

(1992) 03 OHC CK 0034
In the Orissa High Court
Case No : O.J.C. No. 623 of 1987

Orissa Cement Ltd.

APPELLANT

Vs

Superintendent, Customs and C. Ex.

RESPONDENT

Date of Decision : 06-03-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 8
Customs Act, 1962 — Section 12, 12(1), 15, 15(1), 2(25)
Customs Tariff Act, 1975 — Section 12(1)

Citation : (1992) 73 CLT 755 : (1992) 40 ECC 244 : (1992) 61 ELT 256

Hon'ble Judges : G.B. Patnaik, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : G. Rath and Ashok Parija, for the Appellant; Ashok Mohanty, Standing Counsel (Central), for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The legality of the demand raised under An nexure 1/A by the Customs authority is the subject matter of challenge in this writ application, inter alia, on the ground that the notification issued by the Government of India on 28-11-1986 in exercise of its power under Sub-section (1) of Section 25 of the Customs Act superseding the earlier notification dated 1-8-1985 will have no application to the imported goods which had reached the Indian territory prior to the notification dated 28-11-1986 and were in the Bonded Warehouse, inasmuch as the goods were imported pursuant to the earlier notification dated 1-8-1985 and the Government is bound by the principle of Promissory Estoppel.

2. The petitioners' case in a nut-shell is that petitioner No. 1 is a Company engaged in the manufacture of cement and refractories products. Dead Burnt Magnesite (for short "D.B.M.") is the raw material for manufacture of refractories and such D.B.M. having silica content less than 4% by weight is required for highly sophisticated refractories for use in specialised application areas of the steel plants. The said article is not manufactured in India and the Government of

India had permitted import of the said material by the actual users under the Open General Licence Scheme. The Government of India published a notification in exercise of their powers under Sub-section (1) of Section 25 of the Customs Act, 1962 (hereinafter referred to as the "Act") exempting D.B.M. having silicon content less than 4% by weight from so much of that portion of the duty of customs leviable thereon as is in excess of the amount calculated at the rate of 40% ad valorem. The said notification dated 1st of August, 1985 was to remain in force upto and inclusive of 31st of July, 1986. The aforesaid notification has been annexed as Annexure-2/B to the writ application. By yet another Notification dated 30th July, 1986, issued by the Central Government Under Sub-section (1) of Section 25 of the Act, validity of the Notification under Annexure-2/B was extended till 30th of November, 1986, and the said notification has been annexed as Annexure-2/C to the writ application. The petitioners entered into agreements with overseas suppliers for importing the said D.B.M. and on 11-8-1986 placed orders for 4,500 metric tonnes of Brazilian D.B.M. and on 28-4-1986 for 6000 metric tonnes of Chinese D.B.M. The Brazilian D.B.M. reached Paradeep Port on 10-10-1986 and the Chinese D.B.M. reached Paradeep Port on 18-6-1986. The D.B.M. had been kept in the bonded warehouse at Paradeep and petitioners' case is that the duty payable on the goods had been paid and accepted by the authorities between 27th of November, 1986 and 30th of November, 1986. Before 30th November, 1986, 6,739.2340 metric tonnes of D.B.M. had been removed from the bonded warehouse and thereafter the petitioners were not permitted to remove the balance stock from the warehouse on the ground that the extra duty has to be paid in accordance with the Notification of the Government of India dated 28th of November, 1986, which has been annexed as Annexure-2/A. The two letters of the Superintendent of Customs & Central Excise in respect of the said quantity of D.B.M. lying in the bonded warehouse and not removed demanding extra amount have been annexed as Annexures-1/B and 1/C. In respect of the goods already removed between 28th of November and 30th of November, 1986, Opp. Party No. 1 also issued a demand for the differential duty, which has been annexed as Annexure-1/A. The petitioners' case is that they having entered into contracts with the foreign manufacturers acting on the representation of the Union Government in its Notifications under Annexures-2/B and 2/C and having imported D.B.M. on that basis, the Union Government is bound to levy duty in respect of those imported goods in accordance with the earlier notifications (Annexures-2/B and 2/C) and cannot enforce the notification under Annexure-2/A to those goods. The further case of the petitioners is that the duty having been paid in respect of the entire stock in the warehouse and the order of clearance for home consumption having been made by the proper officer, the said goods lost its identity as imported goods, as defined u/s 2(25) of the Customs Act and consequently, it is not open for the Opposite Parties to raise any demand of duty in respect of the same even though the goods might not have been removed from the bonded warehouse.

3. Though the Opposite Parties have not filed any return to this Court, but the learned Standing Counsel appearing for the Central Government in course of hearing took the stand that the notification issued by the Government of India in exercise of their powers Under Sub-section (1) of Section 25 of the Act is statutory in nature and is a legislation to which the principle of promissory estoppel will not apply. The further case is that the Union Government having granted certain concession in its earlier notifications under Annexures-2/B and 2/C was entitled to withdraw or modify the same and, therefore, there has been no illegality in issuing the notification under Annexure-2/A on 28-11-1986. The Opposite Parties also took the stand that u/s 15 of the Act, the date for determination of rate of duty and tariff valuation of imported goods in the case of goods cleared from a warehouse is the date on which the goods are actually removed from the warehouse and, therefore, in respect of the quantity of goods physically removed from the warehouse on or after the 28th of November, 1986, the duty would be payable in accordance with the notification under Annexure-2/A and consequently, the petitioners are liable to pay the balance amount as demanded by the Opposite Parties.

4. In view of the rival stand of the parties, the first question that arises for consideration is whether the principle of promissory estoppel has at all any application to a notification issued by the Government in exercise of its power Under Sub-section (1) of Section 25 of the Act and if that principle would apply, then certainly in respect of goods imported prior to 28th of November, 1986, the exemption notification which was prevalent i.e. Annexures-2/B and 2/C would apply and not the exemption notification which was brought into force on 28th of November, 1986. In this connection, an ancillary question that arises for determination is as to what is the character of a notification issued Under Sub-section (1) of Section 25 of the Act? Is it legislative in nature, in which event the principles of promissory estoppel will have no application, or it is an executive function or governmental function in which case the doctrine of promissory estoppel would apply?

5. Before examining this issue, it would be appropriate to catalogue the admitted facts. The Central Government has the power to grant exemption from the whole or any part of the duty of customs leviable on the notified goods by issuing a notification in the Official Gazette u/s 25(1) of the Act. The Central Government did issue such notification on 1-8-1985 under Annexure-2/B specifying that the duty would be calculated at the rate of 40% ad valorem and making the said exemption valid till 31st of July, 1986, and then later on extended the validity of the said notification by issuing another notification on 30th of July, 1986 under Annexure-2/C upto 30th of November 1986. The petitioners did import 10,500 metric tonnes of D.B.M. from Brazil and West Germany and the aforesaid quantity of imported materials was unloaded at Paradeep Port on 10-10-1986 and 12-10-1986 and was then carried to the bonded warehouse where it had been stored. In accordance with the rates specified in the Government notifications under Annexures-2/B and 2/C, the petitioners had paid the entire

amount of duty leviable on the imported D.B.M. before the 30th of November, 1986. A part of the said stock had been removed by the petitioners from the bonded warehouse prior to 28-11-1986; part of the same stock had been removed from the bonded warehouse between 28th November, 1986 and 30th of November, 1986 and a part of it remained in the warehouse not being removed even after 30th of November, 1986. The Central Government issued a notification under Annexure-2/A on the 28th of November, 1986, in supersession of the earlier notifications issued under Annexures-2/B and 2/C fixing the rate at the rate of 55% ad valorem. The additional demand is made on the basis of the aforesaid notification of the Government under Annexure-2/A in respect of the quantity of D.B.M. removed from the bonded warehouse on or after 28th November, 1986, and in respect of the quantity of D.B.M. which had not been removed and were remaining in the bonded warehouse.

6. Before considering the question of applicability of promissory estoppel, it would be appropriate for us to notice certain provisions of the Customs Act itself. Section 2(25) defines "imported goods" to mean any goods brought into India from a place outside India, but does not include goods which have been cleared for home consumption. Section 2(27) defines "India" to include the territorial waters of India. Section 12(1) provides that duties of customs shall be levied at such rate as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from India. Section 15 provides that the rate of duty applicable to any imported goods shall be the rate in force, (a) in the case of goods entered for home consumption u/s 46, on the date on which a bill of entry in respect of such goods is presented under that section; (b) in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse; and (c) in the case of any other goods, on the date of payment of duty. Section 25 is the power of the Central Government to exempt either absolutely or subject to such conditions from the whole or any part of duty of customs leviable thereon if the Government is satisfied that it is necessary in the public interest so to do. Section 68 provides that the importer of any warehoused goods may clear them for home consumption if (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form; (b) the import duty leviable on such goods and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and (c) an order for clearance of such goods for home consumption has been made by the proper officer. We have noticed the aforesaid provisions of the Customs Act before considering the legal submissions made at the Bar as we think that these provisions would be necessary for adjudicating the point in issue.

7. Now coming to the question of Promissory Estoppel, the landmark decision on the question is the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, . In England, this principle was enunciated by Lord Denning in Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B. 130. In M.P. Sugar Mills case, the Supreme Court held :-

"...The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the other party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not".

Adverting to the plea of executive necessity, the Court further observed :-

"The defence of executive necessity was thus clearly negated by this court and it was pointed out that it did not release the Government from its obligation to honour the promise made by it, if the citizen, acting in reliance on the promise, had altered his position. The doctrine of promissory estoppel was in such a case applicable against the Government and it could not be defeated by invoking the defence of executive necessity."

So far as the applicability of the principle to taxation is concerned, in the self-same judgment their Lordships observed :-

"... It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a trading or business activity of the Government. So far as the doctrine of promissory estoppel is concerned. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it...."

This principle of promissory estoppel enunciated in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, was not approved in a later case of the Supreme Court in the case of *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, which appears to be the sheet-anchor of the judgment of the Delhi High Court in its Full Bench case of *Bombay Conductors and Electricals Ltd. and another Vs. K. Chandramouli, Under Secretary to the Govt. of India and others*, . In *it Ram case*, a Two Judge Bench of the Supreme Court dissented from the earlier judgment in *M.P. Sugar Mills case* and observed:-

"With respect, we are in complete agreement with the law as stated above, but we find the judgment is not in accordance with the view consistently taken by this Court in some respects...."

The learned Judges in *Jit Ram case* summed up the scope of the plea of doctrine of estoppel against the Government in paragraph 39 of the Judgment, which is quoted below in extenso :-

The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows :-

- (1) The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.
- (2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.
- (3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held by the unauthorised acts of its officers.
- (4) When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity of change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.
- (5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State."

Finally, their Lordships observed :-

"On a consideration of the decisions of this Court it is clear that there can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest." (quoted from paragraph 50).

In the said case, though the Municipal Committee of Bahadurgarh had represented to its buyers with regard to levy of octroi duty, but later on resiled from the said promise. The Supreme Court held that the Municipality was not estopped as the representation made by it was beyond the scope of its authority.

This decision of the Two-Judge Bench of the Supreme Court again came up for

consideration before a Larger Bench in the case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., . It was observed by their Lordships :

"We have carefully considered both the decisions in Motilal Sugar Mills case and Jeet Ram's case and we are clearly of the view that what has been laid down in Motilal Sugar Mills case represents the correct law in regard to the doctrine of promissory estoppel and we express our disagreement with the observations in Jeet Ram's case to the extent that they conflict with the statement of the law in Motilal Sugar Mills case and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case."

Reiterating the earlier views in M.P. Sugar Mills case, it was further observed :-

"There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel...."

The Court further added :-

"Of course we must make it clear and that is also laid down in Motilal Sugar Mills case (supra), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the Officer of the Government or of the public authority to make...."

This decision of the Supreme Court had not been brought to the notice of the Full Bench of the Delhi High Court while their Lordships were deciding the Bombay Conductors and Electricals case.

In view of the aforesaid legal position, there cannot be any manner of doubt that though the principle is applicable against the Government in exercise of its Governmental, public or executive functions, but it certainly does not apply against the legislature in the exercise of its legislative function, nor would it apply to the Government or a public authority when it enforces a statutory prohibition. Similarly, if the promise in question emanates from an authority who had no power to hold out that promise or the promise is contrary to law, then certainly the principle of promissory estoppel will not apply.

8. We shall now notice a few decisions of the different High Courts which are relevant in the field. Mr. Rath appearing for the petitioners places reliance on the decision of the Bombay High Court in the case of Ceat Tyres of India Ltd. Vs. Union of India and others, . In that case, an exemption notification had been issued under Rule 8 of the Central Excise Rules, but the same was withdrawn before the date of its expiry. It was held :-

"Therefore, it is clear that when an exemption has been issued under Rule 8 of the Central Excise Rules, such exercise of power cannot be equated with the legislative function and the promise held by the Central Government to grant exemption in given conditions, can be enforced and the Government is bound by it and the obligation cannot be released on the basis that such exemption is in legislative exercise of its function. It is legislative in character, but the Parliament has not made it. The Government can make and unmake such laws, day in and day out. It cannot be said that in such cases the doctrine of promissory estoppel has no application".

Even though the Full Bench judgment of the Delhi High Court in *Bombay Conductors and Electricals* case had been cited in this case, but as the said Delhi judgment proceeded upon the law laid down in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, and *Jit Ram* case itself was not approved by the Three-Judge Bench decision in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, the learned Judge of the Bombay High Court after quoting a paragraph from the *Godfrey Philips India* case, did not follow the dictum of the Full Bench decision of the Delhi High Court and proceeded to apply the principle of promissory estoppel relying upon the ratio of *Godfrey Philips India* case.

Mr. Rath, the learned counsel, further relies upon the decision of the Rajasthan High Court in the case of *J.K. Industries Ltd. Vs. Union of India (UOI) and Others*, , where also a notification issued under Rule 8 of the Central Excise Rules had come up for consideration. The learned Judge observed that when an exemption has been issued under Rule 8 of the Central Excise Rules, such exercise of power could not be equated with legislative function and the promise held by the Central Government to grant exemption in given condition, Government is bound by it and the obligation could not be released on the anvil of the argument that such exemption was in legislative exercise of its function.

Mr. Rath further relies upon yet another Bench decision of the Bombay High Court in the case of *Bharat Commerce & Industries Ltd. and Another v. Union of India and Others* 1987 (23) E.L.T. 40 (Bom.), where their Lordships held :-

"We were, therefore, inclined to take the view that the doctrine of promissory estoppel was available against Government when it was exercising powers conferred upon it by statute or powers of subordinate legislation. We saw no reason why Government should be permitted to act contrary to the terms of its representation, upon which citizens had based themselves, only because it was so acting in exercise of powers given under statute or in exercise of powers of subordinate legislation. As the Supreme Court has pointed out, Government is under no obligation to make a representation. If, then, it does it must be held to it. If the legislature disapproves, it can enact legislation nullifying the representation. If the equities have changed and the public good demands that Government should act contrary to the terms of its representation, the Courts will not require the Government to honour its representation; but, subject to that, it must."

The Division Bench of the Bombay High Court considered the question of principle of promissory estoppel vis-a-vis a notification issued u/s 25 of the Customs Act. In this case a notification had been issued by the Central Government u/s 25(1) of the Customs Act on 5th of January, 1979, exempting viscose staple fibre and viscose tow when imported into India. The said notification was to remain in force till 31st December, 1979. By a subsequent notification dated 30th of October, 1979, issued under the said Section 25(1) of the Customs Act, the Central Government amended the earlier notification and instead of Rs. 1.32 paise per Kilogram, Rs. 2.37 paise per Kg. was substituted. The question arose as to whether in respect of goods imported into the country pursuant to the first notification dated 5th of January, 1979, the rate provided in the second notification would apply, or the Government would be bound by the principle of promissory estoppel? Relying upon the decision of the Supreme Court in the case of Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others, the learned Judges of the Bombay High Court came to hold that the act of the Government granting exemption u/s 25(1) was an act of subordinate legislation and proceeded to consider as to whether the plea of promissory estoppel is available when Government in exercise of its power to frame subordinate legislation makes a representation but thereafter acts contrary to the representation. After discussing a catena of case-laws and relying upon the decisions in M.P. Sugar Mills case and Godfrey Philips India case as well as noticing the decision of the Supreme Court in the case of Pournami Oil Mills and Others Vs. State of Kerala and Another, it was held that the State Government was estopped from resiling from the representation made in the first notification issued under such power by the issuance of the second notification also issued under such power and finally held that the plea of promissory estoppel would be applicable and the viscose staple fibre imported and which arrived at the port of Bombay on or before the 31st of December, 1979, could be levied at the rate of Rs. 1.32 paise per kilogram as per the first notification.

Mr. Rath also places reliance on the decision of the Karnataka High Court in the case of Sewing Systems Pvt. Ltd. v. Union of India 1989 (44) E.L.T. 455 (Kar.), but the said decision is not directly on the point and, therefore, we refrain from discussing the same.

9. Mr. Mohanty, the learned Standing Counsel for the Central Government, on the other hand, very much relies upon the Full Bench decision of the Delhi High Court in Bombay Conductors and Electricals case (referred to supra) and contends that the aforesaid Full Bench decision represents the correct view with regard to the application of promissory estoppel and consequently, the said principle will not have any application to the facts and circumstances of the present case. He also further contends that the notification in question brings in the nature of an exemption it would be always open to the authority to withdraw the said exemption and the question of application of promissory estoppel against such withdrawal does not arise, particularly when the same is in respect of a matter of taxation and the public interest demands such withdrawal.

Coming to the Full Bench decision of the Delhi High Court in Bombay Conductors and Electricals case, which, in fact, is the sheet-anchor of the learned Standing Counsel for the Central Government, we find that the learned judges fully relied upon the judgment of the Supreme Court in Jit Ram case and had observed :-

"... If M.P. Sugar Mills is the apogee of promissory estoppel, Jit Ram may be said to serve as a sounding board of warning against the danger of wider extension of this new doctrine by judicial activists...."

Their Lordships quoted a passage from Jit Ram case to the effect :-

"It is now well-settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers."

But in view of the disapproval of Jit Ram in Godfrey Philips India case, the ratio of the Full Bench decision of Delhi High Court cannot be held to be applicable to the present case and must be held not to be laying down the correct proposition so far as the question of applicability of promissory estoppel to governmental activities is concerned.

The learned Standing Counsel for the Central Government also relied upon the decision of the Andhra Pradesh High Court in the case of Feno Plast Pvt. Ltd. and Another Vs. Union of India and Another, . In the said case, a notification of exemption u/s 25 of the Customs Act was under consideration. It was held that though the power to exempt is not a delegated power of legislation, yet it is a statutory power of the Government to be exercised in accordance with the demands of public interest and it was further held that the Government should not be bound by its notification once issued and it is free to modify or rescind the same as and when public interest so demands. We are unable to appreciate as to how this decision helps the learned Standing Counsel for the Central Government in deciding whether the principle of promissory estoppel would apply to the notification in question, or not. There is no manner of doubt that the Government has the power to issue notification exempting the goods from levability of duty and once the Government issues that notification it can modify or rescind the same as and when the public interest so demands. That apart, so far as the notification dated 28th of November, 1986, is concerned, nothing has been indicated in the notification itself as to what public interest would it subserve by enhancing the rate three days before the expiry of the earlier notification which was to remain in force till 30th of November, 1986. There has been not an iota of material to indicate the public interest excepting learned Standing Counsel arguing in course of hearing that higher rate of duty itself is the public interest. We are unable to accept the said submission. However, in our considered opinion, the Bench decision of Andhra Pradesh High Court does not lead us any further in deciding the applicability of principle of promissory estoppel.

Mr. Mohanty, the learned Standing Counsel for the Central Government also relies upon the decision of the Calcutta High Court in the case of Black Diamond

Beverages Ltd. Vs. Union of India (UOI), . In the said decision, their Lordships have proceeded on the assumption that the issuance of a notification under a statute is exercise of power of legislation and consequently, the principle of promissory estoppel does not apply, If it is held that the exemption notification issued by the Union Government is a legislative function, obviously, the principle of promissory estoppel will not apply, as has been held in M.P. Sugar Mills case, as well as in Godfrey Philips India case. But the question arises, is it a legislative function? The learned Standing Counsel also relies upon a Bench decision of the Delhi High Court in the case of Jain Shudh Vanaspati Limited Vs. Union of India and Another, , wherein, the learned Judges have held that the estoppel cannot be invoked where the result will be to compel the Government to continue the exemption which a competent enactment has validly authorised the executive to withdraw in public interest at any time. In public interest, exemption can be granted and in public interest exemption can be rescinded. The learned Judges have relied upon the Full Bench decision of the said High Court in Bombay Conductors and Electricals case. It is to be noticed that the Bombay Conductors and Electricals case was actually decided on 3-3-1983 though it has been reported in 1986. In view of what we have already stated, with regard to the Bombay Conductors and Electricals case, the aforesaid Bench decision of the Delhi High Court will not assist the learned Standing Counsel for the Central Government in any manner.

10. We will be failing in our duty if we do not notice the judgment of the Supreme Court in Shri Bakul Oil Industries and Another Vs. State of Gujarat and Another, wherein their Lordships observed :-

"The exemption granted by the Government as already stated, was only by way of concession for encouraging entrepreneurs to start industries in rural and undeveloped areas and as such it was always open to the State Government to withdraw or revoke the concession. 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 Govt. 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...."

In view of our discussions on the question of law and following the ratio in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., we are in respectful disagreement with the view expressed by the Delhi High Court and agree with the view expressed by the Bombay High Court and we hold that D.B.M. imported by the petitioners which reached the port at Paradeep prior to the notification dated 28-11-1986 and were in the bonded warehouse would be liable for duty in accordance with the notification of the Government of India dated 1-8-1985 and the Central Excise authorities are estopped from demanding the higher rate as provided in the notification dated 28-11-1986. The submission of Mr. Rath, the

learned counsel for the petitioners, on this score accordingly must succeed.

11. Coming to the second submission of Mr. Rath for the petitioners, namely whether the imported goods having been cleared for home consumption before the subsequent notification was issued by the Government of India, loses its identity as "imported goods" so as to be liable for levy of duty at the rate prescribed under the second notification, it depends upon the interpretation of the provisions of the Act. u/s 12 of the Act, duties of customs can be levied at such rate as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force on goods imported into or exported from, India. The expression "imported goods" has been defined in Section 2(25) to mean any goods brought into India from a place outside India, but does not include goods which have been cleared for home consumption. Section 45 of the Act provides restriction on custody and removal of imported goods. u/s 45(1) all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Collector of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter-VIII. u/s 46 of the Act, the importer of any goods is liable to make an entry by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form. u/s 47 of the Act, the Customs Officer when satisfied that the goods entered for home consumption are not prohibited goods and the importer had paid the import duty, if any, assessed thereon and any charges payable under the Act have been paid, may make an order permitting clearance of the goods for home consumption. u/s 49 of the Act when imported goods entered for home consumption cannot be cleared within a reasonable time, then on the application of the importer, the Assistant Collector of Customs pending clearance may permit the goods to be stored in a public warehouse or a private warehouse, if facilities for depositing in a public warehouse are not available, but such goods shall not be deemed to be warehoused goods for the purposes of the Act and accordingly the provisions of Chapter-IX shall not apply to such goods.

Learned Standing Counsel for the Central Government argues with vehemence that u/s 15(1)(b) of the Act, the rate of duty and tariff valuation applicable to any imported goods shall be the rate and valuation in force, in the case of goods cleared from a warehouse u/s 68, on the date on which the goods were actually removed from the warehouse and, therefore the goods removed from the warehouse from 28th of November, 1986, onwards would be liable for the duty in accordance with the notification dated 28-11-1986 and not in accordance with the earlier notification.

12. The positive assertion of the petitioners in this case is that the goods in question after reaching the port at Paradeep were duly entered by presenting the bill of entry for home consumption u/s 46 and the appropriate customs authority cleared the same for home consumption u/s 47, much prior to the subsequent notification of the Government of India dated 28th of November, 1986, and this

assertion of the petitioners has not been denied, inasmuch as no counter-affidavit has been filed. The argument of the learned Standing Counsel for the Union Government, however, is based upon the provision contained in Section 15 of the Act. Undoubtedly, Section 15(l)(b) stipulates that the rate of duty and tariff valuation in the case of goods cleared from a warehouse u/s 68 would be the rate and tariff valuation in force on the date on which the goods were actually removed from the warehouse. But if the imported goods are for home consumption and the importer of the said goods has made an entry thereof by presenting to the proper officer a bill of entry for home consumption and the proper officer has permitted clearance of the goods for home consumption, and the duty in respect of the same has already been paid, then storage of such imported goods in any warehouse is because of the fact that the customs authorities on being satisfied that the goods cannot be cleared within a reasonable time have permitted the goods to be stored in a warehouse, whether public or private, as provided u/s 49 of the Act. Section 49 clearly indicates that such goods shall not be deemed to be warehoused goods for the purpose of the Act and accordingly the provisions of Chapter IX shall not apply to such goods, Section 49 of the Act is quoted herein below in extenso :-

"49. Storage of imported goods in warehouse pending clearance. -

Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Collector of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored in a public warehouse, or in a private warehouse if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods."

In view of the aforesaid provision of Section 49, the goods in question will not be deemed to be warehoused goods for the purposes of the Act and Chapter IX including Section 68 therein will have no application to the said goods. In that view of the matter, the very stand of the customs authorities as reflected in the arguments of the learned Standing Counsel that the rate of duty and tariff valuation shall be the rate and tariff valuation in force on the date of actual removal of the goods from the warehouse is unsustainable and is based upon overlooking the provisions contained in Section 49 of the Act. In view of the assertions made in the writ application with regard to the clearance of the goods for home consumption, which has not been denied, inasmuch as no counter-affidavit has been filed, we have had no hesitation to come to the conclusion that the goods in question will not be subject to the additional rate as provided in the notification dated 28th November, 1986, since such goods are not warehoused goods u/s 68 of the Act and consequently, the demand under Annexure-1/A as also the demands under Annexures-1/B and 1/C are wholly unauthorised and without jurisdiction and are accordingly quashed.

13. Since the petitioners have been compelled to make payments pursuant to the interim orders of this Court in respect of the demand made under Annexure-1/A, we would direct that any payment made in respect of demand under Annexure-1/A shall be refunded to the petitioners. We further notice that on the basis of a Joint Memorandum, the petitioners were permitted to release certain quantity of Dead Burnt Magnesite which was still in the bonded warehouse at Rajgangpur on depositing a sum of Rs. 5 lakhs by 10-6-1987 and it was mentioned in the Memorandum that the said deposit would be subject to the ultimate determination of duty. In view of our conclusion that the goods are not liable for any enhanced duty pursuant to the subsequent notification dated 28-11-1986, the amount deposited by the petitioners pursuant to the Joint Memorandum has to be refunded to them.

14. In the net result, therefore, we quash Annexures- 1/A, 1/B and 1/C and direct that the amounts subsequently paid by the petitioners pursuant to the interim directions as well as Joint Memorandum be refunded to the petitioners within a period of two months from the date of receipt of this order. The writ application is accordingly allowed. There will, however, be no order as to costs.

D.M. Patnaik, J.

15. I agree.