
(2004) 01 KL CK 0003
In the High Court Of Kerala
Case No : O.P. No. 8563 of 2003 (T)

Pepsico India Holdings Pvt. Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-01-2004

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10
Kerala General Sales Tax Rules, 1963 — Rule 21(9)
Kerala Surcharge on Taxes Act, 1957 — Section 3

Citation : (2006) 144 STC 409

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : Chidambaram, Antony Dominic, E.K. Nandakumar, A.K. Jayasankar Nambiar, Priya Mahesh and Priya Manjooran, for the Appellant; Raju Joseph, Senior Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The scope and ambit of the expressions "have taken effective steps for setting up new industrial unit" occurring in Sub-clause (ii), Clause 1 of Notification S.R.O. No. 1092 of 1999 modifying the exemptions granted in Clauses 1 to 7 of Notification S.R.O. No. 1729 of 1993, both issued by the State Government u/s 10 of the Kerala General Sales Tax Act, 1963 (for short, "the Act") calls for consideration in this original petition.

2. Pepsi Cola India Manufacturing Company, a private company with unlimited liability, had set up an industrial unit by investing approximately Rs. 50 crores at the Industrial Development Area at Kanjikode in Palakkad District and had commenced commercial production of soft drinks, etc., on March 6th/7th, 2001. The company made an application on June 20, 2001 (exhibit P8) for sales tax exemption to the tune of Rs. 43.32 crores under Notification S.R.O. No. 1729 of 1993 before the Director of Industries and Commerce, Thiruvananthapuram, the second respondent in this original petition, who is the competent authority under the notification. The said company was subsequently renamed as Aradhana Beverages Manufacturing Company in August 2001 and later amalgamated with

the petitioner-company in October, 2002. This original petition is thus filed by the petitioner-company for reliefs in respect of the application for sales tax exemption (exhibit P8).

3. The petitioner had applied for and obtained sales tax registration both under the Kerala General Sales Tax Act, 1963 and under the Central Sales Tax Act, 1956 and is an assessee to sales tax under respondents Nos. 5 to 7. The petitioner, as already noted, commenced commercial production from March 6th/7th, 2001. Provisional assessment under Rule 21(9) of the Kerala General Sales Tax Rules, 1963, was made for the month of April, 2001 denying exemption since no orders were passed on exhibit P8 application. The company then filed writ petition, O.P. No. 20675 of 2001 and obtained an interim order dated July 13, 2001 (exhibit P11) staying the recovery proceedings. Later, the writ petition itself was disposed of by judgment dated September 7, 2001 (exhibit P12). The second respondent was directed to take a decision on exhibit P8 in accordance with law within two months. Recovery proceedings pursuant to the provisional assessment order for April, 2001 was also directed to be kept in abeyance till then. For one reason or the other, decision on exhibit P8 was delayed. Respondents also got and/or sought for extension of time for compliance of the directions issued in the judgment.

4. There were correspondences between the Government and the petitioner, between the second respondent and the petitioner and also between the first and second respondents in regard to the grant of sales tax exemption to the petitioner. The petitioner also made representations before the Government pointing out the undue delay and also impressing the Government of the need for urgent orders on the application.

5. In the meantime, again provisional assessment order dated February 4, 2003 for the month of December, 2002 and demand notice (exhibit P23) and provisional assessment notice for the months of April to December, 2002 (exhibit P24) were issued. These situations prompted the petitioner to file the present writ petition seeking for the following reliefs:

(i) To quash exhibit P23, assessment order dated February 4, 2003 passed by respondent No. 6 and the provisional assessment notice dated February 7, 2003 at exhibit P24 issued by the 7th respondent, by the issue of a writ of certiorari or such other writ or order or direction.

(ii) Grant a stay of all proceedings for recovery of tax assessed and found payable solely on account of denial of exemption under exhibits P5 and P6 notifications to the petitioner, and in particular the recovery of amounts pursuant to exhibit P23 order and exhibit P24 notice, pending disposal of the original petition.

(iii) Declare that the petitioner is entitled for the grant of an eligibility certificate in terms of exhibits P5 and P6 notifications for claiming the benefit of sales tax exemptions envisaged in the said notifications.

(iv) Issue a writ of mandamus or such other writ, order or direction, directing the 2nd respondent to forthwith grant an eligibility certificate to the petitioner in terms of petitioner's application dated June 20, 2001, exhibit P8, read with exhibits P5 and P6 notifications so as to enable the petitioner to enjoy the benefit of the sales tax exemptions envisaged in the said notifications.

6. During the pendency of the writ petition, the second respondent passed an order dated June 8, 2003 (exhibit P26) on the petitioner's application for sales tax exemption (exhibit P8). The application was rejected. By way of amendment of the writ petition, the following reliefs are also sought for.

(iv)(a) To call for the records leading to exhibit P26 order of the 2nd respondent and quash the same by the issuance of a writ of certiorari or such other writ, order or direction.

(iv)(b) To grant a stay of operation of exhibit P26 order, pending disposal of the original petition.

7. In essence, it is the legality of the order (exhibit P26) passed by the second respondent which is the issue now to be decided.

8. The second respondent has filed a counter-affidavit justifying the decision (exhibit P26) taken by him on the application (exhibit P8) submitted by the petitioner. The relevant portions of the counter-affidavit are extracted herein below (paragraphs 6, 7, 8 and 9):

As already submitted, this unit had not acquired the necessary plant and machinery prior to January 1, 2000. It claims to have taken the notified effective step of having placed firm orders by making advance payment for the plant and machinery prior to January 1, 2000. The expression in the notification is not "any or some or certain of the plant and machinery", but it is notified as the "necessary plant and machinery". The notifications stipulate the onus of proving that an industrial unit had placed firm order for purchase of "such plant, machinery and equipments", prior to January 1, 2000 shall be on such industrial unit. To prove the issue of "firm orders" the petitioner-unit had produced certain bank certificates and purchase orders. Purchase orders issued before January 1, 2000 cannot fall within the above definition notified by Government. The notification is specific about making payment of advance by DD or cheque and that too for the plant and machinery required for commissioning the project.

The more important question to be considered and decided was whether the payment of only Rs. 21.75 lakhs paid as advance prior to January 1, 2000 against total estimated cost of the necessary plant and machinery amounting to Rs. 3,210 lakhs can be taken to satisfy the definition of "effective steps" for the purpose of the "necessary plant and machinery", in other words "such plant and machinery".

In the best interest of acting within the spirit of the notifications, the eligibility of a unit should be substantiated and justified by the quantum of investment made

as advance before the cut-off date (January 1, 2000) as against the total cost of all "the necessary plant and machinery" required for the project in pipeline. Huge revenue cannot be sacrificed by way of sales tax exemption in a case that has not satisfied the real spirit of the conditions prescribed in the notifications. The unit should have taken "effective steps" and not merely some steps or any step to set up the project. Paying a meagre advance of less than one per cent for certain items of plant and machinery could not be regarded as "effective step" of paying advance for "the necessary plant and machinery" costing about Rs. 3,210 lakhs, i.e., cost of total machinery.

In this case the Director of Industries and Commerce was to issue the eligibility certificate based on which exemption order would be issued by the Deputy Commissioner (General), Commercial Taxes. S.R.O. No. 1729/93 as amended by S.R.O. No. 29/99 stipulates that the competent authority to clarify doubts about the scheme of granting sales tax exemption will be the State Level Committee. The Government have authorized u/s 10 of the KGST Act the S.L.C. to do so. Hence the Director of Industries and Commerce placed the matter before the State Level Committee to clarify the case of the petitioner-unit on the basis of Notification S.R.O. No. 1092/99 and 295/2000. The State Level Committee examined the case in detail and made it clear that the purchase orders and other documents related to payment of advance to machinery suppliers do not show that the company has fully satisfied the definition of "effective steps" as required by the said notification. It was only based on this clarification and the provisions in the said notifications that the unit's application for eligibility certificate was rejected by the 2nd respondent.

9. It is also stated that the petitioner-unit is a self financing unit, that in the case of a self financing unit mere acquisition of 50 acres of land for setting up the project does not help the unit in any way to be regarded as satisfying the notified effective step and that the petitioner had not satisfied the conditions set out in the notifications though it is true that it started commercial production before December 31, 2001.

10. Further, paragraph 12 of the counter-affidavit states thus :

It is true that the petitioner has produced proof of advance payment to certain items of machinery/equipments out of the necessary plant and machinery/equipments. For this a certificate dated September 29, 2000 of Deutsche Bank was produced. The onus of proving that advances were paid in the manner as provided for in the notifications rested with the petitioner. The petitioner forgets the fact that advance payments in the specified manner were to be paid before January 1, 2000 to the "necessary plant and machinery and/ or equipments" and not to any or certain or a small portion of the plant and machinery necessary for the project. Necessary plant and machinery means whatever plant and machinery items required for the project, and not one or two items out of the necessary plant and machinery. S.R.O. No. 1092/99 and S.R.O. No. 295/2000 are very specific about this. It is very important to see that the total requirement

of investment towards plant and machinery/equipments of the project is admittedly Rs. 32.10 crores. Against this, Rs. 21.75 lakhs are paid as advance payments before January 1, 2000. This represents not even one per cent of the cost of "total plant and machinery", whereas, as per provisions in the notifications, the petitioner has to pay advances for such plant and machinery necessary for the project. The term used in the notification is "necessary plant and machinery" and "such plant and machinery and equipments" and this is, in other words, whatever plant and machinery essential for the project and not any or some of the plant and machinery necessary for the project.

11. In paragraph 13 of the counter-affidavit, it is stated as follows :

Acquiring/purchasing one or two items out of the several items of necessary plant and machinery will not amount to satisfying the notified effective step. All the necessary plant and machinery are to be acquired prior to January 1, 2000 (or) it would be at least enough that firm orders are placed for "such plant and machinery" if not already acquired. These conditions in the notifications cannot be left unsatisfied. The S.R.Os. are very specific about this. In cases where only firm orders are placed, it cannot be limited to one or two items of the machinery, leaving the major portion of the machinery not arranged for, without placing firm orders for the purchase of the same in the manner specified in the notifications. When there is a stipulations that the necessary plant and machinery have to be acquired or purchased prior to January 1, 2000 as one of the eligibility conditions, by no stretch of imagination it can be understood or concluded that firm orders need be placed only for any two or three items of the several items constituting the plant and machinery necessary for the project.

12. The petitioner had filed a detailed reply affidavit refuting the stand taken by the second respondent in regard to the scope of Notifications S.R.O. No. 1092 of 1999 and S.R.O. No. 295 of 2000. Petitioner reiterated the stand that it had taken effective steps as contemplated under the above two notifications. The petitioner had also filed LA. No. 115784 of 2003 for accepting additional documents, exhibits P27 and P28, containing all the details regarding firm orders placed for purchase of the plant and machinery required for setting up of the soft drink manufacturing unit.

13. Shri P. Chidambaram, learned Senior Counsel assisted by Shri Jayasankar Nambiar of Menon and Pai, Advocates, appearing for the petitioner took me to Notification S.R.O. No. 1729 of 1993 and submitted that this notification granting sales tax exemption was issued for promoting industrial growth in the State, that the petitioner had set up the unit and started commercial production only on the basis of the benefits available under the notification and that Notification S.R.O. No. 1092 of 1999 was issued only to benefit such persons who relying on the benefits offered in the notification had bona fide taken steps for setting up the industrial unit and had invested money for such venture. Senior Counsel submitted that the petitioner had taken on lease the required land for setting up the unit by paying a sum of Rs. 2,77,64,000 on December 28, 1999 and had

placed firm orders for the purchase of required plant and machinery (vide exhibits P27 and P28 and other documents). Senior Counsel further submitted that a sum of Rs. 21.75 lakhs was admittedly paid by way of advance prior to January 1, 2000 for purchase of four major items of machineries required for the unit. Senior Counsel further submitted that the petitioner's case squarely falls under Sub-clause (ii)(b) and (c) of Clause 1 of Notification S.R.O. No. 1092 of 1999. Senior Counsel submits that though the view taken by the second respondent that, to satisfy Sub-clause (ii)(c) firm orders should have been placed for purchase of the necessary plant and machinery may have some force the further view that advance payments should have been made in respect of all such plant and machinery does not seem to follow from Sub-clause (ii)(c) read with the latter part of Sub-clause (iii). Senior Counsel pointed out that payment of advance amounts only dispenses with the requirement of establishing that firm orders have been placed and that it is open to the petitioner to establish by other means that firm orders have been placed prior to January 1, 2000. Senior Counsel also pointed out that the expressions used in Sub-clause (iii) is "any advance payments" which means the quantum of advance payment is immaterial and that the stand taken by the second respondent to the contrary in the counter-affidavit that the advance payment must be a substantial portion of the sale consideration is due to a misreading of the said Sub-clause. Senior Counsel further took me to various communications commencing from May 11, 1999 (exhibit P1) with regard to company's proposal to make substantial investment of over Rs. 50 crores in setting up the new industrial unit in Kerala for the manufacture of soft drinks with the full range of Pepsi products, confirmation sought for regarding the available sales tax exemption benefit and allotment of land for setting up new unit, the communications received from the Kerala Industrial Infrastructure Development Corporation (exhibit P2), giving information in that regard and the various materials and documents produced before the authorities (exhibits P3, P4 and P7 to P28) to establish that the petitioner had taken effective steps as contemplated in Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 for setting up the industrial unit at Palakkad. Senior Counsel further submitted that the Government had clearly understood the scope of Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000 and expressed their view in clear terms to the State Level Committee as is evident from exhibit P19 proceedings of the State Level Committee on sales tax exemption and also from the impugned order that the petitioner had satisfied the provisions of Sub-clauses (ii) and (iii) of Clause 1 of the Notification. Senior Counsel submitted that this decision of the Government is an administrative decision which the second respondent was bound to honour. Senior Counsel summed up by submitting that the second respondent has totally misunderstood the scope of Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000 and had misdirected in holding that the petitioner did not satisfy by adducing evidence that it had taken effective steps for setting up the unit prior to January 1, 2000.

14. Shri Raju Joseph, learned Special Government Pleader (Taxes), appearing for

the respondents submitted that the application for exemption from payment of sales tax submitted by the company was rightly rejected. With reference to the counter-affidavit filed by the second respondent, Special Government Pleader submitted that the petitioner did not satisfy the requirements of Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999, for, a self financing unit though acquired land for the project prior to January 1, 2000 does not satisfy the conditions of Sub-clause (ii)(b) and that for satisfying Sub-clause (ii) (c) firm orders for all the necessary plant and machinery should have been placed before January 1, 2000 and that those purchase orders must be supported by advance payments of substantial amounts. The Special Government Pleader submitted that the petitioner had paid only a small amount of Rs. 21.75 lakhs as against the purchase value of more than Rs. 32 crores and that too only in respect of 3 or 4 items of machineries. He further submitted that the State Level Committee constituted under Sub-clause (f) of Clause 10 of Notification S.R.O. No. 1729 of 1993 was authorized by the Government to issue clarification regarding the scheme of the notification and that by virtue of the said power, the State Level Committee had clarified that the petitioner did not satisfy the requirements of Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000.

15. Thus the scope of Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000 is the real issue involved in this case.

16. It will be useful at this juncture to have an idea about the background of sales tax exemption granted u/s 10 of the Act. The Government for the first time as an incentive for setting up new industries in the State had issued a Government Order dated April 11, 1979 granting exemption from payment of sales tax to new industrial units under small-scale industries set up after April 1, 1979 for a period of 5 years. This order was not one passed with specific reference to Section 10 of the Act. Government, subsequently, modified the exemption by issuing a statutory Notification S.R.O. No. 968 of 1980. The exemption under the said notification was limited to 90 per cent of the fixed investment in plant and machinery. The notification also contemplated production of eligibility certificate issued by the General Manager, District Industries Centre of the concerned district. Unlike under the Government Order dated April 11, 1979, this notification contemplated an assessment under the Act, regarding the liability to tax for each year. Once the eligibility is determined, the tax due as per the said assessment order will have to be adjusted against the amount of exemption specified in the eligibility certificate.

17. The Notification S.R.O. No. 968 of 1980 was given retrospective effect from April 1, 1979, i.e., the date of the first Government order. All those persons who had set up the SSI units on the assurance given in the Government Order dated April 11, 1979 that they will be given blanket exemption from payment of sales tax for a period five years without any limitation were aggrieved by Notification S.R.O. No. 968 of 1980. Some of them filed writ petitions before this Court which

were dismissed. The matter was taken up before the Supreme Court and the same was decided in favour of the units in the decision captioned Pournami Oil Mills and Others Vs. State of Kerala and Another, wherein the Supreme Court observed thus :

Under the order dated April 11, 1979, new small-scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialization, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five-year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small-scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppels in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppels can be and has been applied and the leading authority on this point is the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, .

It was further observed thus :

It is not disputed that the first order, namely, the one dated April 11, 1979, gave more of tax exemption than the second one. The second notification withdrew the exemption relating to purchase tax and confined the exemption from sales tax to the limit specified in the proviso of the notification. All parties before us who in response to the order of April 11, 1979, set up their industries prior to October 21, 1980, within the State of Kerala would thus be entitled to the exemption extended and/or promised under that order. Such exemption would continue for the full period of five years from the date they started production. New industries set up after October 21, 1980, obviously would not be entitled to that benefit as they had notice of the curtailment in the exemption before they came to set up their industries.

The Supreme Court in this decision has applied the rule of estoppels otherwise known as the principle of "promissory estoppels" laid down in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, .

18. This notification was later superseded by another Notification S.R.O. No. 499 of 1990 which also granted exemption from payment of sales tax payable under the Act by the said industrial units under small-scale industries and by such of the existing industrial units which effect diversification/expansion/modernization on the turnover of sale of goods manufactured and sold by such units and on the turnover of goods taxable at the point of last purchase in the State and used by such units in the manufacture of goods intended for sale within the State or inter-State, subject to conditions. The word "manufacture" used in the notification is defined; the eligibility certificate has to be issued by the District Level Committee, etc., are some of the features. This notification has no relevance for

the purpose of this case and hence not set out in detail.

19. So far as large and medium scale undertakings set up on or after April 1, 1989 and registered with the Department of Industries and Commerce as an industrial unit, the State Government for the first time issued a Notification S.R.O. No. 654 of 1989 u/s 10 of the Act granting exemption in respect of the tax payable under the Act on the turnover of sale of goods produced and sold by new industrial units for a period of five years from the date of commencement of sale of such goods by the said units subject to conditions. Further details are not necessary to be stated.

20. Later, another Notification S.R.O. No. 1729 of 1993 u/s 10 of the Act was issued which superseded all notifications specified in the Schedule thereto including Notifications S.R.O. No. 499 of 1990 and S.R.O. No. 654 of 1989 effective from January 1, 1994. This notification also granted exemption to new industrial units subject to conditions. This notification is the one relevant for the purpose of this case, for, the petitioner claims the benefit of sales tax exemption available under this notification. I will come to the details of this notification later. This notification was amended from time to time, a copy of the notification as amended up to 1999 is exhibit P5.

21. In the year 1999 Government decided to withdraw the benefits of sales tax exemption granted to industrial units set up after January 1, 2000 under Notification S.R.O. No. 1729/93 with effect from January 1, 2000. For the said purpose Government have issued another Notification S.R.O. No. 1092 of 1999 by which the exemption granted under Clauses 1 to 7 of Notification S.R.O. No. 1729 of 1993 was limited to certain categories of industries only. By the said notification, Notification S.R.O. No. 1729 of 1993 was made applicable only to the following four categories : (1) new industrial units other than public sector undertakings which have been set up or have commenced commercial production before July 1, 2000 ; (2) new industrial units other than public sector undertakings which have taken effective steps for setting up new industrial unit prior to the first day of January, 2000 ; (3) existing units other than public sector undertakings which have taken effective steps for diversification, expansion or modernization prior to the first day of January, 2000 ; and (4) sick small-scale industrial units which have been registered as sick units before the Director of Industries and Commerce prior to the first day of January, 2000.

22. The Notification S.R.O. No. 1729 of 1993, inter alia, granted tax exemption to new industrial units in respect of the tax payable on the sale or purchase of goods by such industrial units subject to conditions and restrictions specified therein. Clause (4) of the said notification dealing with new industrial units under medium and large scale industries provided as follows :

4. In the case of new industrial units under medium and large scale industries, there shall be an exemption for a period of seven years from the date of commencement of commercial production--

(a) in respect of the tax payable by such units under the Kerala General Sales Tax Act, 1963--

(i) on the turnover of sale of goods manufactured and sold by them within the State ; and

(ii) on the turnover of goods, taxable at the point of last purchase in the State, which are used by such units for manufacturing other goods for sale within the State or inter-State ;

Sub-clause (iii) not relevant ; hence not extracted.

(b) in respect of the surcharge payable u/s 3 of the Kerala Surcharge on Taxes Act, 1957 (Act 11 of 1957) in relation to the goods referred to in Sub-clause (a) above.

23. Clause 10 specifying the conditions/restrictions for the grant of tax exemption, the relevant conditions are extracted below :

Clause 10(iii).- In the case of new industrial units other than public sector undertakings under medium and large scale industries, the aggregate exemption in respect of sales tax, purchase tax, surcharge and Central sales tax together shall not exceed 100 per cent of the fixed capital investment of the unit.

Clause 10(b). Eligibility certificate for medium and large scale industries assisted by the Kerala State Industrial Development Corporation or the Kerala Financial Corporation will be issued by the Corporation which render assistance and in other cases by the Director of Industries and Commerce, on application by such units and orders of exemption will be issued by the Secretary, Board of Revenue (Taxes), Thiruvananthapuram.

24. The Government by Notification S.R.O. No. 723 of 1998 dated August 17, 1998 with effect from July 1, 1998 substituted the words "Secretary, Board of Revenue (Taxes)" occurring in Clause 10(b) by the words "Deputy Commissioner (General), Commercial Taxes".

Clause 10(c). Eligibility certificate and orders on exemption will be issued by the authorities mentioned in Sub-clause (b) above, if the unit is eligible for exemption or deferment of taxes and the unit satisfies the conditions for the exemptions or deferment of taxes.

Clause 10(d). The eligibility certificate referred to in Sub- Clause (b) above shall contain the date of commencement of commercial production and the monetary limit of exemption the unit is eligible for. The eligibility certificate issued in respect of existing medium and large scale industrial units which undertake expansion, modernization or diversification shall also contain the date of commencement as well as the date of completion of such expansion, modernization or diversification.

25. Sub-clauses (f), (g) and (h) added by Notification S.R.O. No. 29 of 1999

reads thus :

(f) Appeals against the orders of the District Level Committee shall lie to a State Level Committee consisting of Commissioner of Commercial Taxes (Chairman), Deputy Commissioner (General), Commercial Taxes, Managing Director, Kerala Financial Corporation, Managing Director, Kerala State Industrial Development Corporation and Director of Industries and Commerce (Member Secretary). Any of the three members of the committee shall form quorum for its meeting. The above State Level Committee shall also be competent to issue clarifications, wherever necessary, regarding the scheme of the tax exemption.

(g) Appeal against orders of the Deputy Commissioner (General), Commercial Taxes shall lie to a State Level Committee consisting of the Secretary to Government (Finance & Taxes), (Chairman), Commissioner of Commercial Taxes and the Director of Industries and Commerce (Member Secretary). Any of the two members of the committee shall form quorum for its meeting.

(h) The State Level Committee mentioned in Clause (f) or (g) can revise any order of the District Level Committee or the Deputy Commissioner (General), Commercial Taxes, as the case may be, after giving due notice to the industrial unit if in the opinion of the committee, the order of the District Level Committee or the Deputy Commissioner (General), Commercial Taxes, is not in accordance with this notification.

26. Clause 11 gives explanations regarding certain expression used in the notification. Sub-clause (i) thereof defines "new industrial units" as follows:

"New industrial unit" shall mean small-scale, medium or large scale industrial unit set up on or after the 1st April, 1993, and certified as such by the Director of Industries and Commerce in the case of small-scale industrial units and by the Kerala State Industrial Development Corporation in the case of medium or large scale industrial units but shall not include old industrial unit closed down and reopened under a new banner and style of business after 1st April, 1993.

Sub-clause (vii) thereof gives the meaning of the expression of "fixed capital investment of unit", which reads as follows :

"Fixed capital investment of a unit" shall mean the total investment of land including land development cost, building, plant and machinery, power generating system facilities and equipments for research and development and quality control, stand-by equipments like stand-by generator, stand-by steam boiler, pollution control system, delivery vehicles and the like required for the industrial purpose.

27. By virtue of Notification S.R.O. No. 1729 of 1993, all medium or large scale industrial units set up on or after the first day of April, 1993 are entitled to the benefits of this notification (vide Clause 4) provided the conditions are satisfied. However, the benefits of this notification have been restricted to cases covered by Clauses (1) to (4) of Notification S.R.O. No. 1092/1999 which have already

been referred in paragraph 21 supra. This notification came into force with effect from January 1, 2000. By virtue of Notification S.R.O. No. 1092 of 1999, the benefits under Notification S.R.O. No. 1729 of 1993 were discontinued with effect from January 1, 2000. Besides extending the benefits of Notification S.R.O. No. 1729 of 1993 to new industrial units set up or have commenced commercial production prior to January 1, 2000, the Government extended the benefits of the said notification even to new industrial units which have taken effective steps for setting up new industrial units prior to January 1, 2000. This, as already noted, is in view of the fact that the Government have decided to withdraw the exemption in respect of tax under the Act granted to industrial units as per S.R.O. No. 1729 of 1993 from January 1, 2000.

28. As already noted, the petitioner-company had set up the industrial unit (medium scale) and commenced commercial production only after January 1, 2000. Thus Notification S.R.O. No. 1092 of 1999 is pivotal in deciding the claim for sales tax exemption made by the petitioner, for, unless the petitioner's case falls within any one of the four Sub-clauses of Clause 1 of this notification petitioner cannot claim the benefits of the Notification S.R.O. No. 1729 of 1993. Admittedly, Sub-clauses (i) and (iv) of S.R.O. No. 1092 of 1999 have no application. The case of the petitioner is that it will fall under Sub-clause (ii). Sub-clause (iii) is also relevant since the latter part of this Sub-clause inserted by Notification S.R.O. No. 295 of 2000 is common to Sub-clauses (ii) and (iii). Hence it is necessary to extract Sub- Clauses (ii) and (iii) of Clause 1 of the said notification, which read as follows:

Sub-clause (ii). New industrial units other than public sector undertakings which have taken effective steps for setting up new industrial unit prior to the 1st day of January, 2000. An industrial unit shall be considered to have taken such effective steps if it has, (a) obtained provisional registration (applicable only in the case of SSI units), (b) owned or acquired or has been allotted land for establishing the industrial units and applied for financial support from any regular financial institution/Government before January 1, 2000 or (c) in the case of self financed units, acquired or placed firm orders for the purchase of the necessary plant and machinery, before January 1, 2000 provided that the unit commences commercial production on or before the 31st December, 2001.

Sub-clause (iii). An existing unit other than public sector undertaking which has taken effective steps, for diversification, expansion or modernization prior to the 1st day of January, 2000. An existing industrial unit shall be considered to have taken effective steps for diversification, expansion or modernization, if such industrial units (a) has or acquired necessary plant and machinery and/or equipments or (b) has owned or acquired or has been allotted land and has applied for loan from any regular financial institution and/or (c) has placed firm orders for the purchase of such plant and machinery and equipments before the 1st day of January, 2000 provided that such unit commences commercial production of such diversification, expansion or modernization on or before the

31st day of December, 2001.

A unit shall be deemed to have placed firm orders for the purchase of plant, machinery and equipments if such unit had made any advance payments therefore by means of demand draft or cheque which has been credited to the account of the seller prior to 1st January, 2000. The onus of proving that an industrial unit had placed firm order for purchase of such plant, machinery and equipments prior to 1st January, 2000 shall be on such industrial unit.

29. Before proceeding further, it will be advantageous to bear in mind the principles regarding the interpretation of exemption provision in taxing statute. One view is that provision for exemption from payment of tax should be strictly construed. State Level Committee and another Vs. M/s. Morgardshammar India Ltd., and Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad, . The Supreme Court in M/s. Pappu Sweets and Biscuits Vs. Commissioner of Trade Tax U.P Lucknow, held that object of the relevant exemption notification and the intention of the State Government in granting exemption are to be taken into account for interpreting the words used in the notification. In Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, the Supreme Court held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restrictions placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the object of the provision. This principle is applied by the Supreme Court in Commissioner of Sales Tax Vs. Industrial Coal Enterprises, also.

30. Now I will come to the crucial aspect focused in the opening paragraph of this judgment, viz., the scope and ambit of the expression "taken effective steps for setting up new industrial unit prior to January 1, 2000". By virtue of Sub-clause (ii) above, new industrial units other than public sector undertakings which have taken effective steps (emphasis supplied) for setting up new industrial unit prior to the first day of January, 2000 are entitled to apply for exemption under the Notification S.R.O. No. 1729 of 1993. Sub- Clause (ii) further provides that an industrial unit shall be considered to have taken such effective steps in any one of the following fact situations : (1) SSI units which have obtained provisional registration ; (2) if the unit owned or acquired or has been allotted land for establishing the industrial unit and applied for financial support from any regular financial institution/Government before January 1, 2000; and (3) in the case of self financed units if it has acquired or placed firm orders for the purchase of the necessary plant and machinery before January 1, 2000 provided that the unit commences commercial production on or before December 31, 2001.

31. The latter part of Sub-clause (iii) which is applicable to Sub- Clauses (ii) and (iii) alike is a deeming provision as per which if any advance payments are made by means of demand drafts or cheque for the purchase of plant, machinery and equipments which have been credited to the account of the seller prior to

January, 1, 2000, it shall be deemed that firm orders have been placed by the unit for the purchase of such plant, machinery and equipments. This deeming provision, if complied with, it must be noted, only dispenses with the requirement of establishing that firm orders have been placed by the unit for the purchase of plant, machinery and equipments which are required for setting up the unit and for commencing commercial production. This, however, does not mean that the above is the only means for establishing that "firm orders have been placed". The last sentence in Clause (iii) latter part states that "the onus of proving that an industrial unit had placed firm order for purchase of such plant, machinery and equipments prior to 1st January, 2000 shall be on such industrial unit". This makes the position clear that it is open to the industrial unit to independently establish by producing other materials that firm orders for purchase of plant, machinery and equipments are placed before January 1, 2000.

32. The notification itself gives sufficient clues regarding the meaning to be given to the expression "have taken effective steps" for setting up new industrial unit.

33. In the case of small-scale industrial unit, if it has obtained provisional registration prior to January 1, 2000, it could be said that the said unit has taken effective steps. Similarly, an industrial unit can be considered to have taken effective steps, if it has owned or acquired or has been allotted land for establishing the industrial unit and also applied for loan from any regular financial institution/ Government before January 1, 2000. Similarly, in the case of self financed units acquired or placed firm orders for the purchase of necessary plant and machinery before January 1, 2000, it can be considered to have taken effective steps provided the unit commences commercial production on or before December 31, 2001. Regarding the third situation, it is stated that a unit shall be deemed to have placed firm orders for the purchase of plant, machinery and equipments if such units had made any (emphasis supplied) advance payments therefore by means of demand draft or cheque which have been credited to the account of the seller prior to the first day of January, 2000. Here it must be noted that Sub-clauses (ii) and (iii) provide for the circumstances under which an industrial unit can be considered/deemed to have taken effective steps but it is not exhaustive. The burden is on the industrial unit to establish that the unit had placed firm orders for purchase of plant, machinery and equipments prior to January 1, 2000.

34. Thus the question to be considered is as to whether the petitioner-company had taken effective steps for the setting up of the new industrial unit prior to the first day of January, 2000. In this context it will be worthwhile to consider the manner in which Notification S.R.O. No. 1092 of 1999 was couched. If the Government in public interest has taken a decision to withdraw the exemption in respect of the tax under the Act granted to an industrial unit under Notification S.R.O. No. 1729 of 1993, the Government could have very well withdrawn the said notification prospectively, because, exemption under the said notification is granted only to industrial units set up when the notification was in force. Even

after withdrawal of the notification, the case of industrial units which have been set up during the currency of the notification are entitled to be considered in the light of the notification which prevailed at the time of setting up the industrial units. *Pournami Oil Mills and Others Vs. State of Kerala and Another*, .

35. It would appear that the inspiration for the Government to issue notification S.R.O. No. 1092 of 1999 is the decision of a three-Judge Bench of the Supreme Court in *State of Rajasthan and Another Vs. M/s Mahaveer Oil Industries and Others*, . In this decision the court posed the question regarding the applicability of the principle of promissory estoppels as follows :

Are the respondents justified in holding the State to the promise made by it in the form of an incentive scheme which is made available for a specified period of time, when new industries are set up on the basis of that scheme relying on the promise of benefits held out by it? Public interest requires that the State be held bound by the promise held out by it in such a situation. But this does not preclude the State from withdrawing the benefit prospectively even during the period of the scheme, if public interest so requires. Even in a case where a party has acted on the promise, if there is any supervening public interest which requires that the benefit be withdrawn or the scheme be modified, that supervening public interest would prevail over any promissory estoppels.

Further in paragraph 17 of the judgment the matter was considered with reference to the taking of effective steps as follows :

Secondly, in the present case the respondents do not seem to have taken steps which can be considered as effective steps for starting a new unit prior to the notification of May 7, 1990, thereby entitling them to invoke the doctrine of promissory estoppels. The respondents rely upon the following for the purpose of invoking promissory estoppels :

1. The respondent-firm got its provisional registration certificate on February 15, 1990. This is merely a provisional registration issued by the Directorate of Industries.
2. They applied for allotment of land and land was allotted to them by RIICO Limited, by its letter dated February 19, 1990. Possession of the land was handed over on March 7, 1990 and lease agreement was executed in March, 1990. For this land, only an amount of Rs. 30,849 was invested.
3. The respondent-firm was registered as a partnership firm with the Registrar of Firms on March 6, 1990.
4. On April 2, 1990, the respondent-firm applied for registration under the Rajasthan Sales Tax Act which was granted on April 17, 1990.
5. A loan of Rs. 7.5 lakhs was sanctioned by the Rajasthan Financial Corporation in favour of the respondents on April 17, 1990. It is not stated how much loan was actually availed of by the respondents on or before May 7, 1990.

6. Construction of building was started by the respondent on April 20, 1990, barely 3 weeks before the withdrawal of the benefit under the said scheme.

7. The respondents claim that they placed orders for machinery on April 18, 1990. It is, however, not stated whether any amount either as earnest or advance for the purchase of machinery was paid by the respondent to anybody before May 7, 1990. The respondents also claim to have applied for power connection, to have installed a transformer and to have invested about Rs. 15 lakhs in installing the industrial unit. However, there is no material to show that any of this was done prior to May 7, 1990. In fact, the respondents could commence commercial production only in February, 1991, long after the benefit of the incentive scheme had been withdrawn. Their application for eligibility certificate under the said scheme was made only on April 2, 1991, long after the benefit of the scheme had been withdrawn in respect of oil industry. In these circumstances, even if we were to hold that the doctrine of promissory estoppels can be invoked, the same cannot be invoked in the case of the respondents.

This decision was rendered on April 22, 1999. Notification S.R.O. No. 1092 of 1999 was issued on December 31, 1999. The Supreme Court was taking the view that effective steps for setting up the unit can be said to have taken only if some substantial investment is made for setting up the industrial unit. It would appear that it is to get over the difficulty caused by this decision and to give the benefit of exemption to all those who had taken bona fide efforts to set up the industrial unit prior to January 1, 2000 that the Government had stated the circumstances under which it can be considered/deemed to have taken effective steps for setting up the industrial unit. It is only to give the benefit of exemption under Notification S.R.O. No. 1729 of 1993 to all those industrial units which had set up the unit or commenced commercial production as on January 1, 2000 and also to such of those industrial units acting on the faith of the assurance given by the Government in Notification S.R.O. No. 1729 of 1993 had taken effective steps for establishing the unit, but could not set up the unit and start commercial production before January 1, 2000, this notification is issued keeping in mind the principle of promissory estoppels.

36. The meaning of the words "set up" was considered by a division Bench of this Court in *John v. State of Kerala* (1996) 2 KLT 315. It was held that the words "set up" have to be taken as equivalent to the word "established" and that it is only when a unit is ready to go into business and starts production it can be considered as set up. The Orissa High Court in *Crystal Towers v. Commissioner of Commercial Taxes, Orissa* [1998] 110 STC 161 SC, Karnataka High Court in *Nandi Dall Industries v. State of Karnataka* [1994] 92 STC 206 SC and the Andhra Pradesh High Court in *State of Andhra Pradesh v. Godavari Plywoods Ltd.* [1991] 83 STC 289 SC, have also taken the same view. In view of the above, the expression "have taken effective steps for setting up new industrial unit" must be understood as a stage prior to the setting up of the industrial unit. The only question then is, at what stage of the steps taken for setting up of the industrial

unit it can be said that "effective steps are taken". The principles regarding interpretation of an exemption provision in a taxing statute laid down by the Supreme Court as already noted in paragraph 29 supra where the Supreme Court has held that a provision granting incentive for promoting economic growth and development in a taxing statute should be liberally construed and restrictions placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the object of the provision. In this case, the Government when they took a decision to discontinue the incentive provided in Notification S.R.O. No. 1729 of 1993 with effect from January 1, 2000 by way of exception decided to extend the benefit of the said notification to the four categories mentioned in paragraph 21 supra. These exceptions, as already noted, are based on the principle of promissory estoppels as considered by the Supreme Court in *State of Rajasthan and Another Vs. M/s Mahaveer Oil Industries and Others*, . The circumstances under which a unit can be considered to have taken effective steps were incorporated in Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000 only as a measure to help the units which have taken effective steps for setting up the industrial unit based on Notification S.R.O. No. 1729 of 1993. I have also observed that the notification itself gives sufficient clues regarding the meaning to be given to the expression "have taken effective steps" in paragraph 33 supra. According to me Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 as amended by Notification S.R.O. No. 295 of 2000 have to be considered and understood in the above background. If the latter part of Sub-clause (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 inserted by Notification S.R.O. No. 295 of 2000 is understood in the above background, the use of the expression "any" preceding the expression "advance payments" would indicate that the quantum of advance payment is irrelevant and that it is sufficient to make advance payments even if it is negligible when compared to the value of the plant, machinery and equipments.

37. A fair reading of Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 in the background of the scheme for taking away the benefit granted to an industrial unit under Notification S.R.O. No. 1729 of 1993, according to me, would indicate that the intention of the Government is only to ensure that an industrial unit, pursuant to Notification S.R.O. No. 1729 of 1993, should have taken serious steps for setting up the unit and that there is a bona fide effort on the part of the unit to set up the unit and to start commercial production. Here it must be noted that the time given to such units for availing the benefit of Notification S.R.O. No. 1729 of 1993 is also relevant. Notification S.R.O. No. 1092 of 1999 was published in the Kerala Gazette extraordinary No. 1122 dated 4th November, 1999. Time was granted up to January 1, 2000, approximately two months for taking effective steps and further, to a case attracting Sub-clause (ii)(c), 12 months" time was granted to the party to set up the unit and for commencing commercial production. Thus, it would appear that the intention of the Government in issuing Notification S.R.O. No. 1092 of 1999 containing Sub- Clauses (ii) and (iii) is to find out the bona fides of the industrial

unit in setting up and commencing commercial production.

38. Now the question to be considered is as to whether the second respondent had considered the question of eligibility of the petitioner for tax exemption with reference to Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 as amended by Notification S.R.O. No. 295 of 2000 in the manner discussed above.

39. In the instant case, the petitioner admittedly had commenced commercial production long prior to the outer time-limit fixed for commencement of commercial production, that is as against the outer time-limit of December 31, 2001--petitioner commenced commercial production from March 6, 2001.

40. Now let me consider as to how the respondents have considered this matter. In the communication dated May 22, 2001 (exhibit P9) issued by the first respondent the petitioner was requested to furnish information as to whether the project is self-financed or sought for financial assistance from any financial institutions and as to what is the present stage of commissioning of the unit, the date of crediting the amounts in the respective supplier's account. Petitioner had furnished the said details in its letter dated September 3, 2001 [exhibit P9 (2)]. The second respondent also issued a communication dated November 1, 2001 (exhibit P13) with reference to a communication dated August 13, 2001 of the General Manager, District Industries Centre, Palakkad, and the judgment dated July 13, 2001 in O.P. No. 20675 of 2001. It is stated therein that as per Notification S.R.O. No. 295 of 2001 onus of proving that the unit has placed firm orders for the purchase of machineries prior to the first day of January, 2000 shall be on such unit. Petitioner was asked to appear for a hearing in the Chamber of Additional Director of Industries and Commerce (General) with all such proofs of payments made as advance therefore by means of demand drafts or cheques which have been credited to the account of the seller of the machineries. Petitioner then sent a communication dated November 9, 2001 (exhibit P15) which is virtually their submission in regard to the scope of Sub-clause (ii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 as amended by Notification S.R.O. No. 295 of 2000 dated March 31, 2000. Petitioner had also demonstrated as to how they have satisfied Sub-clause (ii)(a) and (c) of Clause 1 of the Notification. First respondent also sent a communication dated November 15, 2001 (exhibit P16) to the fourth respondent, Commissioner of Commercial Taxes, Thiruvananthapuram, in reply to letters dated October 12, 2000 and January 9, 2001 sent by the fourth respondent. First respondent has clearly stated therein that the petitioner qualifies for tax exemption contemplated in Notification S.R.O. No. 295 of 2000 provided all other conditions are complied with. A direction was also given to dispose of the applications in accordance with the procedure stipulated. Second respondent thereafter issued a communication dated January 8, 2002 (exhibit P17) stating that a hearing is fixed to January 14, 2002 and the petitioner was directed to produce evidence to link the advance payments made as per certificate dated September 29, 2000 (exhibit P14) with

the actual invoices/purchase orders from the suppliers. It was specifically stated therein that the issue of eligibility certificate will be based on the petitioner producing the required evidence to the satisfaction of the second respondent. Petitioner then gave a letter dated January 14, 2002 (exhibit P18) to the second respondent enclosing the copies of relevant purchase orders, invoices from the suppliers, confirmation regarding payment of advances, certificates from the company's statutory auditors regarding the correctness of the information furnished. The State Level Committee on Sales Tax Exemption met on July 29, 2002 and considered the matter. The Committee noted that the petitioner started commercial production during March, 2001. Further it is stated as follows :

This case was placed before the State Level Committee twice. In the State Level Committee held on April 4, 2002 it was decided to take up the matter with Government for further clarification whether the action of the unit can be considered to be "effective steps". Government vide letter No. 8881/B2/02/ID dated July 25, 2002 has directed to place the case before the State Level Committee again for taking a decision by stating the view of the Government that the wordings "necessary plant and machinery" would only mean that whatever plant before the stipulated date should only be plant and machinery necessary for the unit and need not be the entire plant and machinery. The Pepsi cola company in this case can be held to have taken effective steps, by buying the entire required land and placing firm orders on some machinery and making advance payments for the same, before the stipulated date of January 1, 2000. They have also started commercial production on March 31, 2001 well before the stipulated time of December 31, 2001, Government added.

41. The Committee then noted that exemptions for industrial units are covered by statutory notifications issued by the Government u/s 10 of the Kerala General Sales Tax Act and the expressions "necessary plant and machinery" in the relevant notification does not admit of any limited or restricted interpretation. The Committee accordingly decided to inform the Government of the above position. It would appear from the above letter that the view of the Committee is that placing of firm orders for purchase of some of the items of plant and machineries and payment of advances in respect of such items is not sufficient compliance of Notification S.R.O. No. 295 of 2000. In other words, the stand of the Committee is that firm orders should have been placed in respect of all the items of plant and machinery required for setting up of the industrial unit and that advance payments have to be made in respect of all those plant and machinery. Thus it would appear that the Committee differed from the view taken by the Government in their communication referred to in exhibit P19. This position was explained by the second respondent in his affidavit (exhibit P21) dated February 14, 2003 filed before this Court in O.P. No. 20675 of 2001. In the affidavit the second respondent has stated that as per the direction of the State Level Committee a request was made to the Government to issue a general clarification to the expression "necessary plant and machinery" prescribed in S.R.O. No. 295 of 2000 and that the matter is pending consideration before the

Government. Petitioner's representations before the Government are dated September 11, 2002, September 13, 2002, October 9, 2002 and January 4, 2002 (exhibit P22).

42. The second respondent had ultimately passed the order dated June 8, 2003 (exhibit P26) rejecting the petitioner's application. In the said order the second respondent, after narrating the circumstances mentioned in the proceedings dated July 29, 2002 (exhibit P19) and extracted in paragraph 40 supra had stated as follows :

In turn, vide letter No. 29815/B2/02/ID dated December 23, 2002, Government have clarified that there is no need to issue a general clarification for S.R.O. Nos. 1092/99 and 295/2000 regarding STE. This position was reported to the State Level Committee held on March 15, 2003 for clarification. Also, the views in the matter contained in letter No. 23364/B3/2000/TD dated November 15, 2001 of the Special Secretary to Government (Taxes) to the Commissioner of Commercial Taxes, Thiruvananthapuram, and in Lr. No. 36693/B2/ 01/ID dated December 21, 2001 of the Principal Secretary to Government (Industries) were also presented before the State Level Committee for its consideration. As per S.R.O. No. 29/99 dated January 6, 1999 the Government have authorized the State Level Committee, u/s 10 of the KGST Act, as the competent authority to issue clarifications, wherever necessary, regarding the scheme of tax exemption.

43. Thereafter the consideration is only this :

The State Level Committee examined the above issues and held that in the case of M/s. Pepsi cola India Marketing Company, the purchase orders and other documents related to payment of advance to machinery suppliers do not show that the company has fully satisfied the definition of "effective steps" as required and as stipulated in S.R.O. No. 1092/99 as modified by S.R.O. No. 295/2000.

44. This decision of the second respondent, according to me, is infirm for the following reasons :

(1) Under the Notification S.R.O. No. 1729 of 1993 as amended, in the case of medium and large scale industrial units the competent authority for considering the eligibility of the unit for sales tax exemption other than those assisted by the KSIDC or the KFC is the Director of Industries and Commerce on application of such units and orders of exemption has to be issued by the Deputy Commissioner (General), Commercial Taxes. [vide Clause 10(b)]. Sub-clause (g) of Clause 10 provides for an appeal against the orders of the Deputy Commissioner (General), Commercial Taxes to a State Level Committee consisting of the Secretary to Government (Finance and Taxes), Chairman, Commissioner of Commercial Taxes and the Director of Industries and Commerce. Sub-clause (h) provides that the State Level Committee mentioned in Clause (f) or (g) can revise any order of the District Level Committee or the Deputy Commissioner (General), Commercial Taxes, as the case may be, after giving due notice to the industrial unit if in the opinion of the Committee, the

order of the District Level Committee or the Deputy Commissioner (General), Commercial Taxes, is not in accordance with Notification S.R.O. No. 1729 of 1993. In the present case though the second respondent who is the authorized officer to consider the eligibility of the unit for sales tax exemption had stated in exhibit P17 communication that it is his satisfaction on the basis of evidence to be produced by the petitioner that is relevant, he had abdicated the jurisdiction vested in him to decide the issue and had acted only as a mouthpiece of the State Level Committee. The decision on the petitioner's application was taken by the State Level Committee and the second respondent has only communicated the decision of the said Committee to the petitioner ; (2) The State Level Committee does not appear to have given any opportunity to the petitioner to substantiate its claim before the said Committee ; (3) Though there is reference to the documents produced by the petitioner to establish that firm orders have been placed for purchase of plant and machinery prior to the first day of January, 2000, there is no independent consideration of all those documents to find out as to whether the petitioner had satisfied the requirements of taking effective steps for setting up the industrial unit prior to the first day of January, 2000. It would appear from a reading of the relevant portion of the proceedings (exhibit P19) of the State Level Committee dated July 29, 2002 and reiterated in the impugned order (exhibit P26) that the State Level Committee was taking the view that only if the petitioner had made advance payments in respect of the purchase orders for the entire plant and machinery and that too representing a substantial portion of the sale price, it can be considered to have taken effective steps for setting up the industrial unit. This view, it would appear, was taken by the second respondent keeping in mind paragraph 17 of the judgment of the Supreme Court in Mahaveer Oil Industries" case [1999] 115 STC 29. As already observed, the said view does not appear to be the correct legal position under the notification. Even in cases where no advance payments had been effected it can be established by other means that firm orders have been placed with the sellers prior to the first day of January, 2000. It is not necessary that advance payments have to be made to the sellers in all situations to make the purchase order firm. It will depend on the credibility, creditworthiness and relationship between the purchaser and the seller. If the seller has got faith in the creditworthiness of the purchaser, it is not necessary that the purchase order must be followed by advance payments to make the purchase order firm. The fact that advance payments in respect of some of the plant and machinery, as observed by the Government, is an indication of taking effective steps for setting up the industrial unit which cannot be ignored ; (4) An appeal is provided under Clause 10(g) of Notification S.R.O. No. 1729 of 1993 against the decision of the second respondent before the State Level Committee consisting of the Secretary to Government (Finance and Taxes), Chairman, Commissioner of Commercial Taxes and the Director of Industries and Commerce (Member Secretary). Petitioner is deprived of the opportunity to file an appeal against the impugned order before the State Level Committee. Had the State Level Committee in the instant case took the decision after affording an opportunity of being heard to

the petitioner the position would have been different as the State Level Committee is admittedly the appellate forum. Here it must be noted that the State Level Committee which took the decision is not the State Level Committee which is the appellate forum but by the State Level Committee constituted under Clause 10(f) of Notification S.R.O. No. 1729 of 1993 for hearing appeals against the orders of the District Level Committee on the application of S.S.I. units. Of course, power is conferred on the said Committee to issue clarifications in regard to the scheme of the tax exemption. According to me the decision taken by the State Level Committee in the case of the petitioner cannot be considered as a clarification of the nature mentioned above. Further any such clarification with reference to individual case can, if at all, be issued only after hearing the affected person. The State Level Committee which took the decision did not hear the petitioner at all. The decision of the State Level Committee in the above circumstances is without jurisdiction ; and (5) Above all, there is no consideration of all the relevant matters for a proper understanding of the provisions of Sub- Clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 as amended by Notification S.R.O. No. 295 of 2000. Irrelevant matters (the facts stated in paragraphs 6 to 9 of the counter-affidavits extracted in paragraph 8 of this judgment) weighed with the second respondent and relevant matters, namely, the various documents produced by the petitioner as also the scheme of sales tax exemption considered in this judgment were either eschewed or not properly considered or appreciated.

45. For all these reasons, I set aside exhibit P26 order. I had given sufficient indications in this judgment in regard to the scope of the expression "have taken effective steps" for setting up the industrial unit prior to the first day of January, 2000 used in S.R.O. No. 1092 of 1999. I direct the second respondent to independently consider the petitioner's application for sales tax exemption (exhibit P8) in the light of the observations contained in this judgment and after considering the documents with regard to the placing of firm orders in respect of plant and machinery and equipments furnished by the petitioner untrammelled by the view taken by the State Level Committee in exhibit P19 proceedings as well as in exhibit P26. The Government in their communication dated December 23, 2002 has clearly stated that there is no need for issuing any general clarification regarding the scope of S.R.O. No. 1092 of 1999 and S.R.O. No. 295 of 2000. Thus the second respondent is entitled to take a decision on the petitioner's application independently.

46. In this case it is relevant to note that the second respondent had issued guidelines regarding the procedure for disposal of applications submitted by the industrial units for sales tax exemption. As per the procedure, a decision has to be taken on the application within three months. In the instant case, the application was submitted as early as on June 20, 2001. In spite of directions issued by this Court, the application was disposed of only on June 8, 2003, that is approximately after two years. Therefore, I direct the second respondent to take a decision on exhibit P8 application afresh within a period of two months

from the date of receipt of a copy of this judgment. The second respondent will pass a reasoned order adverting to the various documents produced or to be produced by the petitioner in support of the contention that the petitioner has taken effective steps for setting up the industrial unit prior to the first day of January, 2000. The interim stay already granted will continue till orders are passed as directed and communicated to the petitioner.

Original petition is disposed of as above.

Order on C.M.P. No. 1488 of 2003 in O.P. No. 8563 of 2003 disposed of vide Judgment dated January 7, 2004.