
(1988) 09 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 87 of 1981

Pine Chemicals

APPELLANT

Vs

Assessing Authority and Others

RESPONDENT

Date of Decision : 23-09-1988

Acts Referred:

Citation : (1989) 73 STC 101

Hon'ble Judges : A.S. Anand, C.J.; M.A. Shah, J

Bench : Division Bench

Advocate : Anil Diwan, S. Thakur, T.S. Thakur and S. Datt, for the Appellant;
Altaf Ahmed, Advocate-General, D.C. Raina and Riaz Rasool, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Anand, C.J.—Petitioners have prayed for the issue of a writ of certiorari besides mandamus to quash the orders of respondent No. 1

assessing it to the sales tax for the period 1979-1984 claiming exemption, inter alia, on the grounds : (i) that the State Government has by issuing

Order No. 159-Ind. of 1971 dated 26th March, 1971 and amended by Government Order No. 414-Ind. of 1971 dated 25th August, 1971,

manifestly represented that large and medium scale industries will be granted exemption from sales tax both on raw material and finished products

for a period of five years from the date the unit goes into production; (ii) that this representation which contains a package of incentives was acted

upon by the petitioner in setting up the factory at Bari Brahmana on the land allotted by the State Industrial Development Corporation in terms of

the representation; (iii) that the petitioner is exempt from the payment of sales tax in terms of the Government order aforesaid and the orders of

assessment impugned in the petition are non est being illegal and invalid in view of the exemption granted under it; (iv) that the respondents are even otherwise estopped from charging sales tax on the doctrine of promissory estoppel though the Government order amounts to grant of exemptions; and (v) that the State Government having provided every other incentive to the petitioner for setting up the unit and in case the order aforesaid is not construed as an exemption from payment of sales tax which, in fact, it is, the State cannot be allowed to resile from the promises it made to the industrialists including the petitioner granting exemption from sales tax both on raw material and finished products. All other averments being based on facts alone were given up at the Bar while arguing the petition and need not be referred to or commented upon in view of the concession.

2. Controverting the averments, the respondents' plea is that the order containing package of incentives relied on by the petitioner is not an order of exemption u/s 5 of the Sales Tax Act but was required to be followed by the issue of notification u/s 5 of the Sales Tax Act on a consideration and

assessment of the facts of each case on merits. It is also denied that the petitioner ever acted upon the representation made by the Government

while setting up the factory as would be evident from the contents of various communications addressed by the petitioner to the respondents.

Besides the petitioner having collected sales tax on behalf of the respondents, it is pleaded, cannot be allowed to pocket it and was rightly assessed

by respondent No. 1 because in the absence of a notification u/s 5 of the Sales Tax Act (hereinafter referred to as "" the Act""), no exemption could

be claimed and even when it could, having charged the sales tax no writ would lie because the burden of sales tax having already passed on to the

consumer, grant of such a relief would only enrich the petitioner at the expense of the consumer and it would be inequitable to allow the petitioner

to retain the sales tax already charged by it.

3. Appearing for the petitioner, Mr. Diwan made a forceful plea that Government Order No. 159-Ind. of 1971 dated 26th March, 1971 (read

with Government Order No. 414-Ind. of 1971 dated 25th August, 1971), hereinafter referred to as the 1971 Order, is so worded that nothing

remained to be done for grant of any of the incentives contained therein. The order, Mr. Diwan contends, by itself is an exemption u/s 5 of the Act

and there was no need for the issue of any formal notification under the Act. Alternatively, his argument is that in case this order is not construed as

an exemption from payment of sales tax the State is estopped from realising the same because of the promise held out by it to exempt the

prospective industrialists and the petitioner being one such industrialist, cannot be dealt with differently than manifested by the aforesaid

Government order because the doctrine of promissory estoppel is clearly attracted; that the 1971 Order containing package of incentives, including

exemption from payment of sales tax is a clear representation made by the respondents followed by allotment of land and the petitioner having

already set up the factory on such land being made available, has not only acted on the representation but acted in the manner required by the

terms of the 1971 Order and is, therefore, entitled to the exemption claimed.

4. The argument of Mr. Altaf Ahmed, learned Advocate-General, is fourfold : (i) that the order cannot be construed as an outright exemption from

payment of sales tax in the absence of a notification u/s 6 of the Act and this was so understood and construed by the petitioner as would be

evident from its own conduct; (ii) that the petitioner having not acted upon any representation and being not even sure of the existence of incentives

offered in the Government orders, even after having set up the factory as per its own admission contained in the documents annexed with the

petition, is not entitled to invoke the doctrine of promissory estoppel; (iii) that the very fact that the petitioner went on collecting sales tax from the

date the factory went into production, is a proof-probendi that it never acted upon the assurances contained in the Government order relied upon

by it and is, therefore, estopped from invoking the equitable doctrine of promissory estoppel by its own conduct and (iv) that no writ can even

otherwise be issued to the State commanding it to issue an exemption notification to give effect to the promise even where it has been acted upon.

5. The foremost question which arises for determination is : whether the 1971 Order by itself amounts to an order of exemption from payment of

sales tax and was it so understood by the petitioner as well ? To appreciate this, Section 5 of the General Sales Tax Act may be referred to. It

reads :

5. Exemption from tax.-The Government may, subject to such restrictions and

conditions as may be prescribed, including conditions as to licence

and licence fees, by order exempt in whole or in part from payment of tax any class of dealers or any goods or class or description of goods.

6. Undoubtedly, the Government has the power to grant exemption from payment of sales tax. The section, however, does not speak of general

order of exemption as the power to grant exemption is limited to a class of dealers or goods and that too subject to such restrictions and conditions

as may be prescribed. So there could be no general order of exemption and hence the need for specific order in favour of the petitioner is quite

obvious.

7. The Government order in question may now be referred. It reads:

Sanction is accorded to the grant of the following incentives and facilities to large and medium scale industries in the State of Jammu and Kashmir:

1. Land: As provided in Government Order No. 206-Ind. of 1968 dated 5th July, 1968. However, such land will include a reasonable amount of

land for the establishment of residential colonies required to house the workers of large and medium scale industries and would be granted on the

terms and conditions denned in the Government Order No. 206-Ind. of 1968 dated 5th July, 1968.

2. Grant of exemption from the State sales tax both on raw materials and finished products for a period of five years from the date the unit goes

into production.

3. Grant of exemption from levy of additional surcharge on toll tax for an initial period of five years from the date the unit goes into commercial

production with respect to raw materials and finished goods. The question of grant of exemption from this levy for further periods would be

reviewed thereafter in every individual case and further grant of this concession would only be considered in deserving individual cases.

4. Grant of exemption from the levy of urban immovable property tax on the lands and buildings belonging to such industries, would be available as

admissible under the Urban Immovable Property Tax Rules.

8. This order was partially modified by Government Order No. 414-Ind. of 1971 dated 25th August, 1971, which reads :

In partial modification of Government Order No. 159-Ind. of 1971 dated 26th March, 1971, item 2 may be read as under :-

1. Grant of exemption from the sales tax both on raw materials and finished products :

The State sales tax paid by large and medium scale industries on the raw materials procured by them for the initial 5 years of the production would be refunded, to such industries. Similarly such industries will be granted exemption from payment of any State sales tax on their finished products for a period of five years from the date the unit goes into production.

9. The combined reading of the section and the order which deals with grant of exemptions under various statutes would unmistakably show that

the order as such is not an exemption but only a policy decision to be followed by the party claiming exemption by establishing that it is covered by

the order and entitled to exemption. In other words, to apply the Government order an industrialist has to establish that he had set up an industry in

the State which conforms to the intent of the 1971 Order and is, therefore, entitled to be granted exemption from sales tax as well as refund of the

sales tax paid on the raw material. The order is just an enabling provision and unless this minimum is done, exemption would not be available

because the Government has to be satisfied that the party claiming exemption has done everything what was required to be done under the 1971

Order and thus, entitled to exemption. Any other interpretation would be doing grave violence to the plain language of the order and the section.

The order, at the best, is only an expression of intention. The fact that the petitioner also understood and considered the 1971 Order only as

enabling it to seek exemption and the Finance Department as the department dealing with the sales tax alone entitled to grant exemption provided

certain conditions were satisfied, has been made amply clear by its letter dated 9th April, 1980 written to the Industries Department, which is

annexure C to the petition. It reads:

We are grateful to you for helping us in obtaining a certificate for the commencement of production of our plant at Bari Brahmana from the Project

Manager, Jarmnu and Kashmir State Industries Development Corporation, Bari Brahmana, Jammu, a copy of which is enclosed. You are now

requested, to issue instructions to the concerned, department which is competent to allow exemption on sale of finished goods produced by us and

refund on raw material purchased by us for the project, under rules.

10. From this it is clear that the petitioner was conscious of the fact that the Government order under reference was not by itself a notification of

exemption from payment of sales tax as contended by Mr. Diwan. If there is still any doubt-though there is hardly any-the same was further

amplified by yet another letter dated 28th May, 1980 addressed to the Deputy Secretary, Industries and Commerce Department, where it wrote:

In this connection we have to inform you that we understand in order to avail of the exemption of sales tax on our finished products a notification is

to be issued by the Finance Department which will enable sales tax authorities for conferring the necessary exemption under the Sales Tax Rules.

11. This means that the petitioner knew that issuance of notification u/s 5 of the Act is a condition precedent for obtaining exemption and also that

it was the Finance Department alone which was competent to do so. This admittedly was its understanding even much after the unit had gone into

production and in the absence of an exemption notification it was obliged to collect sales tax as well because letter (annexure B) dated 28th May,

1980 does not leave any manner of doubt that the petitioner knew that the notification u/s 5 was a must and was also aware of the fact that such

notification had already been issued under SRO No. 267 of 1978 dated 15th May, 1978 granting exemption to small-scale industrial units as is

clear from the following letter dated 28th May, 1980 of the petitioner addressed to the Deputy Secretary, Industries Department:

We may add that in the case of small-scale units necessary notification has already been issued under SRO No. 267 dated 15th May, 1978

amending the Sales Tax Act u/s 5 and as per SRO No. 235 dated 27th April, 1978 u/s 8 of the Central Sales Tax Act. Similar notification have to

be issued by the Finance Department for medium and large scale units as our unit comes under this category.

In the absence of such notification, the sales tax authorities have issued notice why sales tax should not be collected from us.

12. The petitioner undoubtedly has been consistent in approaching the Government for exemption and even its counsel had as early as on 21st

December, 1979 written to respondent No. 1 (annexure E-1) that exemption licence may be granted in its favour and this had been followed by a

number of representations to the Industries Department. This letter, in fact, is an admission of the fact that the petitioner had charged sales tax as it

was not sure of the exemption from sales tax, as would appear from the letter which reads :

We had moved an application for exemption from sales tax before the Assessing Authority, Survey Circle, Jammu, but it is not clear whether

exemption can be granted to large and medium scale industries from payment of sales tax. It is, therefore, most humbly prayed that the matter may

kindly be clarified so that if exemption is available, the tax is not charged by the company on the sale being effected on local and inter-State basis.

It shall be further appreciated if it is further clarified as to under what conditions these exemptions can be claimed by large and medium scale

industries as there is lot of confusion.

13. These communications which, in fact, are admissions of facts in controversy are, ample proof of the manner in which the petitioner conducted

itself in order to obtain exemption and go to establish that the petitioner was conscious of the fact that the order under reference (1971 Order) was

neither an order of exemption nor it was so understood by it and the argument of Mr. Diwan to the contrary has no merit because the petitioner

was also well aware that the Government had from time to time in consonance with the policy decisions contained in the aforesaid order exempted

certain industries from the payment of sales tax on fulfilment of certain conditions. It was, in fact, doubtful about its application to the petitioner as is

evident from the contents of annexure E-1 dated 21st December, 1979 (supra).

14. Moreover, the filing of the returns by the petitioner in form 4 and form 6 in respect of State and Central sales tax respectively, amounts to yet

another admission of its liability to the payment of sales tax and to be assessed as such under the sales tax law. Accordingly, the order under

reference is not by itself an order of exemption but had to be followed by a notification u/s 5 of the Act and the petitioner has never understood it

as an exemption as per its own admissions.

15. This takes us to the main argument of the learned counsel for the petitioner on which great emphasis was laid that the 1971 Order if not

construed as an exemption, is a clear representation promising exemption from payment of sales tax and other incentives. The petitioner, argued

Mr. Diwan, having accepted the offer contained in the order acted upon the representation by setting up the factory on the land provided in terms

of the order and was therefore, entitled to exemption from sales tax as promised by the respondent-State to fulfil which it is required to be

commanded to give effect to this part of the promise contained in the representation as the doctrine of promissory estoppel is clearly attracted to the facts of the case.

16. As the entire thrust of the argument has now been focussed on the promise held out by the State to the grant of exemptions, inter alia, from

sales tax, vide the 1971 Order and secondly, the application of doctrine of promissory estoppel, before proceeding further, it is necessary to

analyse the present state of law relating to the doctrine of promissory estoppel.

17. The evolution of the doctrine of promissory estoppel has its genesis in the law of equity but its origin and growth in India can be traced to the

various judgments of the summit court starting from Anglo-Afghan's case AIR 1968 SC 718 followed by the Excise Commissioner, Uttar Pradesh,

Allahabad and Others Vs. Ram Kumar and Others, , Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, to name only

a few but the more recent in point of time where the doctrine was reiterated is: Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., ,

where their Lordships held:

...The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise

or representation 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 or representation is made and it is in fact so acted upon by the other party, the promise or

representation would be binding on the 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....

18. How the doctrine operates in the legislative and executive field of governmental functioning, the court held :

...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. We may also point out that the doctrine of promissory estoppel being

an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the

facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the

court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation

against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity

would not require that the Government or public authority should be held bound by the promise or representation made by it....

19. This judgment may apart from the exceptions noticed above, be said to have laid down the following three propositions :

(1) There must be a clear and unequivocal representation or promise intended to create legal relationship;

(2) The representation/promise must have been acted upon by the other party so as to bind the party making the promise to bring out a legal relationship;

(3) The doctrine of promissory estoppel would be displaced in a case on the facts of which equity would not require that the Government or public authority should be held bound by the promise or representation made by it.

20. We shall deal with these propositions ad seriatim :

Proposition (1)

The 1971 Order reproduced elsewhere is undoubtedly a representation made by the State promising, inter alia, exemption from sales tax and there

can be no manner of doubt that it should be construed as such without any let or hindrance because having held it not to be an order granting

outright exemption from sales tax, the inescapable conclusion is that it is a promise to exempt, to be followed by the issue of formal notification u/s

5 of the Act when such application is made by entrepreneur setting up the unit who fall within the ambit of this Government order. This, therefore,

should not detain us any further as the order is clear and unequivocal about the

intention of the State Government to grant incentives to the prospective industrialists though whether or not a command can be issued to the State to issue an exemption notification to carry out this promise is a different question.

Proposition (2)

How and in what manner the petitioner has acted upon the representation in setting up the unit depends upon the facts which the petitioner has

pressed in aid to support its case for enforcing the promise contained in the representation. However, the manner and mode of acting pursuant to

the representation/promise also differs from case to case and at least, as in this case, exemption would not be available simply by setting up the

factory but by also obtaining an exemption certificate just as order for allotment of land was obtained. That apart, exemption from sales tax would

not be available merely on the petitioner's having proved the setting up of the factory in terms of the representation but also by proving that he did

not charge sales tax on the assumption that it was exempt under the 1971 Order without any exemption certificate. So first of all, the petitioner has

to establish that the "1971 Order" alone and no other consideration weighed with it in setting up the unit and secondly, that since the Government

order itself granted exemption from the payment of sales tax, therefore, it was not collected under a bona fide belief and reasonable interpretation

of the order and the promise which must be enforced against the State on the principle of promissory estoppel. Yet another important aspect of the

case is that even if the petitioner is found to have acted on the representation in setting up of the unit, he would not be entitled to enforce the

promise in equity if it is found that the sales tax was collected by it because the burden having already passed on to the consumer, the amount

cannot be allowed to be retained by the petitioner for its enrichment.

21. Dealing with the first aspect of the case regarding the setting up of the unit the petitioner has specifically pleaded that an advertisement notice

issued by the Jammu and Kashmir Industries Ltd. ("JKI", for short) appeared in the Delhi edition of the TIMES OF INDIA, on 2nd June, 1974

which invited offers for establishing two rosin and turpentine factories in District Rajouri of Jammu division. Following this advertisement, Camphor

and Allied Products Ltd. ("CAP", for short) despatched its representative to

Srinagar to negotiate modalities of setting up of the aforesaid factories in collaboration with the JKI. It was during the negotiations that the 1971 Government Order came to the notice of its representative. After sometime, the petitioner submitted feasibility report to the JKI following which, sometime in February, 1977, the State Cabinet is reported to have approved the setting up of such a factory by the JKI in collaboration with CAP as a joint sector venture. However, soon after, the State appears to have developed cold feet towards the project being undertaken in the joint sector and the petitioner was allowed to set up the project on its own in the private sector.

22. According to the petitioner following this development it decided to set up the project in the private sector on its own because of the various incentives available in terms of the 1971 Order, as the concessions were quite attractive to make the project viable and finally the foundation of the factory was laid on April 11, 1978, at Bari Brahmana, Jammu, on the land having been provided to it in terms of the 1971 Order. The date of advertisement notice, the year in which the State Government agreed to have the industry in the joint sector, the year in which the petitioner was allowed to set up the factory in private sector and the date on which it laid the foundation of the factory, are relevant to reach a conclusion whether the petitioner had, in fact, acted on the representation of the State. If one reads the advertisement notice and the notification regarding the supply of oleo resin, the scheme is self-contained and the setting up of such a unit follows the advertisement dated 2nd June, 1974 and not the package of incentives granted under the 1971 Order. Not only this, the manner in which the petitioner-company conducted itself, after being permitted to set up the unit in the private sector, also goes to show that it was itself not sure of the availability of the package of incentives contained in the 1971 Order to its unit and it was for the first time in May, 1979-a year after the construction of the factory had started-that the petitioner wrote to the Industries Department seeking clarifications whether the incentives under the 1971 Order were still available. This letter reads:

According to me, over and above, capital cash subsidy grant, the following three incentives are also being given by the Jammu and Kashmir

Government:

(1) The company is entitled under the Government Order No. 414- Ind. of 1971 dated 25th August, 1971 for refund of the State sales tax on the raw material procured for the initial 5 years of the production,

(2) The company will also be granted exemption from the payment of State sales tax on the finished products for a period of 5 years from the date the unit goes into production.

(3) The company is also entitled for exemption from levy of additional toll tax for an initial period of 5 years with respect to raw material and finished products.

However, I am not very sure as to whether these incentives are still continuing as I am told that these incentives were introduced in 1971, there are chances that they may have undergone some changes or the schemes may have even been withdrawn.

As misstatement in the prospectus involve the criminal liability, I would, very much like your giving me the clarification at your earliest convenience

as to whether these schemes are existing or whether there are any amendments to the same or entirely a new scheme is introduced.

I would also be very grateful to you if you let me know that apart from these schemes, whether there are any other incentives which are being given

by the Government to the new industries in the State so that the same can be incorporated in the prospectus.

23. The letter was replied to on 8th June, 1979 and the petitioner-company was informed as under :

The Government, while reviewing the resources position of the State, had decided in principle to review the exemption from payment of tax both

on raw material as well as on finished products and also the levy of toll tax but in view of the Industries Department's strong plea the present

position about these incentives has been maintained. We are separately examining the existing incentives in the light of similar incentives being

allowed to the entrepreneurs in other parts of the country and hope not only to rationalise the same but make them more meaningful.

24. The opening sentence of the petitioner's letter is quite revealing because these incentives were claimed, in addition to some others, but the fact

remains that the petitioner was ""not sure"" whether those were available in 1979. In other words, the petitioner had set up the factory following

discussions and negotiations with the JKI without obtaining any confirmation before seeking allotment of land and commencing construction which

it admittedly did not. The argument that this letter goes to establish that the factory was not set up on the basis of the promise but independent of it

as put forward by the Advocate-General, is sought to be countered by Mr. Diwan on the plea that it was necessary to seek such a clarification to

avoid civil and criminal liabilities arising under Sections 62 and 63 of the Companies Act before the issue of prospectus and the Industries

Department, vide its letter dated 8th June, 1979, having confirmed that the incentives were still available, argued the learned counsel, nothing more

was required to be done by the petitioner than to proceed with the production which it did after spending about two crores of rupees thereafter

and therefore, it was entitled to invoke the doctrine of promissory estoppel both not to pay the sales tax on the finished products and obtain refund

of the sales tax paid by it on the raw material.

25. However, even if it be assumed for the sake of argument that the clarification was sought from the Government about the existence of the

incentives, as contended by Mr. Diwan, the expression in the letter ""However, I am not very sure as to whether these incentives are still continuing

as I am told that these incentives were introduced in 1971, there are chances that they may have undergone some changes or the schemes may

have even been withdrawn"", unmistakably shows that the petitioner-company, even as late as on 28th May, 1979, did not know whether the

incentives contained in the 1971 Order were available or not. Had there been any ""doubt"" present in the mind of the petitioner in the normal course

of human conduct, it would have got it ""clarified"" before 11th April, 1978 when the foundation was laid and not a year later when the factory was

about to start commercial production. The argument of Mr. Diwan appears to be an after-thought and goes against the terms of the letter.

Moreover, had the petitioner-company only sought ""confirmation"" for the purpose of avoiding any civil or criminal liability for misstatement under

the Companies Act, it would have sought a simple ""confirmation"" about the availability of exemption and would not have expressed ""doubts"" as to

whether or not the package of incentives issued in 1971 were still in force. The letter of the petitioner-company dated 28th May, 1979 clearly

shows that it did not act on the basis of so-called assurance to set up the factory.

26. From the circumstances emerging from the letter, it appears that the petitioner was on the look out for some additional benefits, in addition to

those which were available under the advertisement notice for setting up of rosin and turpentine factory in collaboration with the JKI, which.

subsequently it set up in the private sector. Apparently, the package of incentives were meant for such of the industrialists who were able to satisfy

the State Government that in the peculiar facts and circumstances applicable to their case, they should be given exemption from sales tax, toll tax,

urban property tax, etc. and each case was required to be examined on its own facts. The petitioner-company appears to have set up their unit in

the State, as argued by the Advocate-General, because of the supply of the raw material at the door-steps and that too at concessional rates. The

delay in asking for exemption under the 1971 Order by seeking confirmation explains this fact only. The fact that the petitioner was allowed to set

up the unit in the private sector also supports this view. This view also finds support from the use of the expression "'I am told that these incentives

were introduced in 1971"' which unmistakably shows that the information regarding the package of incentives being available came to the

petitioner-company not at the time of setting up the factory but near about the time of writing the letter on 28th May, 1979. Had the petitioner-

company "'acted"' on the Order of 1971, it would have asserted that "'we had been assured or promised that the exemption from sales tax, both on

the raw material and the finished products would be available to us'". It made no such assertion. The petitioner has, therefore, on its own showing

not been able to make out a case on facts that the decision to set up the unit was solely based on the availability of the package of incentives

contained in the 1971 Order and it is safe to conclude that the decision was influenced by the supply of raw material to the factory by the

Government not only at competitive market rates but on concessional rates and that too at its doorsteps besides obtaining of "'capital cash subsidy

grant"' as admitted in the first paragraph of its letter dated 28th May, 1979.

27. Coming now to the second requirement of the second proposition. Acting on the representation in this case would mean having understood the

1971 Order as granting exemption and follow it up by not collecting any sales tax

from the consumers. That the petitioner-company did not understand and interpret the 1971 Order as an outright exemption from payment of sales tax and, therefore, recovered the tax, is admitted by it in its letter dated 21st December, 1979 (annexure E-1) which as already noticed clearly enquired :

...It is, therefore, most humbly prayed that the matter may kindly be clarified so that if exemption is available, the tax is not charged by the

company on the sale being effected on local and inter-State basis. It shall be further appreciated if it is further clarified as to under what conditions

these exemptions can be claimed by large and medium scale industries as there is lot of confusion.

28. This letter, in fact, destroys the very foundation of the petitioner's attempt for setting up a case to attract the doctrine of promissory estoppel

because (i) the petitioner admittedly was not sure whether the exemption from sales tax could be claimed by large and medium scale industries in

1978-79 and (ii) it wanted clarification about the availability of exemption so that the sales tax was not charged on the sales effected on local and

inter-State basis.

29. Thus, the argument of Mr. Diwan that after having received confirmation from the Industries Department about the availability of incentives vide

letter dated 8th June, 1979, there was no doubt left in the mind of the petitioner that it was exempt from payment of sales tax, is selfdefeating when

considered in the light of the admissions contained in annexure E-3 reproduced above. This letter read with the earlier letter dated 28th May,

1979, by themselves are sufficient to establish that the petitioner-company never acted upon the so-called representation either before setting up

the factory or while effecting the sale and both these requirements are pre-conditions to enforce the promise contained in the 1971 Order even

where the law permits it to be enforced. As already noticed, no notification u/s 5 of the Act was ever issued in the absence of which the petitioner

was required by law to collect sales tax even if it had not collected it (though in this case it was), it was liable to be assessed as such. It, therefore,

follows from the admissions and conduct of the petitioner-company that it had not acted upon the representation or the promise held out by the

respondents in the 1971 Order. The petitioner-company has, thus, failed to

establish that it, in fact, acted upon the representation and did not collect the sales tax from the consumers, on whom the burden of sales tax actually falls. It certainly cannot be the petitioner's case that under the 1971 Order it could charge sales tax and retain it for its own benefit.

30. The petitioner-company has failed to lay down even the minimum acceptable foundation for invoking the doctrine of promissory estoppel in its pleadings. In *Ali Mohd. Sheikh and Others Vs. State of Jammu and Kashmir and Others*, , a Division Bench of this Court (to which C.J. was a party) observed :

...There appears also to be consensus of judicial opinion that for invoking the doctrine of promissory estoppel, clear, sound and positive

foundations must be laid in the petition by the party seeking the applicability of the doctrine and that bald expressions, without supporting material,

that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the party would not be

sufficient to press into aid the doctrine. The doctrine of promissory estoppel can also not be invoked in the abstract and the courts are bound to

consider all aspects...". Nowhere in the petition, the petitioner gave any break-up of the price structure of its product. It has not averred anywhere

in its pleadings that while fixing the price, it did not include the sales tax paid on the raw material. The assessment orders, impugned in the writ

petition, contain the findings of fact recorded by the assessing authority that the evidence before it established that the petitioner-company had

charged sales tax from the consumers while fixing the price of its products. Therefore, on facts, the petitioner- company has not laid down any

acceptable foundation for invoking the doctrine of promissory estoppel. The petitioner has, thus, failed to satisfy the second proposition as laid

down in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, .

Proposition (3)

31. Lastly, as held in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, , on the admitted facts of this case, it would be inequitable

to hold the respondents to the promise made by it in the 1971 Order when there is no equity in favour of the petitioner firstly, because it was not

sure if exemption was available to its unit as admitted by it in the letter dated 21st December, 1979; secondly, because to avail of exemption it is its

own case that a notification u/s 5 of the Act had to be issued which was never issued; thirdly, because in the absence of notification the sales tax

had to be collected and this position the petitioner understood very clearly; and, fourthly, because the 1st respondent has, on facts, found that the

sales tax, in fact, has been collected on the sales and regularly charged.

32. With regard to the assessment orders made by respondent No. 1 and impugned herein, the fact these are based on the returns filed by the

petitioner in form 4 and form 6 of the Central and State Sales Tax Acts respectively by itself amounts to an admission of the liability to pay sales

tax. Even otherwise, the petitioner-company having more than once admitted that in the absence of a notification issued by the Finance Department

u/s 5, exemption from charging sales tax was not available to it, the legal presumption would be that sales tax has been so charged and the 1st

respondent has found it, as a fact, that it has been so charged.

33. In order to bind the Government by the promise contained in the package of incentives in the 1971 Order it was incumbent upon the petitioner

to establish, by supporting material, that it had not only relied upon the representation contained therein but had acted upon it by not charging the

sales tax and as such the same should not be recovered but what it has been able to prove is exactly the opposite. On the question as to whether

the sales tax has, in fact, been charged apart from its legal obligation to collect when there was no exemption, from the admitted facts of the case,

assessment orders for the year 1979-80 (annexure A to C.M.P. No. 754/85) sets at rest the entire controversy so far as this writ petition is

concerned. The finding recorded by it reads :

Now I come to the next contention of the assessee that he has not collected the tax and therefore is not liable to pay tax. The contention that no tax

was collected is not supported by any evidence. On the other hand there is evidence to the contrary. In this connection reliance is placed on the

sale vouchers which specify the sale price inclusive of excise and taxes. It is discretion of the dealer to charge tax separately or show the sale price

inclusive of sales tax. In similar circumstances the assessee has himself disclosed inter-State sales in the return filed under the Jammu and Kashmir

General Sales Tax Act as taxable and has also voluntarily deposited the tax payable thereof. Obviously by the method of accounting adopted by

the assessee the sale price charged by him and accounted for includes excise and sales tax.

The return furnished under the State Sales Tax Act wherein inter- State sales have been disclosed as taxable and the facts that the tax thereon has been deposited in spite of the Government Order No. 414 of 1971 established that the assessee did not act on the alleged promise of exemption from the State sales tax. Therefore the claim that he is not liable to Central sales tax is a motivated claim to evade the huge amount of tax which is payable.

34. Similarly assessment order for the year 1982-83 records :

Now I come to the next contention of the assessee that he has not collected the tax and therefore is not liable to pay tax. The contention that no tax

was collected is not supported by any evidence. On the other hand, there is evidence to the contrary. In this connection reliance is placed on the

sale vouchers which specify the sale price inclusive of excise and taxes. It is discretion of the dealer to charge tax separately or show the sale price

inclusive of sales tax. In similar circumstances the assessee has himself disclosed inter-State sales in the return filed under the Jammu and Kashmir

General Sales Tax Act as taxable and has also voluntarily deposited the tax payable thereof. Obviously by the method of accounting adopted by

the assessee the sale price charged by him and accounted for includes excise and sales tax.

35. Identical finding has been recorded for the year 1983-84.

36. The principle laid down in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., is, therefore, clearly attracted to the facts of the

case because it will not only be inequitable but atrocious to allow the petitioner to retain the amount of sales tax charged by it from the consumers

as an agent of the Sales Tax Department of the State Government. Moreover, the burden of the sales tax being always on the consumer, the object

of such an incentive could only be to sell the product cheaper in the market so as to compete in the open market. But when the product has been

sold and there is no averment that by selling the product, in the absence of exemption, at a higher rate the petitioner has suffered damage or

sustained loss, the doctrine of equitable estoppel cannot be invoked because one who seeks equity must do equity. Indeed, as held by this Court in

Malhotra & Sons v. Union of India AIR 1976 J & K 41, which judgment has been noticed with approval by their Lordships of the Supreme Court

in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, and Motilal Padampat Sugar Mills Co. Ltd. Vs. State

of Uttar Pradesh and Others, the doctrine of promissory estoppel is applicable against the Government also in exercise of its governmental, public

or executive functions where it is necessary to prevent fraud or manifest injustice but that doctrine being an equitable one must yield when the

equity so demands. In the instant case the material on the record shows that the petitioner-company had collected sales tax from the consumers

and therefore, there can be no equity in its favour to allow it to retain it and, in fact, to allow it to retain it would result in "manifest injustice" to the

exchequer there being no equity in favour of the petitioner.

37. Sales tax is aimed at generating revenue for the State in accordance with law and is undoubtedly one of the biggest Sources of revenue for the

State. The burden of sales tax falls ultimately on the consumer. The dealer acts only as an agent of the Sales Tax Department to collect the sales

tax and remit the same into the Government treasury. Having passed on the burden to the consumer, both by adding the sales tax paid on the raw

material and including the sales tax on the finished products in the price structure, there is no justification for the petitioner- company to retain that

sales tax. The petitioner-company, in the instant case, does not run the risk of incurring any loss as per the material on the record. The recovery of

the sales tax from the petitioner-company, in the facts and circumstances of the case, will, therefore, not result in any injustice much less manifest

injustice nor would it perpetuate any fraud so far as the petitioner-company is concerned.

38. Ours is not a State with unlimited financial resources and the courts of law cannot shut their eyes to this aspect of the case. Public revenue, it

cannot be denied, is collected for use of the public good. In the present set up of the State, when finances are required for starting and completing

various projects in the interest of the public at large, it is immoral for a party to evade payment of sales tax, particularly after having collected it, as

is evident from the findings of fact recorded by the assessing authority in the instant case, by taking shelter under the imaginary promises and

assurances on the existence of which it neither believed nor acted upon. The affluent must realise their responsibility towards the hungry millions, for

the larger benefits of whom, revenue is collected by the State in accordance with law and not try to enrich themselves by retaining that which

legitimately belongs to the exchequer the realised sales tax.

39. Thus, from the aforesaid discussion it follows that the petitioner has failed to establish that it construed the Government Order 1971 as an

outright exemption u/s 5 of the Act or acted on it either in setting up the unit or by not recovering the sales tax from the consumers. It also failed to

lay down even the minimum acceptable factual foundation for invoking the doctrine of promissory estoppel. In this view of the matter it is neither

necessary for this Court to consider the exceptions as carved out by the Supreme Court in Union of India (UOI) and Others Vs. Godfrey Philips

India Ltd., or even to determine as to whether or not a writ can be issued directing the respondent-State to issue a notification u/s 5 of the Act or

the nature of the power which the State exercises while issuing such a notification. These questions can be dealt with in such a case where they

require consideration.

40. The writ petition, therefore, fails and is dismissed but without making any order as to costs. The interim directions staying the recovery of sales

tax and penalty, etc., are hereby vacated.