

(1999) 04 MAD CK 0079

In the Madras High Court

Case No : Writ Petition No's. 12540, 12894, 14315, 14328, 15352, 15835, 15857, 16499, 16500, 17033, 18082 of 1997 and batch

Madras Cements Ltd.

APPELLANT

Vs

State of Tamil Nadu and 3 others

RESPONDENT

Date of Decision : 23-04-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 162
Electricity (Supply) Act, 1948 — Section 49, 78
Tamil Nadu Essential Article Control and Requisitioning (Temporary Powers) Act, 1949 — Section 2
Tamil Nadu General Sales Tax Act, 1959 — Section 17
Tamil Nadu Revision of Tariff rates on Supply of Electrical Energy Act. 1978 — Section 3, 4

Citation : (1999) 2 CTC 108 : (1999) WritLR 532

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : Mr. Mohan Parasaran, Mr. G.S. Thambi, Mr. K. Mohanram, Mrs. Nalini Chidambaram, for Mr. S. Silambanan, Mr. R. Krishnamoorthy, for Mr. R. Muthukumaraswamy, Mr. V.R. Rajasekaran, Mr. R. Arunagirinathan, Mrs. Vijauakumari Natarajan, Mr. K.R. Vijayakumar, Mr. V. Shanmugam, Mr. K. Thirumuruganandam, Mr. Subbaraya Somasundaram, Mr. P. Mani, Mr. K. Rajagopal, Mr. K. Ravi, Mr. T.R. Rajaraman, Mr. S. Raghavan, Mr. N.S. Mukundan, Mr. V. Krishnan, Mr. Vijay Narayanan, Mr. T. S. Sivanandam, Mr. Palani Selvaraj, Mr. A.L. Somayaji, for M/s Aiyar and Dolia, Mr. V. Nicholas, Mr. R. Raghavan, Mr. C.S. Krishnamoorthy, Mr. A. Kumaraswamy, Mr. K. Ramagopal, Mr. B. Christdas, Mr. V.R. Rajeswaran, Mr. T. Ravikumar, Mr. K. Chandrasekaran, for the Appellant; Mr. R. Nagarajan, Government Advocate, Mr. R. Thiagarajan, for Mr. N. Muthusamy, for the Respondent

Judgement

1. In this group of writ petitions, the petitioners have approached this Court having identical grievance on the letter of the 2nd respondent-

Electricity Board, informing the petitioners that the 1st respondent-Government have clarified the expression "set up", as it means "date of service

connection". Some of the petitioners have also challenged the validity of G.O.Ms. 17, Energy dated 14.2.1997 under which the concession

granted in G.O.Ms.No. 29 Energy, A-2 dated 31.1.1995 had been withdrawn. It is also brought to my notice that some of the petitioners who

filed writ petitions aggrieved by the said letter of the 2nd respondent referred to above, have filed petitions to amend the prayer, to set aside the

said G.O.Ms.No. 17 Energy, A-2 dated 14.2.1997.

2. The petitioners have come forward with the plea that pursuant to the issuance of G.O.Ms.No. 29 Energy (A-2) dated 31.1.1995, they have

started to establish the industry with a view to get tariff concession as mentioned therein and ultimately they have set up the industry but due to

some reason or other giving power connection was delayed beyond 14.2.1997 which resulted in refusal by the respondents in extending infancy

benefit made available as a tariff concession by the Government, in Government Order dated 31.1. 1995. This had happened due to the

clarification of the 1st respondent with respect to the term "set up", as the petitioners did obtain H.T. Service Connection on or after 15.2.1997.

3. To provide supply, distribution, transport and price of articles and trade, commerce therein, and requisitioning of property, the Tamil Nadu

Essential Articles Control and Requisitioning Act, 1949 was enacted, Section 2(a) of the said Act defines ""essential article"" which means any article

specified in the Schedule to the said Act. ""Electrical energy"" has been specified in the said schedule. In view of the above, the 1st respondent-

Government are empowered to notify orders, to regulate or prohibit the supply and distribution of electrical energy and also have control over the

trade and commerce therein. Thereafter in 1979, to provide for revision of tariff rates leviable on the electrical energy supplied in the State of Tamil

Nadu by the Electricity Board, the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act 1978 was enacted, which came into

force from 1.3.1978. u/s 3 of the said Act, the State Government are given power to amend the provisions of Schedule to that Act, after taking

into account the cost of production of energy and such other matters as may be prescribed by notifications. Till 1979 in exercise of powers

conferred by Section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act 1949, the State Government notified

the revision of tariff and condition of supply including concessional tariff to the consumers. After 1979, exercising powers u/s 4 of the Tamil Nadu

Revision of Tariff Rates on Supply of Electrical Energy Act, 1978, the Schedule to the Act was being amended from time to time.

4. Exercising such powers, the 1st respondent, by issuing G.O.Ms.No.29 Energy (A2) dated 31.1.1995 amended the Schedule by substituting the

Schedule mentioned therein. The following is the portion of the Schedule, which is relevant for the present cases:

High Tension Tariff I:

Registered factories, tea estates, textiles, railway tractions, fertilisers, Salem Steel Plant, Heavy Water Plant, Caustic Soda, Calcium Carbide,

Aluminum Pottassium Chlorate and all other industrial establishments.

Area Rate per KWH Rate per KVA of maximum demand per month

1 2 3

(in paise) (in Rupees)

Madras Metropolitan 250 100

Non-Metropolitan 240 100

Tariff concession for High Tension Industries coming under High Tension Tariff:

(a) In the case of the new High Tension Industries to be set up in the areas other than the Madras Metropolitan areas the following concessional

tariffs shall be charged for the first three years from the date, the consumer is given service connection under high tension tariff:—

For the first year .. 60 per cent of the High Tension rates.

For the Second year .. 70 per cent of the High Tension rates.

For the third year .. 80 per cent of the High Tension rates.

For the Fourth year .. Full Tariff.

The above concession shall apply to both unit rates and maximum demand charges. This concession shall not however, be applicable to an industry

set up before the 3rd May, 1989. The concession shall not also be applicable to a consumer, who utilises power from his own generating units or

makes other arrangements for production purpose and utilises the power supplied by the Board for auxiliary purposes only;

Provided that the High Tension Industries set up in any area (including

industrially under developed area, notified as such by the Government)

before the 3rd May, 1989 which are availing tariff concessions or reduction under High Tension Tariff I as on the 2nd May 1989, shall continue to

avail the said tariff concession or reduction until the expiry of the period of five years from the date the consumer is given service connection under

High Tension Tariff I.

Explanation: For the purpose of electricity tariff concessions for new industries the term "new industries" shall mean a new investment by any

entrepreneur including by an existing industry in any area other than the Madras Metropolitan areas, provided the assets other than case, areas, of

the existing industry, are not transferred and shown as assets of the new industry"".

5. Subsequently, the said concession has been withdrawn by way of another amendment in G.O.Ms.No. 17, Energy dated 14.2.1997 in which it is

stated as follows:

(a) New High Tension Industries set up in any area on or after 15th February 1997 shall not be eligible for any tariff concession:

Provided that the High Tension Industries set up in any area other than Chennai Metropolitan area before 15th February 1997 shall continue to

avail themselves of the said tariff concession until the expiry of the period of three years from the date on which the consumer is given service

connection"".

6. On the basis of some doubts raised with respect to the expression "set up", the Government clarified the same as it means the date of obtaining

H.T. Service Connection. This was communicated to the petitioners by the 2nd respondent Electricity Board by way of individual letters. Basing

on the said communication by the Government, the Electricity Board refused the concession contemplated under the G.O.Ms.No, 29, Energy

dated 31.1.1995 to the petitioners on the basis that the power connection was not given on or before 14.2.1997 to the industries concerned.

7. Before proceeding with the factual aspect, whether the petitioners have started to put up their industry on the basis of the tariff concession

provided in G.O.Ms.No. 29, Energy, dated 31.3.1995 and thereby altered their position, I incline to decide first the necessity and correctness of

the interpretation given by the Government and the Electricity Board with

respect to the expression "set up" for the purpose of giving effect to the Government Orders dated 31.1.1995 and 14.2.1997.

8. In the said Government Order dated 31.1.1995 the tariff concession for High Tension industries ""to be set up"" is provided for three years from

the date, the consumer is given service connection. From the above terms, it is clear that to get concession, the following has to be complied with:

- (1) the new High Tension industries have to be set up;
- (2) They should be in the areas other than the Madras Metropolitan areas.
- (3) The said concession commences from the date on which the Service Connection under High Tension tariff is given to the consumers.

Even in the subsequent Government Order dated 14.2.1997 while withdrawing the concession, it is stated that the High Tension industries set up in

any area on or after 15.2.1997 are not eligible for any tariff concession. On the basis of the interpretation given by the Government, now the Tamil

Nadu Electricity Board is trying to apply the clauses in the Government Order dated 14.2.1997 to refuse to extend the tariff concession to the

industries on the ground that the industries were not given power supply on or before 14.2.1997. According to them, if power supply was not

provided on or before 14.2.1997, it cannot be said that the new High Tension Industries had been set up on or before 14.2.1997.

9. It was argued on behalf of the respective learned Senior Counsel for that there is no necessity for giving interpretation to the expression "set up"

when the relevant provision in the Schedule itself very well differentiate the expression "setting up" of an industry, from "the date of giving power

connection". Referring to the relevant portions in the Government Order dated 14.2.1997, they have submitted that the said Government Order

would apply only to the industries, which were not set up on or before 14.2.1997, and if they are able to establish that they have already set up the

same on or before 14.2.1997, they are entitled to enjoy the full benefit given in said Government Order dated 31.1.1995.

10. The learned Senior Counsel appearing for the Electricity Board has submitted that the expression "set up" has to be read along with the

expression ""High Tension industries"" and so only if the petitioners establish that they have set up High Tension industries on or before 14.2.1997

they are entitled for tariff concession. On the other hand, according to the

learned Senior Counsel, only if the power connections given it can be called as High Tension industry. So, the interpretation given by the Government is only in accordance with the said provision and it is only a clarification of the true meaning. The learned Senior Counsel, referring to the earlier Government Orders, has submitted that the extending tariff concession has been synchronised either from the date of commencement of production or date of giving power connection. So, it cannot be said that the Government have taken different view than that of the true intention of the Government Order dated 14.2.1997.

11. When the relevant clause in the Government Order dated 31.1.1995 itself is very clear differentiating setting up of an industry and the date of giving power connection, the question of giving interpretation to the expression "set up", to the said clause will not arise. Even in the Government Order dated 14.2.1997 it is not stated that new High Tension industries which were not able to get power supply on or before 14.2.1997 shall not be eligible for any tariff concession. It is also stated that if industries which had already been set up in any area before 14.2.1997, they shall continue to avail tariff concession.

12. The notification dated 14.2.1997 has been issued in exercise of powers u/s 4 of the said Act. The said amendment is not merely statutory in character but is legislative in character. As the notification has the effect of amending the Schedule to the Act and it takes part of the Act itself, it is not for the Government to give interpretation for the expression "set up". In *Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another*, it is stated as follows:

No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leave Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the Court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the Court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation".

13. Even in case of doubts, it is always safe to have an eye on the object and performance of the amendment or reason and spirit behind it. The object of amendment of Schedule in the said Government Order dated 31.1.1995 is to give tariff concession to the industry to be set up after the said Government Order and such concession will come into force from the date of giving power connection. If that is the object, the interpretation given by the Government will be contrary to the object and performance of the said amendment. If such interpretation as given by the Government is allowed to stand it will defeat the intention of the amendment itself. When there is no difficulty in giving effect to the said amendment, it is not necessary to search for and select particular meaning as it has been done by the Government. While dealing with similar issue the Division Bench of this Court in W.P. No. 14812 of 1989 etc., dated 24.12.1993 has held as follows: It is a well settled proposition of law that words used in a particular statute have to be construed with particular reference to the context, the subject-matter and the purpose or the scheme underlying the same so as to liberally give effect to and perpetuate the object of the scheme and not in isolation to defeat the very purpose of the laudable scheme underlying Tamil Nadu Act 1 of 1979 making available a concessional rate of levy to a deserving cottage industry".

14. The learned Senior Counsel has produced the note file of the Government. From the file, I am able to see that the Chairman, Electricity Board himself while constructing the said expression "set up" has stated that "withdrawal of tariff concession to the industries set up with respect to the industries during 1994 the date of load sanction was taken into account". The Chairman has also recommended to the effect that tariff concession which prevailed prior to 14.2.1997 can be extended to consumers who have informed readiness on or before 14.2.1997 and certified as such all Field Superintending Engineers on inspection of the industry after receipt of readiness report, and, after 15.2.1997, due to the reason that it was not informed prior to 14.2.1997

15. In Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City, , while dealing with the scope of the expression "set up" it is held as follows:

It is important to consider whether the expression used in the Indian Statute for

setting up a business, is different from the expression Mr. Justice

Rowlatt was considering viz., "commencing of the business". It seems to us, that the expression "setting up" means, as is defined in the Oxford

English Dictionary, "to place on foot" or "to establish", and in contradiction to "commence". The distinction in this that when a business is

established and is ready to commence business then it can be said of that business that it is set up. But before it is ready to commence business it is

not set up". In our opinion, the proper meaning to be assigned to the expression "set up" in S.5(1) (xxi) would be "ready to commence business"

.....".

16. The abovesaid decision of the Bombay High Court was referred to and relied on by the Division Bench of this Court in Ramaraju Surgical

Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, . In the said decision, Section 5(1)(xxi) of the Wealth Tax Act came up for interpretation.

Under the said provision, the exemption was restricted only for a new unit set up after commencement of the Act, i.e., after 14.2.1997, and if the

unit in question was already set up prior to the said date, the assessee was not entitled to exemption. So, it necessitated the Division Bench to

analyse the real meaning to the expression "set up". While doing so, the Division Bench has held as follows:

There is no dispute that the "valuation date" in the present case is 30th September 1956. As stated already, the Act came into force on 1st April,

1957. It is clear that the exemption u/s 5(1)(xxi) can be claimed only in respect of a new and separate unit set up after the commencement of the

Act by way of substantial expansion of the undertaking; That the assessee erected 6000 spindles as a new and separate unit by way of substantial

expansion of its original undertaking has not been denied by the department. The only point of controversy is whether the new and separate unit

has been "set up" after the commencement of the Act. The expression "set up" is assigned the following meaning in the Oxford Concise Dictionary:

start (institution, business); establish Oneself in some capacity. The Chambers Dictionary gives the following meaning: to erect, to put up, and set

him up to begin a career. The word "set up" are quite familiar and common place. But in the special context of the exempting provision of Section

5(1)(xxi) of this Act, they present some complexity creating a stubborn

indefiniteness. When can a business undertaking or factory, be said to be

"set up"? Is it the date of the very commencement when the preliminaries are put through or is it one or other of the several intermediate stages that

have to be passed through before a factory can become a fait accompli or is it the final act which puts it in gear?

One thing seems to be fairly clear and it is this: unless a factory is erected and the plants and machinery installed therein, it cannot be said to have

been set up. The resolutions of the Board of Directors, the orders placed for purchasing the machinery, the licence obtained from the Government

for constructing the factory, are merely initial stages towards setting up, however necessary, and essential they may be to further the achievement of

the end. It is not, however, the actual functioning of the factory or its going into production that can alone be called setting up of the factory. The

setting up is perhaps a stage anterior to the commencement of the factory"".

17. The said judgment of the Division Bench of this Court, was taken up by way of appeal to the Supreme Court, Their Lordships, in the judgment

reported in Commr. of Wealth Tax v. R.S. Cotton Mills, AIR 1967 S.C. 507, have elaborately dealt with about the scope of the expression "set

up" and held as follows:

The High Court held that unless a factory is erected and the plants and machinery installed therein, it cannot be said to have been set up. The

resolution of the Board of Directors, the orders placed for purchasing machinery, licence obtained from the Government for constructing the

machinery, are merely initial stages towards setting up, however necessary and essential they may be to further the achievement of the end. It is

not, however, the actual functioning of the factory or its going into production that can alone be called setting up of the factory. The setting up is

perhaps a stage interior to the commencement of the factory. Thereafter the High Court referred to a decision of the Bombay High Court in

Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City, and on its basis, concluded that the proper meaning to

be assigned to the expression "set-up" in Section 5(1)(xxi) would be "ready to commence business". We are unable to agree with the learned

counsel for the Commissioner that in arriving at this view, the High Court committed any error. A unit cannot be said to have been set up unless it is

ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up. The expression used in the proviso, under which the period for which the exemption is available is to be determined, is not the same as used in the principal clause. In the proviso, the period of five successive years was to commence with the assessment year next following the date on which the company commences operations for the establishment of the unit. Operations for the establishment of a unit, from the very nature of that expression, can only signify steps that have to be taken to establish the unit. The word "set up" in the principal clause, in our opinion, is equivalent to the word "established", but operations for establishment cannot be equated with the establishment of the unit itself or its setting up. The applicability of the proviso has, therefore, to be decided by finding out when the company commenced operations for establishment of the unit, actual date on which the company is held, to have been set up for purposes of principal clause. This is also the meaning that the Bombay High court derived in the case of Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City, where that court was concerned with the interpretation of the expression "set up" as used in Section 2 (II) of the Income Tax Act. That Court held: "It seems to us that the expression "setting up" means, as is defined in the Oxford English Dictionary, "to place on foot" or "to establish" and is contradiction to "commence". The distinction is this that when a business is established and is ready to commence business, then it can be said of that business, that it is set up. But before it is ready to commence business it is not set up".

This view was expressed when that Court was considering the difference between the meaning of the expression "setting up of a business" and "commencing of a business". In the case before us, the proviso does not even refer to commencement of the unit. The criterion for determining the period of exemption is based on the commencement of the operations for the establishment of the unit. These operations for establishment of the unit cannot be simultaneous with the setting up of the unit as urged on behalf of the Commissioner, but must precede the actual setting up of the

unit. In fact, it is the operations for establishment of a unit which ultimately culminate in the setting up of the unit.

18. The Division Bench of Kerala High Court also had an occasion to deal with the expression "set up" in the decision in Commissioner of Wealth

Tax, Kerala, Ernakulam Vs. Travancore Cements Ltd., Kottayam, , and on the basis of the decision of the Madras High Court (supra), has held

as follows:

(7) Condition No.(3) is that the unit should have been set up after the commencement of the Wealth-tax Act, 1957, i.e., after 1.4.1957. The

controversy is as to the meaning to be attributed to the expression "set up". The question as to when a unit can be considered to have been "set

up" came up for discussion before the High Court of Madras in Ramaraju Surgical Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, . The

Court said:

"in our opinion, the proper meaning to be assigned to the expression "set up" in section 5(1)(xxi) would be "ready to commence business"."

(8) The Tribunal has taken the view that the date of the setting up of the unit in this case should be taken as the date on which the trial run was

completed. We are in agreement with this view. It is admitted that the trial run was completed only in or about May, 1959, that is, after 1.4.1957.

It must follow that condition No. (3) is satisfied.

19. The Division Bench of Bombay High Court also had an occasion to deal with the meaning of "set up" in the judgment reported in Commr. of

Wealth-tax v. Dalmia Dadri Cement Ltd. 1956 (60) itr 24, and has held as follows:

The assessee-company, having commenced operations for the establishment of the new and separate unit in July, 1955, and having completed the

unit by February, 1958, the first question that arises for consideration is whether the new and separate unit has been set up after the

commencement of the Act, as the expression "set up" is used in clause (xxi) of Section 5(1)? The learned Tribunal has answered this question in

the affirmative. But the learned counsel for the applicant, the Commissioner of Wealth-tax, contends that the meaning of that expression extends to

the whole process beginning with the commencement of operations for the establishments of the unit and ending in the completion of that operation.

In this approach he has urged that, as the operations for the establishment of

the unit commenced before the coming into force of the Act, so within clause (xxi) of Sec.5(1) it cannot be said that the new and separate unit has been set up after the coming into force of the Act. He says that the expression "set up" embraces the whole process with the commencement of the operations to establish the unit, the intermediate steps towards its establishment, and the final completion of the establishment. The whole process, according to him must from the beginning to the end be after the coming into force of the Act before it can be said that the new and separate unit has been set up after that date. He has not been able to support his argument by reference to any decided cases or on any logical basis. The second proviso to clause (xxi) of Section 5(i) uses the words "commences operations for the establishment of such unit", in contradistinction to the use of the words "employed by it in a new and separate unit set up after the commencement of this Act", and, in my opinion, those words used in the second proviso give a clear indication of the intention of the legislature that the commencement of operations for the establishment of a new and separate unit was not to be a part of what is referred to in the main body of that clause under the words "set up" as has been contended by the learned counsel for the applicant. This is one consideration which speaks against the contention. In the Shorter Oxford English Dictionary, among other meanings, the meaning of the expression "set up" is: to erect and make ready for use; to pitch (a tent); to erect (a building); to put together the parts of (a machine) and erect it in position. To start (a piece of work) on a loom". Similarly, in Webster's Dictionary, this expression has been defined, with some other meanings, in this manner: "To place upright; erect; raise; elevate; as, to set up a building, a post, a wall, a pillar. To place upright and put together in readiness for use, as in pitching a tent.. To assemble and erect in position (a machine)". The dictionary meanings of this expression thus also do not support, or rather speak against, the contention of the learned counsel, In *Armitage v. John Haigh & Sons Ltd.* 1893 (9) T.L.R. 287, Lord Esher M.R., Lindley and Bowen L. JJ. concurring, held in relation to the setting up of machines that the words "set up" meant completed. In *Ramaraju Surgical Cotton Mills Ltd. Vs. Commissioner of Wealth Tax*, , the learned Judges have held that this expression means "ready to commence business". This has been

followed in Commissioner of Wealth Tax, Kerala, Ernakulam Vs. Travancore Cements Ltd., Kottayam, , and a similar view has prevailed in

K.C.P. Ltd., Vuyyuni Vs. The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad, . There is thus no basis for this contention of the

learned counsel for the applicant and the expression "set up" as used in Clause (xxi) of Section 5(1) means completed or ready to be

commissioned of ready to commence business, all of which expressions mean in this context exactly the same. It does not cover the whole process

from the commencement of the operations to establish a new and separate unit to the end when such a unit is completed; it " means the last of the

final stage when such a unit is complete and ready to be commissioned. So the assessee- company is, within the meaning and scope of clause (xxi)

of section 5(1) of the Act, titled to the exemption claimed by it, it having set up a new and separate unit after the commencement of the Act as

provided in that clause.

20. In the terms and conditions of supply of electricity of the Tamil Nadu Electricity Board the expression "date of commencement of supply" has

been defined in Section 2.01 (vi), which is as follows:_

Date of commencement of supply in the case of High Tension consumer means the date immediately following the date of expiry of a period of

three months from the date of issue of intimation by the Board to the consumer of the availability of power or the date of actual availing of supply

by the consumer whichever is earlier, in the case of a Low Tension consumer, the "date of commencement of Supply" means the date of actual

availing of supply by the consumer.

The said definition also does not indicate interpretation given by the Government by the impugned proceedings.

21. This Court has to interpret the expression "set up" on the basis of the decisions cited above and on the basis of the object of the amendment,

The expression "set up" would mean only ready to commence business, or ready to start functioning. For the purpose of the present case an

industry has "set up" should be construed as having reported their readiness to the Electricity Board for getting power connection, irrespective of

the fact whether actual power supply is given or not. In view of the above, the impugned communication given by the Electricity Board oft the basis

of the clarification given by the 1st respondent-Government cannot be sustained and it is set aside. The industries which have reported their

readiness to the Electricity Board and got power connection are entitled to enjoy the tariff concession for the full period of three years, according

to the Government, Other dated 31.1.1995.

22. In some of the writ petitions, the industry has not yet been completed and fully established, so as to enable them to report readiness to get

power supply, and so they have challenged the Government Order dated 14.7.1997 itself, withdrawing the said concession on the ground that the

Government are estopped from denying the concession already extended to them. In one of such writ petitions, Mrs. Nalini Chidambaram, learned

Senior Counsel submitted that the concession given under the Government Order dated 31.1.1995 has been withdrawn, in the Government Order

dated 14.2.1997, within two years, during which period, it is very difficult for an industrialist to complete their industry and to make the industry to

be ready to get the concession on or before 14.2.1997. According to the learned Senior Counsel, since no time limit had been prescribed in the

Government Order dated 31.1.1995, the amendment in the Government Order dated 14.2.1997 is unreasonable and arbitrary and so it offends

Article 14 of the Constitution.

23. Mr. Thambi, learned counsel appearing for some of the writ petitions has also submitted that only because of the tariff concession extended to

the industries, as amended in the Government Order dated 31.1.1995, the petitioners have established their industry and so it cannot be

withdrawn.

24. The petitioners are not having any vested right in getting tariff concession, and the 1st respondent Government is having power to revise and

enhance periodically the same from time to time. While dealing with the said power, the Division Bench of this Court in W.P.No. 14812 of 1989,

dated 24.12.1989. (supra) has held as follows:

3. Before advertent to the various claims and contentions on behalf of the petitioners. it would be not only useful but necessary to refer to the

genesis of the levy and the statutory authority therefore with the details relating to the successive and periodical revisions and enhancement from

time to time. The Electricity (Supply) Act, 1948, provided for the rationalisation

of the production of supply of electricity and generally for taking measures conducive to electrical development and for all matters incidental thereto. Section 49 of the said Act governs and regulates the sale of electricity by the Board to persons other than the licensees viz., consumers and empowers the Board to supply electricity to a consumer upon such terms and conditions as the Board thinks fit and also enables the Board to fix for such supply Uniform tariffs. Sub-section (2) of Section 49 illustrates the factors which the Board shall have due regard to in fixing uniform tariffs. Sub-section (3) of section 49 is almost akin to a non-obstante clause declaring that nothing in the earlier portion of the section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to a consumer having regard to the geographical position of any area, the nature of the supply any purpose for which supply is required and any other relevant factors, while at the same time exhorting the. Board that in fixing the tariff and terms and conditions for the supply of electricity it shall not show any undue preference to any person. Section 78-A stipulates that in discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.

(4) The Tamil Nadu Essential Articles Control and Requisitioning Act, 1949 provided for the control of, the supply, distribution, transport and prices of essential articles and trade and commerce therein and "Electrical Energy" as a scheduled essential article for the said purpose and statutory orders were passed and were in force governing such matters. While so, the State Legislature enacted the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act, 1973 (Tamil Nadu Act 1 of 1979) to provide for the revision of tariff rate leviable on electrical energy supplied in the State by the Tamil Nadu Electricity Board, with effect from 1.3.1978. The provisions of Section 3 provided that notwithstanding anything contained in the Tamil Nadu Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, the tariff rates payable to the Tamil Nadu Electricity Board by any consumer on the electrical energy supplied by the Board shall be as specified in the Schedule to the Act u/s 4, of the Act, the state Government was empowered, after taking into account the cost of production of energy and such other matters as may be

prescribed, to amend the provisions of the Schedule to the Act, by means of a notification. The Schedule, apart from providing different rates for

supply of High Tension and Low Tension power supply also providing different scales of tariff to different categories of consumers with particular

reference to the peculiarities of the consumer and/or as well of the nature and purpose of consumption"".

25. Moreover, as held by the Division Bench, the petitioners cannot have any inherent or vested right for any concessional rate. The learned

Judges have held as follows:

The only plea that remains to be considered is the denial of the concessional rate on the basis of an individual consumer exceeding the 15 per cent

of the connected load for purposes of lights and fan. The plea on behalf of the petitioners is that such a provision is arbitrary and discriminatory.

We are unable to countenance such a plea. This type of stipulation is not peculiar to the category of cottage industries alone but as a matter of

policy is found to have been incorporated in respect of concessions shown to certain other categories of consumers also. It is normally for the

legislature to determine what categories it would embrace within the scope of a particular provision and merely because certain categories which

would stand on the same footing as those which are covered by a provision are left out, by itself would not render the provision as such

discriminatory. The grant of exemption or a concession is the exclusive discretion of the legislature or the Government and merely because those

authorities have chosen to extend the benefit of concession or exemption to only the category of cottage industries whose consumption of energy

does not exceed a particular limit for a particular purpose, does not involve per se any discrimination or arbitrariness whatsoever. The petitioners

have no inherent or vested right for any concessional rate. The benefit of concessional rate itself is a privilege granted by the legislature or the State

government and that being the position it is always open to those authorities to also fix their own guidelines or criteria for purpose of according or

denying the concessions. Such intricate questions as to the prescription of conditions and terms or guidelines for availing of a concession are purely

matters of policy and the wisdom of which is wholly alien to the consideration of Courts. The classification brought about of the cottage industries

falling under the main category and those who fall under the explanation and stand denied of the privilege of the concessional rate is just and

reasonable and based upon sufficient basis and also has sufficient nexus and relevance to the very object of the concessional levy. Consequently,

we see no merit in the challenge based on this ground also"".

In the present case, the respondents have come forward with the plea in the counter that in view of the concession extended, the Board has

incurred a huge loss, and thereby if the concession has been withdrawn the public interest would suffer. Even in G.O.Ms.No. 115 Energy

Department dated 19.7.1998 the Government felt that there was a revenue deficit of Rs. 960.47 crores which has to be bridged and in order to

mobilise additional revenue so as to bridge the revenue gap, it was decided to revise the tariff.

26. In view of the above, the petitioners cannot challenge the withdrawal of the tariff concession as they have no right to get concession and so

they cannot sustain such prayer challenging the Government Order dated 14.12.1997.

27. The petitioners also have tried to sustain their prayer on the ground of promissory estoppel. In support of their submission, the learned counsel

have relied on a number of decisions of the Supreme Court, mainly the decision in M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs.

U.P. State Electricity Board and others, . On the basis of the said decision the learned counsel for the petitioners while challenging the Government

Order dated 14.2.1997 withdrawing the concession to the High Tension industries have submitted that the petitioners have spent huge amount, and

they have altered their position on the basis of the Government Order dated 31.1.1995.

28. In the said decision cited above, the Apex Court has dealt with a case in which the concession was granted to the appellants and even before

expiry of the duration of the three years period, the concession was withdrawn. So, it was challenged on the basis that the Board is estopped from

withdrawing the said concession before completion of the period for which it was given by virtue of doctrine of promissory estoppel. While

considering the said submission, the Apex Court has held as follows:

11. It is now well settled by a series of decisions of this Court that the State

authorities as well as its limbs like the Board covered by the sweep of

Article 12 of the Constitution of India being treated as "State" within the meaning of the said Article, can be made subject to the equitable doctrine

of promissory estoppel. In cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel

does not fly in the face of power and authority of the promisor is otherwise not opposed to public interest, and also when equity in favour of the

promisor does not outweigh equity in favour of the promisor entitled the latter to legally get out of the promise.

12.....

13. We may say at this stage that at the time the aforesaid decision was rendered, judgment of this Court in the case of Kasinka Trading and

another, etc. etc. Vs. Union of India and another, was pending scrutiny before a larger Bench. Subsequently the said decision came to be

confirmed by the decision of a Bench of three learned Judges of this Court speaking through A.M. Ahmadi, CJ, in the case of Shrijee Sales

Corporation and Another Vs. Union of India (UOI), . We will refer to these decisions in the latter part of this judgment. Suffice it to say at this

stage that if a statutory authority or an executive authority of the State functioning on behalf of the State in exercise of its legally permissible powers,

has held out any promise to a party who relying on the same has changed its position not necessarily to its detriment and if this promise does not

offend any provision or law or does not fetter any legislative or quasilegislative power inhering in the promisor then on the principle of promissory

estoppel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the

promisee".

29. While rejecting the submission of the learned counsel appearing for the Electricity Board that there cannot be any promissory estoppel against

the Board to exercise its power under Sec. 49(1) of the Act, the Apex Court has held as follows:

Shri Dave next invited our attention to a three Judges Bench Judgment of this Court in the case of Shrijee Sales Corporation and Another Vs.

Union of India (UOI), wherein A.M. Ahmadi, C.J., speaking for the Bench considered the correctness of the aforesaid decision in Kasinka

Trading and another, etc. etc. Vs. Union of India and another, has laid down the parameters of the field in which the doctrine of promissory

estoppel can apply it is necessary to closely refer to the relevant observations found in the said judgment. It may be mentioned that the very same

customs exemption notification which was considered by the Bench of two learned judges in Kasinka Trading and another, etc. etc. Vs. Union of

India and another, was considered by a three judges Bench in Shrijee Sales Corporation and Another Vs. Union of India (UOI), . While upholding

the said notification Ahmade, C.J., in paragraphs 3 and 4 of the Report observed as under:

"It is not necessary for us to go into a historical analysis of the case-law relating to promissory estoppel against the Government. Suffice it to say

that the principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government

would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain

steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such

a public interest exists. The law on this aspect has been emphatically laid down in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of

Uttar Pradesh and Others, ., The portion relevant for our purpose is extracted below:

It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the

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

against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the

Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the

Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it

would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the

discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the

promise" on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position"

provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise

would become final and irrevocable; Vide Emmanuel Ayodeji Ajayi v. Briso, 1964 (3) All ER 556. Two propositions follow from the above

analysis:

(1) The determination of applicability of promissory estoppel against public authority/Government hinges upon balance of equity or "public

interest".

(2) It is the Court which has to determine whether the Government should be held exempt from the liability of the "promise" of "representation".

In the present case, the first notification exempting the customs duty on PVC itself recites "...Central Government being satisfied that it is

necessary in public interest to do so.... In the notification issued later which gave rise to the present cause of action, the same recitation is present.

30. The Apex Court while testing the sustainability of the said withdrawal on the ground of any public interest, has held as follows:

Under these circumstances when no public interest was sought to be pressed in service by the Board for withdrawal of this incentive rebate, as

seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity

in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promisees high and dry before the

requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted".

31. Referring to Shrijee Sales Corporation and Another Vs. Union of India (UOI), , in which it was held that even where there is no such

overriding public interest it might still be open to the promisor-State or its delegate to resile from the promise on giving reasonable notice which

need not be a formal notice giving the promisee a reasonable opportunity for the promisee to restore the status quo ante, held that it was only

raised before the Apex Court, but has not given any opportunity to the appellants to resume their earlier position. While considering the reason to

come to such conclusion, the Apex Court has held as follows:

Once the new industries were lured into establishing their factories in the region catered to by the Board on being assured three years guaranteed incentive of development rebate of 10% on their total bills of electricity charges and acting on the same once they had established their industries and spent large amounts for constructing the infrastructure and for employing necessary labour and for purchasing raw materials etc., it would be almost impossible for them to restore the status quo ante and to walk but midstream if the development rebate incentive was withdrawn for the unexpired period out of the three years" guaranteed period of currency of development rate incentive. In fairness even it was not suggested by learned senior counsel for the respondents that on such withdrawal of development rebate the appellants would be able to restore the status quo ante and walk out lie simply relied upon the ratio of Shrijee Sales Corporation and Another Vs. Union of India (UOI), for contending that it is the power of the Board to grant the rebate and it is equally the power of the Board to withdraw the same in its own discretion.

32. Similar issue came up for consideration before another Division Bench of this Court, in M/s. Sulochana Cotton Spinning Mills (P) Ltd v. State

of Tamil Nadu & Ors., 1995 (7) M.T.C.R. In the said case, in G.O.Ms.No.500 dated 14.5.1990 concession was extended to the industries to be

set up in the given backward areas. Subsequently, in G.O.Ms.No. 92 dated 22.2.1991 issued under Sec. 17-A of the Tamil Nadu General Sales

Tax Act modified the abovesaid Government Order dated 14.5.1990 stating that the benefit given in G.O.Ms.No.500 dated 14.5.1990 will apply

only to the industries to be established subsequently, i.e., 22.2.1991. While dealing with the scope of the said Government Orders, the Division

Bench of this Court has held as follows:

12. In this context, the question of promissory estoppel as pleaded by the petitioners requires to be considered. It is not disputed and it cannot be

disputed at all that irrespective of the provisions contained in Section 17-A of the Tamil Nadu General Sales Tax Act, which only enable the State

Government to provide for payment of deferral tax under certain circumstances, it is open to the State Government in exercise of its executive

powers under Article 162 of the Constitution to lay down an industrial policy and implement it and in order to give effect to such industrial policy to

order certain concessions such as waiver or deferment of sales tax, concessional rate of energy consumed by the industries and several other such

matters as incentives to the industrialists to set up their new industries so that the industries can come up in the State, resulting in more production

and more employment which will add to the welfare of the State and thereby the welfare of the people. G.O.Ms.500 dated 14.5.1990 has been

issued in the name of, and under the order of, the Governor: Therefore it is clear that it is issued in exercise of the executive power under Article

162 and that if is so, is not disputed before us. As long as it is permissible in law and there is no prohibition contained either under any Act or

under the Constitution or under any other law prohibiting the State Government to offer such an incentive as the one under consideration, the

representation made by the State Government through G.O.Ms.500 dated 14.5.1990 to the industrialists to take advantage of those concessions

and establish industries can in unequivocal terms be construed as a lawful promise made by the State Government to the industrialists. It is also not

in dispute that the industrialists acting upon such promise, established new industries and also commenced production before 24.4.1991. There is

no illegality, no lack of bona fides on the part of industries. Everything has been fair and proper. If that be so, the State Government cannot turn

back and cannot withdraw the concession or restrict it. In view of the fact that the State Government is entitled to exercise the power u/s 17-A of

the Act which even if construed as an act of the delegatee, in other words, exercise of the legislative power, the State Government cannot escape

from the promise made by it".

33. Ultimately, the Apex Court on the basis of the above discussions held that the Board must be estopped from prematurely withdrawing the

incentive development rebate made available to the appellant industries by issuing impugned notification.

34. While dealing with the similar issue, the Apex Court in *Shri Bakul Oil Industries and Another Vs. State of Gujarat and Another*, , has held as

follows:

We must, however, observe that the power of revocation or withdrawal would be subject to one limitation viz. the power cannot be exercised in

violation of the rule of promissory estoppel. In other words, the Government can

withdraw an exemption granted by it earlier if such withdrawal could be done without offending the rule of promissory estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation having regard to the fact that promissory estoppel cannot be claimed against a statute".

35. While dealing with the claim of the appellants regarding sales tax exemption, the Apex Court in *Pine Chemicals Ltd. and Others Vs. Assessing*

Authority and Others, , has held as follows:

The learned counsel for the appellants also contended that they are entitled to enjoy the benefit for the full period of five years both on law as also

on the ground of estoppel. We have already noticed that in *Shri Bakul Oil Industries and Another Vs. State of Gujarat and Another*, this Court

held that in the case of a grant of exemption without specifying any period for which the exemption is available the Government could withdraw the

same at any time. Though in that case on facts no further question can arise since it was held that the dealer was not entitled to the benefit of the

subsequent notification giving the exemption for a period of five years on the ground that the notification was prospective in operation and therefore

not applicable to the dealer in that case, this Court made certain further observations to the effect that even in the case of exemption for a particular

period it could be withdrawn at any time subject of course to the plea of estoppel. In *Pournami Oil Mills Case*, 1986 Supp SCC 728: 1987 SCC

(Tax) 134, also the learned judges appear to have given the benefit of exemption for the full period even after the withdrawal on the basis that the

industry was set up in pursuance of some representation made by the government amounting to estoppel. In the present appeals also there are lot

of materials to show that the Government made representations to industry that they would give tax exemption and other incentives and invited

entrepreneurs to establish their industries in J & K. Relying on those representations each of these appellants have set up their industries. It is not

necessary to set out these factual details in the judgment. Suffice it to say that

we have carefully considered all the materials and are of the view that the appellants acting on the representations had set up their industries. Therefore they are entitled to claim the benefit of the exemption for the entire period of five years calculated as per the terms of the Government orders, even if it were to be held that S.R.O.80/82 superseded the earlier exemption orders"".

36. To succeed in a plea of promissory estoppel it is indispensable to prove that the promisee has altered his position in reliance on an assurance

which he has received. Such a promise should have been made which is intended to create legal relations and which, to the knowledge of the

person making the promise was going to be acted on a person to whom it was made and which was in fact so acted on. Here the promise is

"acted on". Such action, in law as in physics, must necessarily result in an alternation of position. But it is difficult for this court to imagine such a

case which would qualify in all promissory estoppel cases. The abovesaid qualifications to get a benefit out of the said promissory estoppel have to

be established on the basis of the facts available to the petitioners. On the other hand the petitioners have to strictly establish that they have altered

their position only due to the statutory amendment to the Schedule by way of issuing Government Order dated 31.1.1995. The abovesaid

requirements on the basis of the facts with reference to each petitioner cannot be gone into in this group of writ petitions. As held by the Apex

Court, if the petitioners are able to establish that they have altered their position pursuant to the said amendment in the Government order dated

31.1.1995, they are entitled for such benefit. Since it is not possible for this Court to go into that factual position, it is for the petitioners who were

not ready and had not applied for power connection on or before 14.2.1997, to approach the 2nd respondent- Electricity Board, for getting tariff

concession given in the Government Order dated 31.1.1995 and establish that they have altered their position positively only on the basis of the

tariff concession announced in the said Government Order. If they are able to satisfy the 2nd respondent-Electricity Board that they have altered

their position in view of the said Government Order, they are entitled for the tariff concession notified in the said Government Order for the full

period of three years.

37. On the basis of the above, the following order is passed:

1. The petitioners who had informed about their readiness for getting power connection or made applications to the 2nd respondent-Electricity

Board on or before 14.2.1997, are entitled to enjoy the said tariff concession for the full period of three years, from the date of giving power

connection as stipulated in G.O.Ms.No. 29, Energy (A-2), dated 31.1.1995, and the respondents are directed to extend such concession to those

petitioners in accordance with the said Government Order.

2. The writ petitions in which the G.O.Ms.No.17, Energy dated 14.2.1997 is challenged are dismissed.

3. The writ petitions in which the petitioners who have not made applications or sent intimation, regarding their readiness to the 2nd respondent-

Elec-tricity Board to get power connections on or before 14.2.1997, filed claiming that they have altered their position by establishing the industry

on or before 14.2.1997 only to get advantage of the said Government Order dated 31.3.1995, in which tariff concession was given, are also

entitled for such tariff concession as stipulated in G.O.Ms.No. 29, Energy dated 31.3.1995, provided if they are able to establish the same before

the 2nd respondent-Electricity Board.

38. With the above observations, this group of writ petitions are disposed of accordingly. No costs. Consequently, the connected pending

W.M.Ps. are closed.