estoppel also found in later judgement reported in Birmingam & District Land Co. v. London and North-Western Rail Co. [1888] 40 Ch. D. 268.

29. Mr. Justice Denning as he then was in his most celebrated and of quoted judgement reported in [1956] 1 All. E.R. 256 Central London Property Trust Ltd. v. High Trees House Ltd. in the year 1947 rediscovered and given modern and widest enunciation to the principle of promissory estoppel. Justice Denning observed that in equity the plaintiff could not have been allowed to act inconsistently with their promise on which the defendants had acted. Justice Denning turned down the submission advanced by plaintiff relying upon Jorden v. Money [1854] 5 H.L. 185 that no estoppel could be raised against the plaintiff since the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence and not to promises de futuro which, if binding at all, must be binding only as contracts. Justice Denning observed, to quote (supra) as under:

They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured.

30. According to Lord Denning, to quote: "that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply"

31. However, Justice Buckley in a case of Beesly v. Hallwood Estate Ltd. [1960] 2 All. E.R. 314; observed as under:

The doctrine may afford a defence against the enforcement or otherwise of enforceable rights : it cannot create a cause of action.

32. Lord Denning in Crabb v. Arun Distric Council observed, to quote:

there are estoppels and estoppels. Some do give rise to a cause of action.

33. House of Lord while overruling the judgment of Howell v. Falmouth Boat Construction Co. Ltd. reported in 1951 A.C. 837 observed that the doctrine of promissory estoppel cannot be invoked to bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it".

34. In Greater Sydney Development Association Ltd. v. Rivett and Anr. (1929) 46 W.N. (N.S.W.) 99 Long Innes J. had said in that case that promissory representations of future intention could not prevent a person enforcing his legal rights, but they could form a good defence to an action seeking equitable relief in respect of those legal rights.

35. The element of doctrine promissory estoppel as settled by English Courts though not in its absolute term shows that if two parties, who are in some contractual relationship, enter into a course of negotiations that result in one party promising or representing to the other, in the absence of consideration, that either he will not enforce his full legal rights or he will hold them in abeyance, the other party will have an equitable defence to an attempt by the promisor to go to enforce his full legal rights if:

(a) the promisor intended to create legal relations by his promise, that is he intended to be bound by it;

(b) the promisor knew that his promise would be acted on;

(c) the promisee acts on the promise or representation in such a way as to alter his position,

(d) either the promisor has not given reasonable notice that he has revoked his promise or the promisee has so altered his position as not to be able to return to the position he was in previous to the promise being made, and

(e) the promise has not himself acted inequitably. Of course, the principles outlined above are not all beyond dispute for example, Combe and Robertson v. Minister of Pensions (1949) 1 K.B. 227 suggest that the doctrine may be more than purely a defensive equity, whilst P. v. P. (1957) N.Z.L.R. 854 provides some ground for believing that the doctrine may operate outside of a purely contractual context.

36. In Preston v. Inland Revenue Commissioners 1985 A.C. 835 where a taxpayer claimed that the Revenue should honour an agreement with him and not to pursue certain tax claims, it was held on the facts that the agreement did not bind the Revenue, but Lord Templeman made it clear that , in principle,

conduct equivalent to a breach of contract or breach of representation could amount to an abuse of power on the part of the tax authorities.

In later period the House of Lords unanimously accepted that it may be an abuse of power for the Revenue to seek to extract tax contrary to an advance clearance given to the tax payer by the Revenue. (1994 (1) W.L.R. 324, Matrix Securities Ltd. v. IRC)

37. An express representation on the basis of express undertaking is given which induces an expectation of a specific benefit or advantage.

In Judicial Review by De Smith Sixth Edition (page 615) the incident of express representation has been summarized as under, to quote:

An obvious example is where an express undertaking is given which induces an expectation of a specific benefit or advantage. The form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow. The promise may relate to an existing situation which will continue, or to a future benefit. In the case an expectation inducing a right to procedural fairness, rather than the substance of the expectation, the promise, as we have seen, may be either to the benefit itself or to a fair hearing.

38. Present case is an example of express representation in the form of original notification. In Judicial Review by De Smith discussed it as under:

The promise or representation on which the expectation is based may be implied, e.g. from past conduct or a practice which the claimant may reasonably expect will be continuedas in another tax case where the Court of Appeal held that the Revenue could not resile from a long practice of accepting a claim for a tax refund despite the fact that the statutory time limit had expired.

39. One of the principle recognised to draw inference of legitimate expectation on the basis of promissory estoppel is a legitimate expectation must be induced by conduct of the decision maker. Representation by different person or authority will therefore not found the expectations. (Judicial Review by De Smith) Ordinarily an unlawful representation shall not create a ground under the principle of promissory estoppel. However, there may be a situation where fairness requires an expectation to be fulfilled, even where public body exceeds its authority, shall depend upon the case to case (Judicial Review De Smith 636).

40. In Administrative Law, Tenth edition by H.W.R. Wade and C.F. Forsyth page 455, it has been observed that courts should protect the legitimate expectation substantively, to quote as under:

The courts have gone further still in the protection of substantive expectations. They have required the fulfillment of the expectation unless an overriding public interest ordains otherwise. In the leading case a health authority which, for practical and financial reasons wished to close a specially built home for very seriously injured long-term patients, in breach of its promise to the residents that it was their home for life, was prevented from doing so. The Court of Appeal, in rejecting rationality as the appropriate standard of review, held that it was for the court to judge'' whether there (was) a sufficient overriding interest to justify a departure from what has previously been promised. This approach is consistent with European law which balances the protection of the general public interest against the individual''s legitimate expectation.

U.S. Courts

41. The U.S. Courts are also strictly in favour of doctrine of promissory estoppel against the government and public bodies where interest of justice morality and common fairness clearly dictate, the court may grant equitable relief. Hon''ble Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, while summing up the applicability of doctrine of promissory estoppel in U.S. summarize as under:

There has so far not been any decision of the Supreme Court of the United States taking the view that the doctrine of promissory estoppel cannot be invoked against the Government. The trend in the State courts, of late, has been strongly in favour of the application of the doctrine of promissory estoppel against the Government and public bodies "where interests of justice, morality and common fairness clearly dictate that course." It is being increasingly felt that "that the Government ought to set a high standard in its dealings and relationships with citizens and the word of a duly authorised government agent, acting within the scope of his authority ought to be as good as a Government bond". Of course, as pointed out by the United States Court of Appeals, Third Circuit in Valsonavich v. United States (1) the Government would not be estopped "by the acts of its officers and agents who without authority enter into agreements to do what the law does not anction or permit" and "those dealing with an agent of the Government must be held to have notice of limitations of his authority" as held in Merrill''s case. This is precisely what the House of Lords also held in England in Howell v. Falmouth Boat Construction Co. Ltd. (supra) where Lord Simonds stated the law to be:

The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a Government officer however high or low in the hierachy. The question is whether the character of an act done in face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion the answer is clearly No. " But if the acts or omissions of the officers of the Government are within the scope of their authority and are not otherwise impermissible under the law, they "will work estoppel against the Government.

42. However, equitable estoppel is distinct from promissory estoppel. Promissory estoppel involves a clear and definite promise, while equitable estoppel involves only representations and inducements. The representations at issue in

promissory estoppel go to future intent, while equitable estoppel involves statement of past or present fact. Further the equitable estoppel lies in tort, while promissory estoppel lies in contract. The major distinction between equitable estoppel and promissory estoppel is that the former is available only as a defense, while promissory estoppel can be used as the basis of a cause of action for damages.

Australian law

43. The doctrine of promissory estoppel was adopted into Australian law in Legione v. Hateley (1983) 152 CLR 406; however, the plaintiffs were unsuccessful in that case because the reliance was unreasonable and the promise not unequivocal.

44. In fact, now Australian law has gone beyond the position espoused in the High Trees case (supra); it has been extended successfully to cases where there is no pre-existing legal relationship between the two parties, and promissory estoppel can be wielded as a "sword", not just as a "shield". Mason CJ and Wilson J in Waltons Stores (Interstate) Ltd v. Maher (1988) 164 CLR 387 held that if estoppel is proven, it gives rise to an equity in favour of the plaintiff, and the court will do the minimum equity that is just in the circumstances. From this case, it is also possible for the promise to come from silence or inaction.

45. It was stated by Brennan J in Waltons Stores(supra): "To establish an equitable estoppel, it is necessary for the plaintiff to prove that 1) the plaintiff assumed that a particular legal relationship would exist between them (and in the latter case) that the defendant would not be free to withdraw from that expected legal relationship; 2) the defendant has induced the plaintiff to adopt that assumption or expectation; 3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; 4) the defendant knew or intended him to do so; 5) the plaintiff''s action or inaction will occasion detriment if the assumption of expectation is not fulfilled; and 6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation of otherwise."

46. In Australian law, there is an element of unconscionability, which is satisfied if one party encourages the other party to create assumptions that lead to reliance. Today, the principle of estoppel may give birth to an enforceable obligation even without a consideration under the following conditions: 1. promise 2. dishonest behavior of the promittant 3. special relationship between the promittant and the beneficior (eg: duty of information) 4. irreversible changement of the situation of the beneficior of the promise

INDIAN CASES

47. In India in the cases reported in Gangaes Manufacturing Co. v. Surajmull and Ors. ILR 5 Cal. 669; Municipal Corporation of Bombay v. The Secretary of State ILR 29 Bomb. 588; Ransden v. Dyson [1866] L.R. 1HL 170, the doctrine of

promissory estoppel has been applied.

48. In Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., their Lordship of Hon''ble Supreme Court had virtually reiterated the proposition with regard to doctrine of promissory estoppel of the Bombay High Court in the case of Dyson (supra) and observed that Government is not exempted from its liability in case a representation made by it is believed and carried out by a person. To reproduce relevant portion from the judgement of Indo-Afgan Agencies (supra) as under: Para 23 Under our jurisprudence the Government is not exempt form 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 appraisement of the circumstances in which the obligation has arisen.

49. In Collector of Bombay v. Municipal Corporation of the City of Bombay and Ors. their Lordship of Hon''ble Supreme Court observed that Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power and held that Government must deemed to be bound by promise made. In the case of Indo Afgan (supra) their Lordship of Hon''ble Supreme Court had repelled the defence of executive necessity and pointed out that Government cannot be spared from its obligation to honour the promise made by it, if the citizen, acting in reliance on such promise, had altered the position. It was held that doctrine of promissory estoppel in such cases shall be applicable against the Government and it could not be defeated by invoking the defence of executive necessity or administrative exigencies.

50. In Motilal Padampat Sugar Mill (supra) Hon''ble Supreme Court observed that in a Republic governed by the rule of law, no one, however high or low is above the law. Every one is subject to the law as fully and completely as any other and the Government is no exception. To quote relevant portion as under:

It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned; the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not beheld to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations, but let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case (supra) and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promise acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavor of the Courts and the legislatures must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible.

51. Their Lordship of Hon''ble Supreme Court in Motilal Padampat Sugar Mill (supra) retreating the principle propounded by Indo Afgan Agnecy (supra) observed that, to quote:

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 in definite and undisclosed round of necessity or expediency", nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex-parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether these facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, the 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.

Their Lordship further observed to quote:

The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden.

52. Their Lordship of Hon''ble Supreme Court after considering catena of judgements of Indian Supreme Court, High court and various courts in the case of Motilal Padampat Sugar Mill (supra) proceeded to observe as under:

We do not think that in order to invoke the doctrine of promissory estoppel it is necessary for the promise to show that he suffered detriment as a result of acting in reliance on thepromise. But we may make it clear that if by detriment we mean injustice to the promisee which could result if the promisor were to recede from his promise then detriment would certainly come in as a necessary ingredient. The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise. The classic exposition of detriment in this sense is to be found in the following passage from the judgment of Dixon, J in the Australian case of Grundt v. The Great Boulder Pty. Gold Mines Ltd. (1):

It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no understanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong, and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act or source of prejudice.

If this is the kind of detriment contemplated, it would necessarily be present in every case of promissory estoppel because it is on account of such detriment which the promisee would suffer if the promisor were to act differently from his promise, that the Court would consider it inequitable to allow the promisor to go back upon his promise. It would, therefore, be correct to say that in order to invoke the doctrine of promissory estoppel it is enough to show that the promisee has acting in reliance of the promise, altered his position and it is not necessary for him to further show that he has acted to his detriment.

53. However, the legislatures is not precluded from exercising legislative function by resort of doctrine of promissory estoppel vide State of Kerala and Another Vs. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc., State of Kerala v. Gwalior Rayon Silk Manufacturing Co. Ltd. (para-24); (2001) 2 SCC 62: Sharma

Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, Pune Municipal Corporation and Another Vs. Promoters and Builders Association and Another, Tata Iron and Steel Co. Ltd. Vs. State of Jharkhand and Others, Hira Tikkoo Vs. Union Territory, Chandigarh and Others, Hira Digi v. Union Territory Chandigarh.

54. In Devasahayam (D) by LRs. Vs. P. Savithramma and Others, Deva Sahai v. P. Savithramma Hon''ble Supreme Court held that a doctrine of approbate and reprobate is a specific of estoppel. However, there cannot be estoppel against statute.

55. In some other cases reported in M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., Bangalore Development Authority and Others Vs. R. Hanumaiah and Others, State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others, State of Bihar and Anr. v. Project Uchcha Shikshak Sangh and Ors. (paga-77) also while accepting the vested right of citizens in pursuance of doctrine of promissory estoppel, Hon''ble Supreme Court dealt with the exception reiterate the law that the estoppel shall have no obligation where bona fide claim go against the constitutional or statutory provisions.

56. In a case reported in (2008 (1) UPLBEC 122, Public Sector Employees Co-operative Housing Society Ltd. v. State of U.P. and Anr.) Hon''ble Supreme Court held that Promissory Estoppel does not apply to cases where certain order is obtained by misleading an authority.

57. In a case reported in State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others, Hon''ble Supreme Court held that principle of promissory estoppel not applicable against constitutional or statutory provisions (para 77).

58. In a case reported in 2003 (1) SCC 152, Central Airmen selection board and Anr. v. Surender Kumar Das Hon''ble Supreme Court held that promissory estoppel is based on equitable principle. A person who misled authority by making fake statement cannot take shelter of promissory estoppel. (Para 7)

59. In a case reported in Hira Tikkoo Vs. Union Territory, Chandigarh and Others, . Hon''ble Supreme Court held that promissory Estoppel (para 25) cannot be enforced against general public interest.

60. In a case reported in Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, Hon''ble Supreme Court held that promissory estoppel operates even in legislative field. (para 22, 24, 25 to 38).

61. It shall be appropriate to consider the judgements relied upon by Shri H.P. Srivastava learned Additional Chief Standing counsel. In Kainska Trading Company (supra) their Lordship of Hon''ble Supreme Court had considered earlier judgements right from Union of India v. Indo Afgan Agencies Limited (supra) and reiterated the principle with regard to its applicability. However, it

has been held that if it can be sworn by the government or public authority that having regard to the facts as they have transpired it would be inequitable to hold the government or public authority to the promise or representation made by it then the Court would not raise any equity in favour of person to whom the promise or representation is made and enforce the promise or representation against the government order public authority (para 13 and 14).

62. The exemption with regard to manufacture of certain product requiring PVC resin was held to be rightly withdrawn by the Government where it was found and realise that international price of the product were falling and consequently the import price has become lower than the ex factory price of the indigenous material, hence, in public interest government withdrawn the exemption notification. However, the facts of the present controversy is entirely different and no material has been placed before the Court justifying the withdrawn of exemption from the industry which has started production in pursuance to original notification.

63. In Shri Jee Sales Corporation (supra) the ratio of Motilal Padampat Sugar Mill (supra) has been reiterated by Hon''ble Supreme Court while holding that exemption granted can be withdrawn in public interest. It has been held that public interest dominates the economic scene and in case Central Government found that it is necessary to protect its own industry by putting up a tariff wall it would be futile to say that it cannot do so because it is bound by its promise. The facts of Shri Jee Sales Corporation (supra) is entirely different than the present one and judgement is not attracted.

64. In the case of Arvind Industries and Ors. (surpa) the principle of promissory estoppel was not made applicable by the Court on the ground that the appellant was not able to show that some definite promise was made on behalf of the Government (para 9).

65. In the case of Sharma Transport (supra) their Lordship of Hon''ble Supreme Court reiterated the principle with regard to promissory estoppel holding that it has been evolved by courts on equitable ground to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel. The object of promissory estoppel is to interpose equity shorn of its form to mitigate the rigour of strict law.

66. Their Lordship held that in order to resit its liability from promissory estoppel government have to disclose to the court the various events insisting its claim to be exempted from liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the government.

67. Hon''ble Supreme Court held that Article 301 is of widest amplitude subject to rider contained in Part XIII of the constitution. For the tax to become a prohibited tax it has to be direct tax the effect of which is to hinder the movement part of trade. It is the reality or substance of the matter that has to

be determined. The case of Sharma Transport (supra) seems to be of different issue and not applicable.

68. In the case of Mahaveer Oil Industries (supra) while reiterating the principle of promissory estoppel, Hon''ble Supreme Court held that the public interest requires that State be held bound by the promise held out by it but it does not preclude the State from withdrawing the benefit prospectively even during the course of claim if public interest requires. It shall be appropriate to reproduce relevant portion from the judgement of Mahaveer Oil industries (supra) which is as under: para 14. Are the respondents justified in holding the State to the promise made by it in the form of an incentive scheme which is made available for a specified period of time, when new industries are set up on the basis of that scheme relying on the promise of benefits held out by it? Public interest requires that the State be held bound by the promise held out by it in such a situation. But this does not preclude the State from withdrawing the benefit prospectively even during the period of the scheme, if publicinterest so requires. Even in a case where a party has acted on the promise, if there is any supervening public interest which requires that the benefit be withdrawn or the scheme be modified, that supervening public interest would prevail over any promissory estoppel.

69. Accordingly from the judgements relied upon by the learned Additional Chief Standing counsel though Hon''ble Supreme Court held that Government had got power to withdraw tax exemption during the continuance of scheme but its benefit should be withdrawn prospectively. Accordingly, after starting production like in the present case the benefit should not have been withdrawn by the Government under the principle of promissory estoppel.

70. In the case of Durga Oils Mills (supra) Hon''ble Supreme Court had reiterated the principle of promissory estoppel affirming the Kainska trading company (supra) and held that in case, there is supervening public equity, the Government would be allowed to change its stand by withdrawing the representation made by it. In the case of Durga Oil Mill (supra) the withdrawal of tax benefit was on the basis of resource crunch demonstrated before the court by the State which does not seems to cover the present controversy.

71. The case of Godhawani Brother (supra) relates to a situation where the promise was refused with regard to tax exemption relying upon the case of Kainska trading (supra) or their Lordship had not disclosed the ground facts and circumstances while allowing the appeal. It does not seem to cover the present controversy.

72. In the case of Bannari Amman Sugar (supra) their Lordship of Hon''ble Supreme court held that concession given by the Government can be withdrawn at any time but with the rider that in case industry has been established the promissory estoppel can be invoked. It shall be appropriate to reproduce relevant portion from the judgement of Bannari Amman Sugar (supra) which is as under:

No vested right as to tax-holding is acquired by a person who is granted concession. If any concession has been given it can be withdrawn at any time and no time- limit should be insisted upon before it was withdrawn. The rule of promissory estoppel can be invoked only if on the basis of representation made by the Government, the industry was established to avail benefit of the exemption. In Kasinka trading v. Union of India it was held that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice.

73 Hon''ble Supreme Court in Bannari Amman Sugar (supra) further consider the principle of legitimate expectation and observed that a person may have legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. However, it has been further held that protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. To reproduce relevant portion from the judgement of Bannari Sugar (supra) as under:

8. A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review.------------.The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise.

74. In the case of Dhampur Sugar (supra) Hon''ble Supreme Court held that the State and dis-instrumentality has got power to change policy. It has untrammelled power to change or re change adjust and readjust the policy taking into account the relevant and germane considerations and is a discretion of Government. However, the change of policy should not be arbitrary, capricious or unreasonable. Government has liberty to change policy in public interest and the principle of play in joint.

75. In the case of Kusumam Hotels (supra) Hon''ble Supreme Court reiterated the applicability of principle of promissory estoppel and while holding the right of the State to change its policy it is held that ordinarily it shall be prospective in nature unless expressly or by necessary implication indicated in the notification with regard to retrospectivity. To reproduce relevant portion from the judgement of Kusumam Hotel (supra) as under:

Para 21 It is now a well settled principle of law that the doctrine of promissory estoppel applies to the State. It is also not in dispute that all administrative orders ordinarily are to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly or by necessary implication. The authority issuing such direction must have power to do so. The Board, having acted pursuant to the decision of the State, could not have taken a decision which would be violative of such statutory directions.

76. While considering impugned notification, in the absence of any specific indication it may be given only prospective effect.

77. In the case of Nezone Law House (supra) the principle of promissory estoppel has been reiterated by the Hon''ble Supreme Court but has been not applied on the ground that the petitioner had relied upon the assurance given by the Law Minister with regard to purchase of book while acting thereon.

78. In the case of J.K. Udaipur Udyog (supra) Hon''ble Supreme Court had upheld the power of State Government to withdraw the tax exemption and held that there is no indefeasible right to the continued grant of an exemption but Hon''ble Supreme Court had not adjudicated the question with regard to situation where sanction was granted and eligibility certificate was issued. The period of exemption under sanction if would cover the date of certification of application is complete. Their Lordship of Hon''ble Supreme Court held that grant of concession may be withdrawn and the recipient of a concession has no legally enforceable right against the Government to grant a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power. However, facts and circumstances of the case of J.K. Udaipur Udyog (supra) seems to be based on different circumstances and does not relate to establishment and production by industry keeping in view the promise made by the government like present one.

79. The case reported in Delhi Science Forum and others Vs. Union of India and another, relates to grant of licence does not seem to applicable to the facts and circumstances of the present case and question involved.

80. The case reported in Punjab Communications Ltd. Vs. Union of India and Others, relates to applicability of principle of legitimate expectation and their Lordship held that policy decision extending certain benefit of substantive industry creates legitimate expectation and normally binding on the decision maker. Such policy can be changed only by the decision maker only in overriding public interest.

81. In a case reported in Bhavesh D. Parish and Others Vs. Union of India and Another, Hon''ble Supreme Court held that the policy matter should not lightly be interfered under judicial review and where action is taken in public interest it should not be interfered.

82. In the case of U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others, after considering earlier judgements of Hon''ble Supreme Court, their Lordship has held that the concession given creating vested right under statute can be revoked only by the some statute. It has further been held that where concession is revoked not in public interest shall be violative of Article 14 of the Constitution.

Their Lordship had uphold the judgement of Allahabad High Court and dismissed the appeal with the following observation, to quote:

30. It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behove on the part of the appellant-Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the respondents were legitimately entitled to avail. We fail to understand why the appellant-Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation the principle of promissory estoppel which has been evolved by the Courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

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

83. In a recent case reported in State of Bihar and Others Vs. Kalyanpur Cements Ltd., their Lordship of Hon''ble Supreme Court had reiterated the aforesaid principles with regard to promissory estoppel and held that mere change of policy be not a good ground to exonerate the State government from its liability with regard to tax rebate or exemption. Their Lordship has summarised the principle of promissory estoppel as under:

26. In our opinion, the aforesaid statement of law covers the submissions of Dr. Dhawan and Mr. Dwivedi that in order to invoke the aforesaid doctrine, it must be established that (a)that a party must make an unequivocal promise or representation by word or conduct to the other party (b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future (c) a clear foundation has to be laid in the petition, with supporting documents (d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise (e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the

Government were required to carry out the promise (f) the Court will not apply the doctrine in abstract. However, since the judgments have been cited, we may notice the law laid down therein.

84. In the case of Kalyanpur Cements Ltd. (supra) the fact relates to a situation where State Government had consistently given assurance not only to company but also to the financial institution that the necessary Sales Tax exemption notification shall be issued which later on not done. Keeping in view the overwhelming evidence on record with regard to assurance given by the State Government in the case of Kalyanpur Cement Limited (supra) their Lordships held that it is a fit case for invoking the doctrine of promissory doctrine (para 56). Though the notification was not issued by the State government but keeping in view the assurance given by the State Government the company established the industry and when exemption was not granted by issuing notification they approached the High Court. To reproduce relevant portion, which is as under:

56 From the above it becomes apparent that the State Government had been consistently giving assurances not only to the Company but also to the financial institutions that the necessary Sales Tax exemption notification will be issued. In our opinion the Company had laid a clear, sound and a positive foundation for invoking the doctrine of `promissory estoppel''. Therefore, it is not possible to accept the submissions made by Dr. Dhawan and Mr. Dwivedi that no definite promises were ever made. This, however, is not the end of the matter.

59. All the aforesaid material would be lead to a conclusion that the Company as well as the financial institutions were entitled to rely upon the repeated assurances given by the State Government. However, since the promised notification was not forthcoming, the Company was constrained to file the writ petition.

85. After relying upon the case of Motilal Padampat Sugar Mill (surpa) and Union of India v. Anglo Afghan Agencies, in the case of Kalyanpur cement ltd. (supra) Hon''ble Supreme Court observed as under:

68...........Thereafter, 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 liability. It is only when the Court is satisfied that the Court would decline to enforce the promise against the Government.

However, the burden would be upon the Government to show that it would be inequitable to hold the Government bound by the promise. The Court would insist a highly rigorous standard of proof in the discharge of this burden. In the present case, the claim of the Government is based on a change in policy advocated in the Chief Ministers'' Conference. These Conferences have taken place before the affidavit is filed on 05.12.2001. Therefore, the High Court concluded that the Government has not been candid in disclosure of the reasons for passing the order dated 06.01.2001. In our opinion, the aforesaid decisions with regard to the discontinuance of the Sales Tax exemptions from 01.01.2000 could not have affected the rights of the Company under the Industrial Policy, 1995. Necessary application was made to the Government seeking exemption on 21.11.1997. For more than 3 years, the Company and the financial institutions had been assured by the Government that the notification will be issued forthwith. However, it was not issued. We are of the opinion that the action of the appellants is arbitrary and indefensible.

86. It shall be appropriate to mention that in the case of Kalyanpur Cements Ltd(supra) Hon''ble Supreme Court had considered almost all the judgements relied upon by the learned Additional Chief Standing counsel. It is not necessary to consider other cases to make the judgement bulky keeping in view the recent judgement of the Hon''ble Supreme court of the Kalyanpur Cements Ltd. (supra)

87. So far as the submission of learned Additional Chief Standing counsel that being a policy decision it is not open for this Court to interfere with the impugned notification through judicial review, seems to be not correct. It has been settled by Hon''ble Supreme Court by catena of judgements that public authorities have liberty and freedom in framing policies by playing in joint but the discretion is not absolute, unqualified, unfettered or uncanalised and judiciary had control over the executive action. The Court can consider whether the policies are arbitrary, violative of statutory provisions or fundamental rights enshrined in Part III of the Constitution. An arbitrary, capricious or malicious, unfair policy decision is open to judicial review. Change of policy decision must be fair and it should not give impression that it is arbitrary and for ulterior motive or criteria vide Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc., State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others, Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttranchal and Others, Dhampur Sugar (Kashipur) Ltd. v. State of Uttranchal.

88. Every action of the public authority must be based on utmost good faith and genuine satisfaction ought to be supported by reason and rationale (Dhampur Sugar Mill (supra)).

89. It is also settled law that every government order or notification ordinarily shall be prospective unless it is made retrospective specifically vide State of Tamil Nadu Vs. Seshachalam, General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others, General Manager, Uttranchal Jal Sansthan v. Laxmi Devi and Ors.

90. Relying upon a case of Rajesh Gupta v. State of U.P. in Writ Petition No. 815 of 2009 delivered by a Division Bench dated 7.8.2009, Additional Chief Standing counsel vehemently submitted that government has got power to play in joint and being a policy decision court should not interfere.

Though the case of Rajesh Gupta (supra) relates to change of policy but it does not relate to a situation where license had acted on the basis of earlier policy. The facts and circumstances seems to be different and not applicable in the present context. It has been settled by Hon''ble Supreme Court that every judgment should be seen and considered in reference to context vide Grasim Industries Ltd. Vs. Collector of Customs, Bombay, Grasim Industries Limited v. Collector of Customs 2003 SCC (1) 410 Easland Combines v. CCE A.N. Roy, Commissioner of Police and Another Vs. Suresh Sham Singh, and Deewan Singh and Others Vs. Rajendra Pd. Ardevi and Others, The case of Rajesh Gupta (supra) does not seem to be applicable under the facts and circumstances of the present case.

91. However, it should not be missed that having power to do certain thing is different than the manner to do a thing . Both stands on different footing. Even if, government has got power to change policy by playing in joint it does not mean that government may act arbitrarily by proceeding in a manner which effects the fundamental right enshrined in Part III of the Constitution or amounts to go back from a situation or promise made while discharging its sovereign function.

92. While issuing the impugned notification revoking earlier one it was incumbent upon the State Government to take into account the plight of industries who have established and started production relying upon earlier one. Non application of mind by the State Government with regard to fate of industrial units established relying upon impugned notification seems not only unethical but also is an arbitrary exercise of power hit by Article 14 of the Constitution of India in view of Motilal Padampat Sugar Mill (supra).

93. In Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, the Supreme Court observed that where Government activity involves public element, the "citizen has a right to claim equal treatment", and when "the State acts to the prejudice of a person, it has to be supported by legality." Functioning of democratic form of Government demands equality and absence of arbitrariness and discrimination."

94. Similarly, in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Apex Court observed that every action of the executive Government must be informed by reasons and should be free from arbitrariness. That is the very essence of rule of law and its bare minimum requirement. Thus, the decision taken in an arbitrary manner contradicts the principle of legitimate expectation and the plea of legitimate expectation relates to procedural fairness in decision making and forms a part of the rule of non-arbitrariness as denial of administrative fairness is Constitutional anethama. (Vide E.P. Royappa Vs. State of Tamil Nadu and Another, Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, Ghaziabad Development Authority and State of U.P. Vs. Delhi Auto and General Finance Pvt. Ltd. and Maha Maya General Finance Co. Ltd. and another, and Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others,

95. So far as the impugned notification is concerned, it seems to be prospective in nature. No inference may be drawn from either plain reading of notification or

by implication with regard to its retrospective application. Accordingly in view of Apex court judgement referred in the preceding paras particularly Mahaveer Oil Industries (supra) and Kusumam Hotels (supra) impugned notification may be applied only for the industries which have been established after its notification. In the present case, it has not been disputed that petitioners industries started production before the issuance of impugned notification, hence, it seems to be entitled to avail and continue with the benefit for the period of tax exemption keeping in view the original notification dated 27.2.1998 (supra).

96. In a case reported in Dai-Ichi Karkaria Ltd. Vs. Union of India and Others, Hon''ble Supreme Court held that subordinate legislation like impugned notification may be questioned on the ground that it is an unreasonable one. Being as a piece of subordinate legislation, the same degree of immunity is not available like the statute passed by legislature. Government may exercise power in public interest in a reasonable manner in accordance to spirit of constitution. It may not exercise its power on unfounded ground or having no basis for formation of the opinion with regard to public interest calling for withdrawal or modification of exemption notification (para 10).

97. In MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, Hon''ble Supreme Court had held that the principle under lying legitimate expectation is based on Article 14 of the Constitution and the rule of fairness as held in Bannari Amman Sugar Ltd. benefit under legitimate expectation may be denied only by showing some overriding public interest.

98. In case the argument of the learned Addl. Chief Standing Counsel is accepted that being a policy matter, the impugned notification is beyond judicial review, then it shall amount to hold against the constitutional spirit providing check and balance amongst the three wings of the government. In Lord Acton''s words, absolute power corrupts absolutely, it shall be anti-thesis of rule of law to hold that the power of judicial review in policy matter is not available. Only in feudalistic or aristocratic State, the decision of the government may not be subject to judicial review.

99. It is only the power of judicial review available to higher Courts against the executive action, checks the government action and keep within the four-corners of law. History shows that a country where the courts are weak and committed to political ideologies, peoples suffer from ill consequences.

After fire in Reichstag on 24.2.1933, Adolf Hitler issued various orders, circulars confining of political opponents into concentration camp. The fire provided him with the perfect pretext to begin consolidating the foundations of a totalitarian one-party State, and special enabling laws were ramrodded through the Reichstag(Parliament) to legalize the regim''s intimidatory tactics.

Avoiding any institutionalization of authority and status which could challenge his own undisputed position as supreme arbiter, Hitler allowed subordinates like Himmler, Goering and Goebbels to mark out their own domains of arbitrary power while multiplying and duplicating offices to a bewildering degree.

100. That is why Hon''ble Supreme Court in the case reported in I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, upheld the right of higher judiciary to interfere with the action of the government including constitutional amendment under the process of judicial review. The Government does not have unfettered power to amend laws or change policy claiming immunity from judicial review.

101. Shri Bharat Ji Agarwal learned Senior Counsel had invited attention of this Court towards notification dated 14.9.1999 and 27.8.2003 issued by the Government of India Ministry of environment for the use of flyash and environmental protection. There appears to be no doubt that environment should be protected but when a question comes with regard to physical matter i.e. dealt with in accordance to statutory provisions.

102. In these days of globalisation of business and shrinking up of the boundaries of nation and impetus given to industries to establish employment generated units shall suffer setback in case the State Government disowned its promise in the form of tax rebate or otherwise after follow up action taken by industrial units, believing the State notification, circulars or orders.

103. Of course, there may be a case when it is proved by cogent and trustworthy evidence establishing that the tax rebate was granted in violation of statutory provisions, constitutional mandate or for some oblique or political motive and in consequence thereof the Government thinks proper to withdraw the tax rebate notification then in such situation the benefit of tax rebate may not be provided even if the industrial units are established under such unlawful notification but such ground neither been pleaded nor argued by the government counsel. The impugned notification does not assign any justifiable reason to robe the earlier one. In any case, the notification revoking earlier one may be given prospective effect and it shall not effect the industrial units which has already been established with production of material like cement in the present case. Whether it is common citizen or the government, honesty, good faith, adherence to promise is not only necessary for the maintenance of morality but also for the maintenance of public faith in the administration.

104. Government have to exercise its power maintaining highest standard expected in public life. Action must be non arbitrary, uninfluenced by political or non ethical considerations. The probate in governance, fair play in action and larger public interest should be hallmarked of decision making process. MORALITY IN LAW

105. In Motilal Padampat (supra) Hon''ble Supreme Court emphasised for social acceptance of law with moral values and observed that it should be constant endeavour of the Court and the legislatures to close the gap between law and morality and bring about as near as approximation between the two as possible.

106. Morality is derived from the Latin word moralitas means manner, character, proper behaviour is a system of conduct and ethics that is virtuous. In descriptive sense morality refers to personal or cultural values, codes of conduct or social mores which distinguished between right and wrong in a given society. It refers directly to what is wrong and right. The law and morality are complimentary to each other and serve to regulate our behaviour. Law accomplishes this primarily through the threat of sanctions in case, it is disobeyed. On the other hand, immoral act may lead to legal sanction or may not. Article 14 of the Constitution provides justness and fairness in action. The justness and fairness is the part and parcel of morality.

107. Noble laureate Amartya Sen in his celebrated treatise, The Idea of Justice observed that there are three principles governing the administration of justice. Firstly, a theory of justice that can serve as the basis of practical reasoning must include the ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies an exercise that is such a dominant feature of many theories of justice in political philosophy today. Secondly, while many comparative questions of justice can be successfully resulted and agreed upon in reasoned arguments, there could well be other comparisons in which conflicting considerations are not fully resolved. Reasonable arguments in competing directions can emanate from people with diverse experience and traditions but they can also come within the society or for that matter even for the very same person. Thirdly, the presence of remediable injustice may well be connected with behavirial transgressions rather than with institutional shortcomings. Justice is ultimately connected with the way peoples lives go and not merely with the nature of the institution surrounding them. In contrast, many of the principal theories of justice concentrate overwhelmingly on him to establish just institutions.

108. Amartya Sen speaks for political and moral philosophy on one side and also discussed the ongoing engagements in law, economics, politics. The requirement of theory of justice include bringing reason into play in the diagnosis of justice and injustice. Democracy has to be judged not just by institutions that formally exists but by the extent to which different voices from diverse sections of the people can actually be heard.

109. Amartya Sen says, to quote : Indeed the business every dynamic persons tend to have some kind of reasons, possibly from creed ones, in support of their dogmas like racist, sexist, classist and caste based prejudices belonging there and other course reasoning but there is hope in this sense bad reasoning can be confronted by better reasoning. The scope of reasoned engagement does exist though people may refuse at initial stage.

110. Mahatma Gandhi from time to time propagated for moral values in personal as well as public life. He emphasised for morality in public life observing that ultimately it is the individual who is the unit.

Mahatma Gandhi also interpreted the civilization a the mode of conduct which regulate the society from generation to generation. 108. Virtually, it is the individual who influence the system individually or jointly as the member of governing body, legislature, bureaucracy or judiciary. In his concluding lecture Dr. Rajendra Prasad observed that a good constitution may be bad in case, bad peoples are at the helm of affairs and bad constitution may be good in case, good peoples are managing the affairs of the country.

Accordingly, change of policy, issuance of notification on various subjects affecting the citizens, public and private rights may be good or bad or may be just and unjust, may be legal or illegal depending upon the person who are governing the country and managing the affairs. Hence, merely because government took a policy decision to revoke the earlier notification depriving benefit available thereon it shall not deprive the higher judiciary to consider its validity by process of judicial review.

111. It shall be appropriate to refer what Immauel Kant has said, to quote:

We must not expect a good Constitution because those who make it are moral men. Rather it is because of a good Constitution that we may expect a society composed of moral men.

The purpose of law is not only to regulate the society or run the government but the purpose of law is also to ensure that the persons possessing moral value occupy high offices in all the three wings of the government to provide selfless service to the country.

112. The pure and positive theory of law convessed by certain western philosophers makes a man ''animal''. There must be inner morality in the enforcement of law. Law should be implemented, interpreted and enforced in such way which enhances and give strength to the morality in men''s private and public life. Morality is a flavour of law which check hypocrisy in public and private life and compel a person or public representative to speak honestly and fairly, honour the declaration made.

113. The swift change in the policy or statutory provisions to meet out the immediate requirement without future vision may be disadvantageous for the country or the society at large. Successive change in policy or law erodes people faith in the administration or the Government.

114. Lon L. Fuller in his treatise The Morality of Law observed as under:

Of the principles that make up the internal morality of the law, that which demands that laws should not be changed too frequently seems least suited to formalization in a constitutional restriction.

Further, the Author observed, to quote as under:

Yet there is a close affinity between the harms done by retrospective legislation and those resulting from too frequent changes in the law. Both follow from what may be called legislative inconstancy.

The Author has noted the anguish of American people weary of the fluctuating policy which has directed the public councils.

115. While accepting the states right to change law retrospectively referring the judgement of Ochoa v. Hernandez y Morales 230 U.S. 139, the Author (supra) observed as under:

The affinity between the problems raised by too frequent or sudden changes in the law and those raised by retrospective legislation receives recognition in the decisions of the Supreme Court. The evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect. But sometimes an action taken in reliance on the previous law can be undone, provided some warning is given of the impending change and the change itself does not become effective so swiftly that an insufficient time is left for adjustment to the new state of the law. Thus the Court has said:

it is well settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this is done while the time is still running, and so that a reasonable time still remains for the commencement of any action before the bar takes effect.

116. Learned author further says, to quote : the internal morality of the law is not some-thing added to, or imposed on, the power of law, but is an essential condition of that power itself.

Learner author further proceeded to observe, to quote : I should apologize for insisting on so obvious a proposition as that some minimum adherence to legal morality is essential for the practical efficacy of law, were it not that the point is so often passed over precisely in contexts where it needs most to be made explicit.

117. However, in Indian context, statutory provisions including the administrative action is subject to judicial review and court has got ample power to see justness and fairness in action. Keeping in view the moral devaluation in system coupled with the political and vested interest as noted by courts from time to time, the discharge of sovereign function by the government is subject to judicial review and the courts have got ample power to lift the veil and impart justice.

118. Apart, since, a decision is more or less affected by the individual thoughts, actions and interest of the person running administration, the decision of the government must fulfil the test of Chapter III of the Constitution and the assurance, word or promise given by the government ordinarily may be enforced by the courts in case the promise or representation so made is not unconstitutional or suffers from malice or political considerations.

Long back, Chines philosopher, Confucius (551-479 B.C.) has rightly said, to quote, By nature men are alike. Through practice they have become far apart.

119. Shri Shashi Tharoor, is currently an Indian minister of State for External Affairs, in his celebrated book India: From Midnight to the Millenium expressed his concern with regard to rampant corruption in our system. In case a minister of the government say so it carries weight. The falling of standard in social life or in the life of persons holding high offices, seems to be prevailing on account of the fact that judiciary has segregated morality from law. Though there may be a situation when immoral act may not be punishable and rightly statutory law should prevail but while interpreting the statutory provisions and constitutional philosophy courts should take into account the morality and be given effect as far as possible to eradicate corruption, casteism and other evils. Segregation of morality while construing statutory provisions or constitutional philosophy in due course of time convert the men into animal and may result into end of civilization.

120. The moral values necessary for regulating a society is the part and parcel of the quality and dignity of life. Though in absence of penal provision under an enactment, a person may not be convicted for violation of moral code of conduct but while dealing a dispute, in absence of any statutory provision or while filling the gap or interpreting the law, in case two views are possible, the courts should favour the one which is based on morality. By enforcing the morality in public life and accordingly interpreting the law, the government or its representatives would not be able to give the false declaration as vote catching device. Hypocrisy is antithesis to rule of law as well as morality. The principle of promissory estopple or equitable grounds evolved by the courts are part and parcel of moral values. It is expected from every gentleman to adhere with the moral values while discharging his or her obligations and same apply to government bodies.

SUMMARY

121. Supervening public interest may not be established merely by pleading in the counter affidavit. It shall not be sufficient to meet out the requirement of law. The supervening public interest should be adjudged on the basis of material placed by the State Government during the course of judicial review. Nothing has been brought on record to establish as to what prompted the government to revoke earlier notification more so when the situation has not been changed and flyash remain an ecological hazard release by thermal power stations.

122. Since, before issuance of the impugned notification the petitioner had started production establishing the factory in Tanda, the principle of promissory estopple attracted in view of catena of judgement of Hon''ble Supreme Court particularly Kalyanpur Cement Ltd (supra) as well as world wide settled proposition of law, it shall be fitness of thing and to maintain the people''s confidence in the administration, ordinarily government should be abide by its assurance or promise and person should not be deprived of the benefit available from such assurance, in case it acted on. Though the government has got right

to change its policy but that too is subject to judicial review and the courts have got ample power to ensure that because of change of policy fundamental or statutory rights of the citizen is not infringed. Equitable relief under the principle of promissory estopple may be given by courts for the ends of justice.

123. The impugned notification should be given prospective effect with regard to tax rebate. Thus, industries which were established relying upon the assurance given in the notification dated 27.2.1998 and started production are entitled for tax rebate for the period which they were entitled at the time of production or before the issuance of impugned notification.

124. In view of above, writ petition deserves to be allowed partly and petitioner seems to be entitled for benefit of tax exemption in view of original notification dated 27.2.1998. However, keeping in view the law on the subject that government has got right to change the policy on one hand and on the other hand, petitioner''s right may be protected by applying the impugned notification prospectively, the right available under the principle of promissory estoppel may be protected by applying the impugned notification prospectively. The prayer for quashing the impugned notification is refused and the relief is moulded accordingly.

O R D E R

125. The writ petition is allowed in part to the extent petitioner''s entitlement for tax exemption for the period available under the original notification dated 27.2.1998. Accordingly, a writ in the nature of mandamus is issued directing the opposite parties to provide tax exemption to the petitioner industry from the date of production for the period of entitlement under original notification dated 27.2.1998.

Writ petition is allowed in part. Cost easy.