

(2010) 03 GUJ CK 0078
In the Gujarat High Court

Case No : Special Civil Application No. 6299 of 2008 and SCA No's. 5909, 6300, 6298, 5907, 8468, 6334, 6562 of 2008

Sal Steel Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Central Excise Tariff Act, 1985 — Section 3, 5A
Central Excises and Salt Act, 1944 — Section 5A

Citation : (2011) 183 ECR 256 : (2010) 260 ELT 185

Hon'ble Judges : S.R. Brahmbhatt, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Kamal B. Trivedi, Mihir J. Thakore, Gaurav S. Mathur, Hardik P. Modh, H.D. Dave, Vikram S. Nankani, P.M. Dave and B.Y. Mankad, for the Appellant; Harin P. Raval, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—With the consent of the counsel of both the sides, the petition has been taken up for final hearing. RULE. Learned Counsel appearing for Respondents are directed to waive service of rule.

2. The Petitioner, the Limited Company, having its unit at survey No. 254 paiki, Kidana Bharapar Road, Village Bharapar, Taluka Gandhidham, District Kutch, is engaged in the business of manufacturing steel bars and other related products. The goods manufactured by the Petitioner -company fall in Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985 (the Tariff Act).

3. By this petition, the Petitioner originally challenged Notification No. 16/2008-C.E., dated 27-3-2008 (Annexure-E). Subsequently vide amendment permitted on 10-7-2008 the Petitioner has also challenged Notification No. 33/2008 dated 10-6-2008. In other words, the Petitioner has sought relief by way of a declaration that the Petitioner is entitled to the exemption from duty of excise on

the goods cleared by the Petitioner as provided in Notification No. 39/2001-C.E. dated 31-7-2001 (the Original Notification) and amendments thereto for a period of five years from the date of commencement of commercial production.

4. The backdrop in which the Original Notification dated 31-7-2001 was issued is the requirement to provide tax holiday in the wake of massive earthquake in the Kutch region of Gujarat, on the basis of the representations received by the Union of India from the State Government as well as representatives of the people, trade and industry. Government of India, considering the fact that a larger number of industries located in the earthquake affected areas were either totally destroyed or partially damaged and people had thus been rendered jobless notified an exemption scheme exempting goods produced by new industrial units from paying duty of excise, subject to specific conditions. The intention behind this exemption scheme was to attract immediate fresh investment by offering incentive to set up new industrial unit so as to generate employment.

5. It is the case of the Petitioner -Company that the aforesaid Original Notification No. 39 of 2001 was amended from time to time modifying certain conditions, including the condition stipulating the point of time when the industry should be set up. Accordingly the Petitioner -Company was incorporated on 6-11-2003. On 11-10-2005 Petitioner commenced commercial production from its sponge iron plant; on 16-12-2005 commercial production from Ferro Alloys Plant commenced; on 28-12-2005 Captive Power Plant was commissioned. Petitioner was issued certificates on 23-3-2006 by the Committee formed and functioning as per the conditions of the Original Notification certifying commencement of commercial production and the total amount of investment made by the Petitioner. Accordingly, the Petitioner started claiming exemption upon fulfilling necessary conditions of the Original Notification.

6. It is the case of the Petitioner that impugned Notification No. 16 of 2008 dated 27-3-2008 substantially takes away the benefit of exemption granted by the Original Notification by changing the basis of the entire scheme before expiry of the entire period of five years from the date of commencement of commercial production. The said Notification dated 27-3-2008 has been made effective from 1-4-2008 and thus the Petitioner has been adversely affected by substantial withdrawal of the benefit to which the Petitioner was undisputedly entitled to under the Original Notification.

7. On 16-5-2008 the Court adjourned the matters to 25-6-2008 in view of the Summer Vacation, with a direction that in the meantime, the Central Government shall consider the representations of the Petitioner along with similarly situated other Petitioners.

8. In compliance with the aforesaid order the Petitioner made a representation dated 26-5-2008 through the Kutch Chamber of Commerce and Industry. The Respondents thereupon issued fresh Notification dated 10-6-2008 bearing No.

Learned Senior Counsel appearing on behalf of the Petitioner assailed the impugned Notification dated 27-3-2008 No. 16 of 2008 and impugned new Notification dated 10-6-2008 No. 33 of 2008 stating that the exemption benefit granted to the Petitioner under the Original Notification was withdrawn within the period of five years by reducing the quantum in light of the change made in the basis for calculating the amount of exemption that may be available to the Petitioner. Inviting attention to the Original Notification No. 39 of 2001 it was submitted that the said Notification laid down that a unit located in Kutch district of Gujarat would be entitled to refund of the amount of duty of excise or additional duty of excise, as the case may be, leviable on the goods specified in the First Schedule to the Tariff Act, other than the goods specified in the Annexure appended to the said Notification, such duty being equivalent to the amount of duty paid by the manufacturer of goods, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001. As against that the impugned Notifications changed the basis by substituting the same by the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit", and further providing the rate of percentage of the total duty payable at which the relief would be available. In case of the Petitioner, it was contended that the relief which was equivalent to 100% of the duty paid stood reduced to 39% with various other conditions attached and prescribing an entirely arbitrary and irrational mode of working out the relief with further discretion vested in the Respondent-authority to modify even the stipulated rate by raising the same in light of peculiar facts and circumstances of a case. In other words, it was submitted, the change vested the authority with a discretion which could be misused by unscrupulous persons in connivance with a dishonest officer. learned Counsel elaborated on the aforesaid submission to contend that the amendment brought about the two impugned Notifications dated 27-3-2008 and 10-6-2008 were contrary to the avowed object with which the Original Notification had been issued by providing for an irrational basis which had no nexus with the purpose and object of the Original Notification. That equity demanded invoking principle of promissory estoppel, the Petitioner having acted on the promise and altered its position by having invested a large amount in setting up the unit at the site mentioned. That the Original Notification having been issued in public interest the onus was on the Respondent to show supervening public interest so as to permit the modification restricting the exemption by changing the entire basis. That mere loss of revenue by itself would not be a good ground for modifying the Original Notification before the stipulated period was over and making the modification effective midstream. In support of the submissions made reliance has been placed on the following judgments:

- (i) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,
- (ii) U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd.

and Others,

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

(iv) MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax, 2006 (206) E.L.T. 6 : 2008 (12) S.T.R. 206 (S.C.);

(v) Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others,

(vi) State of Punjab Vs. Nestle India Ltd. and Another,

(vii) Dai-Ichi Karkaria Ltd. Vs. Union of India and Others,

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

(ix) Pournami Oil Mills and Others Vs. State of Kerala and Another,

(x) Unicorn Industries Vs. Union of India (UOI),

(xi) WA Nos. 219 to 222 in WP (C) Nos. 1470, 1525, 1881 and 2854 of 2001 dated 3-12-2002 - Dharampal Satyapal Ltd. v. Union of India (UOI) and Ors. [High Court of Gauhati]; and

(xii) CWP No. 589 of 2008 dated 18-12-2008- Gillete India Ltd. and Anr. v. Union of India and Ors. [Himachal Pradesh High Court, Shimla - 2009 (235) E.L.T. 5 (H.P.)].

9. On behalf of Respondents it was submitted that in the field of taxation a wide discretion vests in the Legislature to classify items for tax purpose, and same principle be applied for granting exemption and/or withdrawal, and/or modification of the exemption. u/s 5A of the Central Excise Act, 1944 (the Act) Central Government is vested with statutory powers to issue necessary Notification to grant exemption from duty of Central Excise on being satisfied that it is necessary in public interest so to do. As such Notification is placed before both the Houses of Parliament the Notification would have statutory flavor. There is no limitation on the power available u/s 5A of the Act. The power to grant exemption by its very nature permits revocation, annulment, modification or variation. It was submitted that the provision for granting refund of duty paid in cash had prompted certain unscrupulous manufacturers to indulge in different types of tax evasion tactics. According to learned Counsel on the basis of analysis of cases booked by the Excise Department as well as representations received from Industry Association following modus operandi was broadly followed:

(i) Reporting of bogus production by mere issuance of sales invoice without actual production of goods and supply/clearance of excisable goods. This would result in availment of CENVAT credit by buyers of such excisable goods in other parts of the country without actual production being carried out and in absence of actual receipt of goods.

(ii) Reporting of bogus production by such units in these areas where actual production takes place elsewhere in the country.

(iii) Overvaluation of goods resulting in availment of excess of credit by buyer.

Goods are supplied by manufacturers, importers to these units without issuance of sales invoice and these are backed by bogus sales invoice issued by traders who do not undertake actual supply of goods. The actual supplier of these goods issued bogus duty paid invoices to other manufacturers who take credit based on such invoices without receipt of goods. To elaborate the above modus operandi, I beg to give the following illustration:

1. It was submitted on the basis of illustrations set out in the Affidavit in Reply that the same are general illustrations of misuse of exemption, which exemption was meant to be available to genuine manufacturers. That units in the Kutch region were wanting to pay maximum amount of duty in cash so that refund of the entire amount can be claimed. A study was undertaken to verify this aspect and find out percentage of excise duty paid in cash as well as percentage of excise duty paid by utilizing CENVAT credit by similar units located elsewhere when compared with units situated in the notified area availing exemption. That the units in the specified area were paying high percentage of duty in cash when compared to payment of duty on an all India basis in relation to manufacture of similar goods. The Government therefore realized that purpose of exemption was being defeated, exemption being available only in respect of genuine manufacturing activities carried out in specified areas. That the policy manifesting the intention of the Government was to grant excise duty exemption only to actual value addition made in the specified areas. Hence the exercise of powers u/s 5A of the Act.

2. It was submitted that as a result of the modification the manufacturers are required to pay duty on the full value of goods manufactured and cleared in the same manner as per existing scheme, but refund would be granted only to the extent of duty paid on the actual value addition according to the percentages fixed in the Notification, or as may be fixed as a special case as provided in the Notification. In the written submissions filed by the Counsel the effect of modification is stated in the following words:

"The effect of modification is as follows:

(i) It is submitted that genuine manufacturers would not at all be affected inasmuch as they would be getting the refund of same amount under the present modification as also in the proposed scheme.

(ii) Unscrupulous manufacturers reporting bogus production was resorting to fictitious purchase of inputs on the strength of invoices which are not duty paid invoices would be getting excise duty refund equivalent only to the duty paid on actual value addition made by such manufacturers who have industries in these specified areas.

(iii) The excise duty exemption would be available only to the extent of actual value addition made in these areas and not for the value of raw materials manufactured in other part of the country, which are received by the units in these areas without cover of duty paying invoices".

3. The methodology of calculating value addition has also been explained in part 3 of written submissions. In support of the submissions made as regards the exercise of legislative power and Courts not being entitled to question policy decision as well as on inapplicability of principle of promissory estoppel reliance has been placed on the following judgments:

- (i) R.K. Garg and Others Vs. Union of India (UOI) and Others,
- (ii) BALCO Employees Union (Regd.) Vs. Union of India and Others,
- (iii) Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another,
- (iv) Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.,
- (v) Banwari Lal and Others Vs. Sukhdarshan Dayal,
- (vi) 1655 Advanced Law Lexicon, 3rd Edition, by B. Ramanatha Iyer;
- (vii) AIR 1979 629 [Pages 629, 630 and 631];
- (viii) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,
- (ix) Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.,
- (x) Kasinka Trading and another, etc. etc. Vs. Union of India and another,
- (xi) United Copiex (India) Pvt. Ltd. Vs. Commissioner of Sales Tax,
- (xii) Dai-Ichi Karkaria Ltd. Vs. Union of India and Others,
- (xiii) Shrijee Sales Corporation and Another Vs. Union of India (UOI),
- (xiv) Indian Express Newspapers (Bom.) Private Ltd. Ors. Etc. v. Union of India and Ors. Etc. Etc., 1999 (110) E.L.T. 3 (S.C);
- (xv) Union of India and others Vs. M/s. Jalyan Udyog and another,
- (xvi) Union of India v. Bharat Commerce & Industries Ltd., 1999 (107) E.L.T. 582;
- (xvii) R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others,
- (xviii) State of Punjab Vs. Nestle India Ltd. and Another,
- (xix) MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax, 2006 (206) E.L.T. 6 (S.C);
- (xx) Adani Exports Pvt. Ltd. v. Union of India, 2004 (4) G.L.R. 2891 (Paragraphs 3.5, 5.2, 5.4, 5.6, 8.4, 8.5, 9, 26 and 32.4);

(xxi) Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,

10. Original Notification No. 39/2001-C.E. dated 31-7-2001 was titled -"Kutch (Gujarat) - Exemption to excisable goods (except those specified in Annexure) and cleared from Units in Kutch District of Gujarat". The said Notification as originally issued in principle grants exemption by way of refund in relation to the duty of excise paid on the goods specified in the First Schedule to the Tariff Act, except the goods specified in the Annexure to the Notification. The goods have to be manufactured and cleared from a unit located in Kutch district. Payment of excise duty by utilization of CENVAT credit would not be entitled to exemption. A unit having an original value of investment exceeding Rs. 20 crores in plant and machinery installed in the factory is entitled to the refund without any limit. In relation to a unit having original value of investment below Rs. 20 crores on the date of commencement of commercial production the exemption shall apply only for the first clearances up to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production, in each year.

1. Paragraph No. 2 prescribes the procedure to be adopted for giving effect to the Notification. Paragraph No. 3 of the Notification stipulates conditions which will have to be fulfilled for availing the exemption. The first condition states that the exemption Notification shall apply only to new industrial units, namely units which are set up on or after the date of publication of the Notification in the Official Gazette, but not later than 31-7-2003. The second condition requires a manufacturer to produce a certificate from a Committee consisting of the Chief Commissioner of Central Excise (originally Vadodara and then Ahmedabad) and the Principal Secretary to the Government of Gujarat, Department of Industry, to the jurisdictional authority, that the unit in respect of which exemption is claimed is a new unit and has been set up during the time period specified in condition No. 3(i). Condition No. (iii) requires the manufacturer to furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on the date of commencement of commercial production, to the jurisdictional authority. Condition No. (iv) obliges a manufacturer to produce a certificate from the said Committee confirming the original value of investment within a period of one month from the date of commencement of commercial production, or such extended period as the jurisdictional authority may allow. In so far as condition No. (v) is concerned it provides for return of the refund availed of in case, on the basis of certification as aforesaid, or otherwise, the original value of investment in plant and machinery is found to be below the specified limit as stipulated in Proviso to paragraph No. 1 of the Notification. Condition No. (vi) lays down the outer time limit by stating that the exemption shall apply for a period not exceeding five years from the date of commencement of commercial production. In the Explanation appearing after paragraph No. 4 the expression "set up on or after the date of publication of this Notification in the Official Gazette" has been defined to mean that any civil construction work

on the factory premises and any installation of plant and machinery on such premises commences only on or after the date of publication of the Notification in the Official Gazette.

2. Vide Notification No. 42/2001-C.E., dated 21-9-2001 Explanation-II has been added while numbering the original Explanation as Explanation-I. The second Explanation defines the phrase "original value of investment in plant and machinery installed in the factory" to mean original value as determined in accordance with the Accounting standards issued by the Institute of Chartered Accountants of India on Accounting for Fixed Assets.

3. Vide Notification No. 45/2002, dated 2nd September, 2002 in Paragraph No. 3, in condition No. (i), the date has been changed from 31st July, 2003 to 31st July, 2004. Hence new industrial units set up by this date would also become entitled to exemption under the original Notification.

4. Notification No. 60/2002, dated 19-12-2002 has been issued considering administrative exigency by specifying that in the Committee instead of Chief Commissioner of Central Excise, Vadodara, now Chief Commissioner of Central Excise, Ahmedabad will be a Member.

5. Notification No. 5/2003-C.E., dated 13-2-2003 has been issued with the following title: "Refund to units in North-East States and J & K Amendment to Notification Nos. 39/2001-C.E., 56/2002-C.E., and 57/2002-C.E.". By virtue of this Notification a Proviso has been added in Clause (b) of Paragraph No. 2 of the Original Notification to provide for that the amount of refund shall not exceed the amount of duty paid less the amount of CENVAT credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this Notification.

6. Vide Notification No. 65/2003-C.E., dated 6-8-2003 while amending various Notifications applicable to North-East States, Kutch and Jammu and Kashmir, in Original Notification paragraph No. 1A has been inserted after paragraph No. 1 to provide for, that in all cases where all goods produced by a manufacturer are eligible for exemption under the original Notification, the exemption shall be available subject to the condition that the manufacturer first utilizes whole of the CENVAT credit available to the manufacturer on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash. For the present it is not necessary to refer to other clauses which are procedural in nature.

7. Vide Notification No. 9/2000-C.E., dated 21-1-2004 titled as "Kutch (Gujarat)" Goods cleared from new units situated therein "Time limit for exemption extended" Amendment to Notification No. 39/2001-C.E. it is provided that the last date for setting up shall stand extended from 31st July, 2004 to 31st December, 2004, with further provision that not only the unit will have to be set up but commercial production shall have to commence not later than 31st December, 2004.

8. Vide Notification No. 55/2004-C.E., dated 9-11-2004 the aforesaid period upto 31st December, 2004 has been extended upto 31st December, 2005.

9. Thereafter, Notification No. 16/2008-Central Excise, dated 27-3-2008 has been issued by substituting in paragraph No. 1 for the words and figures, "to the amount of duty paid by the manufacturer of the goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001", the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit". Thereafter paragraph Nos. 1A, 2 and 2A have been substituted with paragraph Nos. 2, 2A, 2B, 2C, 2.1 etc., and the said Notification has been made effective from 1st April, 2008.

10. Vide Notification No. 33/2008-Central Excise, dated 10th June, 2008 once again major amendment has been carried out in Paragraph No. 2 as well as paragraph No. 2.1 etc.

11. Vide Notification No. 51-Central Excise dated 3rd October, 2008 the table in paragraph No. 2 has been modified in relation to certain entries.

12. The question that is therefore required to be considered is whether the Notifications dated 27-3-2008 and 10-6-2008 really achieve the purpose and object with which Notification No. 39/2001-C.E., dated 31-7-2001 was issued. In the Explanatory memorandum to Notification No. 39/2001-C.E. it is stated thus ":

"Notification No. 39/2001-Central Excise, dated 31st May, 2001, seeks to provide exemption from excise duty on goods manufactured by factories located in the district of Kutch in the State of Gujarat. The exemption is applicable to all commodities with the exception of tobacco and tobacco products, goods attracting special excise duty and a few other specified goods.

The exemption is available to new units that are set up within 2 years from 31st July, 2001, in the district of Kutch. The exemption would be available for a period of 5 years from the date of commencement of commercial production. However, if the original value of investment on plant and machinery in Kutch happens to be below Rs. 20 crore, the exemption shall apply only to clearance up to twice the value of such investment in each year.

The revenue implication of the above notification is not quantifiable

11. As against that the Explanatory Memorandum to Notification Nos. 16/2008-C.E. to 23 /2008-Central Excise dated 27-3-2008 states:

Notification Nos. 16/2008-Central Excise to 23/2008-Central Excise, all dated 27th March, 2008 seek to amend the Central Excise exemption schemes for North-Eastern states, Sikkim, Jammu and Kashmir and Kutch district of Gujarat, w.e.f. 1-4-2008. The underlying objective of these exemptions is to incentivize genuine value addition in these backward areas. In order to achieve this in a more effective manner some amendments have been carried out in the present schemes, wherein:

? the rates of value addition for goods falling under different chapters of the Central Excise Tariff have now been prescribed;

? the extent of exemption shall henceforth be equivalent to the duty payable on value addition carried out by the unit in these areas;

? in case the actual value addition undertaken by a unit exceeds the pre-

1 Paragraph number as per official text.

scribed rate by more than 25%, the unit may apply for a special rate to be fixed by the jurisdictional Commissioner;

Details of amending notifications and their original notifications are as under:

Original Notifications Amending Notifications (All dated 27-3-2008, effective from 1-4-2008). 32/99-Central Excise dated 8-7-99 17/2008-Central Excise 33/99-Central Excise dated 8-7-99 18/2008-Central Excise 39/2001-Central Excise dated 31-7-2001 16/2008-Central Excise 56/2002-Central Excise dated 14-11-2002. 19/2008-Central Excise 57/2002-Central Excise dated 14-11-2002. 22/2008-Central Excise 56/2003-Central Excise dated 25-6-2003. 21/2008-Central Excise 71/2003-Central Excise dated 9-9-2003. 23/2008-Central Excise 20/2007-Central Excise dated 25-4-2007. 20/2008-Central Excise

12. Again in Explanatory Memorandum to Notification No. 31/2008 to 38/2008 the same basis of value addition has been referred to in relation to the exemption scheme for North-East States, Sikkim, Jammu and Kashmir and Kutch district in Gujarat.

13. Thus when one reads the Explanatory Memorandum to the Original Notification it becomes clear that the exemption is available to new units that are set up in the district of Kutch within the stipulated time limit. The exemption would be available for a period of five years from the date of commencement of commercial production. The said Explanatory Memorandum does not talk of any exemption in relation to value addition. A plain reading of the Notification No. 39/2001 also indicates that the basis of eligibility is the amount of new investment in plant and machinery installed in the factory on or after the date of publication of the Notification in the Official Gazette with further condition that the new unit shall be set up and shall commence commercial production by the stipulated date. The focus and emphasis is on setting up new industry in an area ravaged by devastating earthquake which occurred on 26-1-2001. There is no question of any value addition in relation to the manufactured goods. The purpose and object, on a plain reading, is to ensure that new units are set up in Kutch district, employment is generated providing succour to people affected by the earthquake. This becomes clear from the communication issued by Government of India. Ministry of Finance, Department of Revenue on 29th July, 2008 in the form of Questions and Answers as appearing in the compilation filed by Respondent-authority, wherein in reply to Question No. 3 it is stated "The intention behind this exemption scheme was to attract immediate fresh

investment by in-centivizing setting up of new industrial units so as to generate employment".

14. As against that the Explanatory Memorandum to Notification dated 27-3-2008 refers to the object of "these exemptions" to be to incentivize genuine value addition in "these backward areas". Thus it is apparent that while issuing the subsequent Notification dated 27-3-2008 the authority has mixed up the object of the two notifications, one issued immediately after the earthquake of January, 2001 for the purpose of attracting immediate fresh investment by granting incentive to set up new industrial units to generate employment, and the others issued from time to time for development of backward areas. The two objects cannot be equated and put at par. The notifications issued for the North-Eastern States, Sikkim, Jammu and Kashmir cannot be considered as being *pari materia* in so far as Notification No. 39/2001 relating to only Kutch District of Gujarat State is concerned, as the said notification is not primarily in relation to a backward area as such. This is more so because Notification No. 39/2001 was not issued in light of backwardness of Kutch District being notified for the purpose of development. Therefore, the subsequent Notifications dated 27-3-2008 and 10-6-2008 cannot be upheld as they treat unequals as equals. Merely because the power to issue notifications is available in both cases u/s 5A of the Act authority exercising powers of delegated legislation under the said provisions cannot be permitted to equate what is inherently not equal.

15. Section 5A of the Act reads as under:

5A. Power to grant exemption from duty of excise. -- (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured-

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent. export-oriented undertaking and brought to any other place in India.

Explanation: -- In this proviso, "free trade zone", "special economic zone" and "hundred per cent, export-oriented undertaking" shall have the same meanings as in Explanation 2 to Sub-section (1) of Section 3.

(1 A) For the removal of doubts, it is hereby declared that where an exemption under Sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

(2) If the Central Government is satisfied that it is necessary in the public so to do, it may, by special order in each case, exempt from payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under Sub-section (1) or order issued under Sub-section (2) insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue the notification under Sub-section (1) or order under Sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under Sub-section (1) or Sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this Sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation: -- "Form or method", in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every notification issued under Sub-rule (1), and every order made under Sub-rule (2) of Rule 8 of the Central Excise Rules, 1944, and in force immediately before the commencement of the Customs and Central Excise Laws (Amendment) Act, 1987 shall be deemed to have been issued or made under the provisions of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provisions of this section.

(5) Every notification issued under Sub-section (1) or Sub-section (2A) shall, -

(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations, Customs and Central Excise, New Delhi, under the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963).

(6) Notwithstanding anything contained in Sub-section (5), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public

Relations on a date on or before the date on which the said notification comes into force.

16. Under Sub-section (1) of Section 5A of the Act powers are vested in the Central Government to issue notification to exempt generally, either with or without conditions, excisable goods as may be specified, from the whole or any part of the duty of excise, provided Central Government is satisfied that it is necessary in the public interest to grant such exemption. The Proviso thereunder lays down an embargo in relation to goods produced or manufactured in free trade zone, etc. unless specifically exempted by notification.

17. Sub-section (1A) of Section 5A of the Act specifically declares that where an exemption in respect of any excisable goods from the whole of excise duty has been granted absolutely the manufacturer of such goods shall not pay the duty of excise.

1 Paragraph number as per official text.

18. Sub-section (2) of Section 5A of the Act empowers the Central Government to issue a special order in each case, to grant exemption under circumstances of an exceptional nature. It is open to the Central Government, if it considers it necessary or expedient for the purpose of clarifying the scope or applicability of any notification issued under Sub-section (1) to insert an explanation in such notification, by issuing another notification at any time within one year of issue of the notification under Sub-section (1), and every such explanation shall have effect as if the explanation had always been part of the first such notification. This is what is laid down in Sub-section (2A) of Section 5A of the Act. For the present, one may not refer to the other Sub-sections.

19. It is an admitted position that the Original Notification issued on 31-7-2001 was only in relation to excisable goods manufactured and cleared from new industrial units set up in Kutch District of Gujarat within the period specified and the said Notification was issued in exercise of powers u/s 5A(1) of the Act. The said provision itself provides for vesting of powers in the Central Government to issue a notification to exempt from whole or any part of duty of excise leviable on specified excisable goods. Hence, the concept of the Central Government foregoing certain amount of revenue is inherent in the provision and the contention that a loss occurs to the Central Government by virtue of operation of an exemption notification and hence, the same is required to be modified, or varied or rescinded cannot be countenanced. An authority exercising delegated legislation cannot read in the provision granting powers of delegated legislation something more than what such provision in fact provides. In other words, a delegatee of powers of delegated legislation cannot exercise such powers, even by attempting to read intent, in excess of the powers granted by the provisions.

20. In the present case the Respondent-authority has sought to curtail the exemption in purported exercise of powers u/s 5A of the Act by trying to read an object which did not exist, and which was not the object, when Original

Notification No. 39 of 2001 was issued by issuing subsequent notifications impugned herein. Thus, the authority has exceeded its powers and such an exercise cannot be upheld. At the cost repetition, it is required to be stated that the discussion in relation to the Explanatory Memorandum at both the stages, in 2001 and in 2008, makes this more than abundantly clear.

21. The contention that the power to modify/vary/revoke a notification already issued is inherent in the power u/s 5A of the Act to issue a notification may in general be correct, but when such an exercise is challenged, like in the present case, it becomes necessary to examine as to whether such an exercise is within the scope and extent of power available u/s 5A of the Act. The authority has to be alive to the fact that the power u/s 5A of the Act is essentially a power to grant exemption in relation to duty of excise which is otherwise leviable under other provisions of the Act. Therefore, in exercise of such power u/s 5A of the Act the authority cannot be permitted to take recourse to the principles applicable for determining whether duty is correctly levied or not. Once the authority has come to the conclusion that an exemption is required to be granted from payment of duty of excise, the only caveat being that it is in public interest, the authority cannot thereafter refer to loss of revenue as larger public interest for withdrawing such exemption, when the notification originally issued has fixed a time frame for the exemption. To put it differently, once power u/s 5A of the Act has been exercised and ex-

1 Paragraph number as per official text.

emption granted, a larger/superior public interest has to be shown for curtailing/modifying/withdrawing an exemption already granted. The onus shall be on the Respondent authority in this regard and the same cannot be discharged by merely referring to a perceived loss of revenue on comparison with similar units in other areas which are not entitled to exemption. If non-comparables are compared it would not yield correct result. Therefore, the attempt on part of the Respondent-authority to refer to certain pan India figures and percentages thereof to compare with the figures and percentages thereof from new industrial units in the District of Kutch cannot be permitted. It is not possible to even ascertain as to whether the other units, not located in the District of Kutch, were put up within the same period; and even if so put up, were put up in an area affected by a devastating earthquake. The object and purpose of issuing Original Notification was in relation to a region, namely, District Kutch, which was almost razed to ground by the earthquake in January, 2001, and the package for economic and social revival thereof cannot be treated at par with industries set up in other areas of India and, therefore, the assimilation of percentile figures of two incomparable regions would give a misleading picture. The entire exercise of issuing subsequent notifications on 27-3-2008 and 10-6-2008 is thus without any basis, i.e. the basis adopted has no nexus with the object, intent and purpose which formed the basis for issuing Original Notification in 2001.

22. Section 38A of the Act is in relation to effect of amendments, etc., of Rules,

Notifications or Orders. The said provision reads as under:

"38A. Effect of amendments, etc., of rules, notifications or orders. --

Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

- (a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect, or
- (b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or
- (c) affect any right, privilege, obligation or liability acquired, accorded or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or
- (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed under on in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid."

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded."

23. u/s 38A of the Act it is provided that where any Rule, Notification, etc. made or issued under this Act is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescission "then five Clauses (a) to (e) are set out" to lay down that what is provided in each of the five clauses, which are alternative to each other, shall not take place. Clause (b) stipulates that an amendment, etc. shall not affect the previous operation of any Rule, Notification, etc. so amended, etc. or anything duly done or suffered thereunder. Therefore, an amendment of a notification shall not, not only not affect the previous operation of the notification, but shall also not affect anything duly done or suffered under the notification. Similarly, Clause (c) provides for a situation where an amendment, etc. shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Rule, Notification, etc. so amended, etc. which means that where under a notification any right or privilege has been acquired or has accrued, the same shall not be affected by the amendment, etc. of the notification, and correspondingly an obligation or liability incurred under the notification shall have

to be discharged even after the amendment, etc. Clauses (d) and (e) similarly provide for permitting continuation of leviability of any penalty, etc. and continuation of any investigation, legal proceeding or remedy, etc.

24. Thus, the scheme which emerges on a plain reading of Section 38A of the Act is that even in a case where a Rule, Notification, etc. is amended, etc., unless the amending Rule, Notification, etc. specifically denotes a contrary intention, everything that has taken place under the Rule, Notification, etc. prior to amendment shall continue to its logical end. This provision is not only a saving provision, but is a provision which correspondingly obligates both the person who was a beneficiary under the existing Rule, Notification, etc. and the authority under the existing Rule, Notification, etc. to continue to comply with the requirements of the Rule, Notification, etc. as it existed even after amendment once the parties have duly done anything or suffered under the existing Rule, Notification, etc. An Assessee, who is required to act in a particular manner as specified by the Rule, Notification, etc. as existing before the amendment, is obliged in law to act accordingly, and correspondingly the authority is equally obliged in law to act as if the amendment had not taken place, such act on part of the authority being not only in relation to collection of revenue and other attendant provisions like penalty, etc., but also in relation to the entitlements of an Assessee. This provision, namely, Section 38A of the Act incorporates in the statute the principle of a completed contract between the parties, whereunder the parties are obliged to fulfil their respective part of the concluded contract, and in case of failure, the Court may step in and direct the defaulting party to specifically perform his part of the promise. To put it differently, one may say that the principle of promissory estoppel, as normally understood, has been incorporated in the statute.

25. Hence, neither by virtue of powers u/s 5A of the Act, nor by virtue of operation of Section 38A of the Act can the Respondent authority be permitted to resile from the promise statutorily made by way of notification issued u/s 5A(1) of the Act, being Original Notification No. 39 of 2001 dated 31-7-2001. The Petitioner had acted as required by the Original Notification and when the Original Notification with attendant circumstances is read in context the subsequent notifications dated 27-3-2008 and 10-6-2008 do not indicate any intention to the contrary, that is contrary to the object, intent and purpose of the Original Notification. Thus by operation of law, namely, provisions of Section 38A of the Act, more particularly Clauses (b) and (c) of the said section read together, it is not possible to uphold the action of the Respondents in issuing subsequent Notifications dated 27-3-2008 and 10-6-2008.

26. In view of various decisions of the Apex Court cited by both the sides a consensus emerges that the approach of the Court in the matter of invoking the principle of promissory estoppel depends on facts of each case. The general principle is that once a representation has been made by one party and the other party acts on that representation and makes investments and thereafter the

other party resiles, such act cannot be stated to be fair and reasonable. This principle is applicable even in a case where one of the parties, namely, the party making a representation may be the State. It is also stated that promissory estoppel cannot be invoked against legislation. This is only partly correct. A distinction has to be made between the delegated legislation and the primary legislation. So far as the primary legislation is concerned, no estoppel can be applied against an Act. However, in case of delegated legislation it is not so. The general principle will come into play and if a subject is able to establish having acted on the promise made, put himself in a detrimental position, the other party is obliged in law to make good the promise, even if the promise is by way of a delegated legislation. The State cannot be heard to complain that the promise has resulted in financial loss. If the nature of promise is such where in exercise of delegated legislation the State has consciously agreed to forego certain revenue the State cannot resile from the said position only on the ground of loss to the exchequer. Of course, it is equally well settled that no person can be permitted to misuse the concession or benefit and invoke promissory estoppel. If one party abuses the concession it is always open to the other party to revoke such concession. But for this there has to be cogent material in the form of direct evidence pointing out misuse of the concession. When public interest is pleaded the same cannot be general and vague for the purpose of either modifying or revoking an exemption already granted. Supervening public interest is always a good ground for modifying or withdrawing an exemption. But once again such supervening public interest has to be established by direct cogent evidence in this regard, and not on basis of general and vague apprehensions.

27. In a case where the State invited new industries by offering concessional power tariff and thereafter withdrew the same on the ground that there was power theft on a large scale the Apex Court in case of U.P. Power Corporation Limited (*supra*), after detailed analysis of the law on the subject, struck down the action of the State by invoking principle of promissory estoppel and in the process stated:

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

28. In light of the aforesaid principle and approach stated by the Apex Court it is necessary to examine whether Original Notification can be termed to be deficient in any manner so as to lead to perceived misuse which forms the basis for issuing the subsequent Notifications impugned herein. In the Original Notification in paragraph No. 2 it is provided that a manufacturer is obliged to submit a statement of the duty paid, other than the amount of duty paid by utilization of CENVAT credit, and such statement has to be furnished to the Jurisdictional Commissioner by the seventh day of the next month in which the duty has been paid in cash. Upon receipt of the statement the Jurisdictional Commissioner is required to undertake verification, which he deems necessary, and thereafter refund the amount of duty paid in cash by the fifteenth day of the next month. It is further provided that in case of likelihood of delay in verification the Jurisdictional Commissioner shall refund the amount on provisional basis and thereafter adjust the amount of refund by such amount as may be necessary, at the time of payment of subsequent refunds. Thus it is not as if the statement made by a manufacturer is accepted at face value. If any claim for refund is made and approved by the Jurisdictional Commissioner, revenue will have to show by co-relating with the specific transaction and specific order of refund as to where and how a concession/benefit has been availed by a manufacturer by misusing the scheme of exemption. The Jurisdictional Commissioner who is entrusted with the duty to undertake verification cannot be permitted to grant refund and not take any steps to recover duty, if erroneously refunded. The bogey of misuse and the scheme of exemption therefore cannot be permitted to be raised and under the guise of so called misuse. Central Government cannot be permitted to modify the exemption scheme before the stipulated period is over merely because the same may possibly have exceeded the estimated forego of revenue.

29. Original Notification in Paragraph No. 3 also provides various checks and counter checks to ensure that only a genuine case where a new industrial unit is set up within the stipulated period and which actually commences commercial production after making investment as per the stipulated limit becomes entitled to benefit under the scheme. Not only the limits of investment but also the period during which the unit has to be set up and commence commercial production are specified, but the manufacturer is required to furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on the date of the commencement of commercial production, to the Jurisdictional Commissioner. The manufacturer is also required to produce a Certificate from a Committee wherein one of the principal members is the Chief Commissioner of Central Excise and the other is Principal Secretary to the Government of Gujarat, Department of Industry. The Certificate has to state that the unit in respect of which the exemption is claimed is a new unit and has been set up during the specified time period. The manufacturer is also obliged to produce a Certificate from the said Committee confirming original value of investment within a period of one month from the date of

commencement of commercial production. In the event any discrepancy is found in the original value of investment in plant and machinery on the basis of Certificate issued by the Committee, or otherwise, Jurisdictional Commissioner is entitled to recover the refund availed of by a manufacturer. Therefore, a rebuttable presumption arises once a manufacturer has placed on record the necessary Certificates from the Committee constituted under the Original Notification. The Court cannot be expected to accept a bald generalized statement as to misuse of the scheme as otherwise it would mean that the Certificates issued by the Committee are doubted, the role of the Jurisdictional Commissioner who is empowered to undertake verification, withdraw the refund, etc. is also doubted. The revenue cannot be permitted to plead such a state of affairs without bringing case specific cogent evidence in this regard on record. In fact, in the written submissions and the Affidavit-in-Reply where certain instances are referred to alleging violation/misuse of the scheme it is apparent that the said instances are of action initiated in 2009, namely, after the impugned Notifications dated 27-3-2008 and 10-6-2008 have already been issued. Thus on facts also it is not possible to state that the Respondent-authorities have even prima facie been able to establish any such wide scale misuse of the scheme.

30. One more aspect of the scheme which came by way of amendment dated 6-8-2003 vide Notification No. 65 of 2003-C.E. further makes it more rigorous to ensure that no undue advantage is derived by a manufacturer, when the said Notification provides that a manufacturer is obliged to discharge his liability to pay duty of excise in the first instance by exhausting the whole of CENVAT credit available to the manufacturer on the last day of the month under consideration and paying only balance amount of duty in cash. This would ensure that the actual cash outgo would be limited.

31. Thus when one considers the entire scheme as a whole it is more than abundantly clear that there is hardly any scope for misuse of the scheme. Furthermore, the period of the scheme is a self limiting one and only those manufacturers who have complied with the requirements of the Original Notification are entitled to the benefit. The said manufacturers therefore cannot be called upon to make payment of duty and seek a smaller amount of refund under the scheme considering the purpose of granting exemption. One of the purposes that is apparently discernible is to ensure that during gestation period a new industrial unit is able to recoup the capital outlay involved in setting up a new industrial unit so as to ensure that the new unit does not face cash crunch during the initial period and circulating capital is available to such new unit.

32. Applying the aforesaid principles to the facts of the case it becomes clear that the Petitioner has acted on the basis of promise set out in the Original Notification No. 39 of 2001 dated 31-7-2001 by making huge investment and it is not the case of the Respondent-authority that the Petitioner has in any manner misused or abused the exemption granted to the Petitioner. Respondent-authority

is therefore prevented from changing the position unilaterally in absence of any direct cogent evidence to show that any supervening public interest is involved. In so far as individual cases of alleged misuse are concerned, the provisions of the Act are adequate to take care by not only effecting recovery of revenue but levying statutory penalties, provided conditions imposed by the statute are shown to be fulfilled. However, from that, namely, a few stray instances of misuse it is not possible to uphold the generalization that every new industrial unit is misusing the exemption granted. As the record reveals out of more than 100 units set up in District Kutch show-cause notices have been issued to only 3 units, and that too after filing of the petition. This only underscores the fact that in a case where there is evidence of misuse the provisions of the Act are sufficient to take care. At the cost of repetition, it is required to be borne in mind that the object, intent and purpose of Original Notification was to ensure immediate revival of Kutch District, which was worst affected by the massive earthquake which occurred on 26-1-2001, by ensuring that new industrial units are established so as to revive the economy and generate employment. Thus, loss of revenue by way of exempting such new industrial units from payment of duty of excise was inherent and the subsequent lame explanation that exemption was to be limited only to value addition is nothing else but an afterthought to reduce loss of revenue. The policy was not in relation to inflow or otherwise of revenue, but was to invite establishment of new industrial units. That was the public interest. Hence, Respondents cannot be permitted to plead supervening public interest on the basis of perceived revenue loss or misuse of the scheme of exemption. The primary inquiry that is required to be undertaken is as to whether a new industrial unit has been set up in the District of Kutch and whether such a new industrial unit fulfils all other requisite conditions prescribed by the Original Notification. The inquiry cannot be in the direction of the amount of revenue generated or the amount of excise duty refunded. Respondent-authorities have thus failed to co-relate the modification of the basis for granting exemption midstream with the purpose and object with which Original Notification had been issued by considering extraneous factors not germane to the object, intent and purpose behind the issuance of Original Notification.

33. Various figures given in the form of charts and comparing the same with figures stated to have been obtained from similar industries situated elsewhere in India would have no bearing on the issue at hand because operation of Section 5A of the Act itself envisages foregoing of revenue when exemption is granted by issuing a notification. The entire approach is misconceived in law and is contrary to the legislative scheme which emanates from a plain reading of Section 5A of the Act. Therefore, the hypothetical illustrations given in the affidavit-in-reply and the written submissions of the Respondent-authority need not be considered in light of what is stated hereinbefore, as the entire exercise is misdirected considering the object, intent and purpose of the Original Notification. Similarly there can be no dispute with the general proposition of law as regards taxability, but the said principles would have no role to play when the Act itself envisages

granting of exemption u/s 5A of the Act which itself involves loss of revenue. Thus, loss of revenue per se is not a factor which would tilt the balance one way or the other. It is a neutral factor and need not be considered for the purpose of ascertaining whether the subsequent notifications are correct or not.

34. To Summarize:

(i) A plain reading of Notification No. 39/2001-C.E. indicates that the basis of eligibility is the amount of new investment in plant and machinery installed in the factory within the specified period with further condition that the new unit shall be set up and shall commence commercial production by the stipulated date.

(ii) The purpose and object of the Original Notification is to ensure that new units are set up in Kutch District and employment is generated providing succour to people affected by earthquake.

(iii) While issuing subsequent Notification dated 27-3-2008 the Respondent-authority has mixed up the object of the two notifications, Original Notification issued immediately after the earthquake of January, 2001 and the others issued from time to time for development of backward areas. The two objects cannot be equated and put at par.

(iv) Merely because power to issue notifications is available in both cases u/s 5A of the Act in exercise of delegated legislation authority cannot be permitted to equate what is inherently not equal.

(v) The concept of the Central Government foregoing certain amount of revenue is inherent in Section 5A of the Act.

(vi) The contention that a loss occurs to the Central Government by virtue of operation of an exemption notification and hence, the same is required to be modified cannot be countenanced.

(vii) In exercise of delegated legislation the authority cannot read in the provision something more than what such provision in fact provides.

(viii) The authority has to be alive to the fact that the power u/s 5A of the Act is essentially a power to grant exemption in relation to duty of excise which is otherwise leviable under other provisions of the Act. Therefore, in exercise of such power u/s 5A of the Act, the authority cannot be permitted to take recourse to the principles applicable for determining whether duty is correctly levied or not.

(ix) Once an exemption notification has been issued on the footing that it is in public interest, the authority cannot thereafter refer to loss of revenue as larger public interest for withdrawing such an exemption.

(x) The onus shall be on the Respondent-authority to establish superior public interest for curtailing or withdrawing an exemption already granted, and the same cannot be discharged by merely referring to a perceived loss of revenue on comparison with similar units in other areas which are not entitled to exemption.

(xi) The entire exercise of issuing impugned notifications dated 27-3-2008 and 10-6-2008 is without any basis, as the basis adopted has no nexus with the object, intent and purpose which formed the basis for issuing Original Notification in 2001.

(xii) The provision of Section 38A of the Act is not only a saving provision, but is a provision which correspondingly obligates both the person who was a beneficiary under the existing Rule, etc. and the authority under the existing Rule, etc. to continue to comply with the requirements of such Rule, etc. as it existed, even after amendment once the parties have duly done anything or suffered under the existing Rule, etc.

(xiii) Section 38A of the Act incorporates in the statute the principle of a completed contract between the parties, whereunder the parties are obliged to fulfil their respective part of the concluded contract, and in case of failure, the Court may step in and direct the defaulting party to specifically perform his part of the promise.

(xiv) In view of various judgments of the Apex Court a consensus emerges that the approach of the Court in the matter of invoking the principles of promissory estoppel depends on facts of each case.

(xv) The general principle is that once a representation has been made by one party and the other party acts on that representation and makes investments if the other party resiles such act cannot be stated to be fair and reasonable.

(xvi) It is only partly correct to state that promissory estoppel cannot be invoked against legislation; a distinction has to be made between delegated legislation and the primary legislation.

(xvii) Where in exercise of delegated legislation the State has consciously agreed to forego certain revenue the State cannot resile from the said position only on the ground of loss to the exchequer.

(xviii) A person cannot be permitted to misuse the concession or benefit and invoke promissory estoppel. If one party abuses the concession it is always open to the other party to revoke such concession. But there has to be cogent material in the form of direct evidence pointing out misuse of the concession.

(xix) Supervening public interest is always a good ground for modifying or withdrawing an exemption. But the same has to be established by direct cogent evidence and not based on general and vague apprehensions.

35. Hence, on application of the law in the form of provisions of Sections 5A and 38A of the Act as well as the general principles relating to promissory estoppel it becomes clear that even if one were to uphold the powers of the Central Government to issue a notification in exercise of powers u/s 5A of the Act, it would not be possible to uphold the said exercise in so far as impugned Notification No. 16/2008-C.E. dated 27-3-2008 and Notification No. 33/2008-C.E.

dated 10-6-2008 are concerned to the extent they are sought to be applied to new industrial units set up in Kutch District of Gujarat in compliance with Original Notification No. 39/2001-C.E. dated 31-7-2001 within the stipulated period. Accordingly, the two impugned notifications to the extent they curtail/modify/substitute the basis laid down in Original Notification No. 39/2001-C.E. dated 31-7-2001 are declared to be bad in law. New industrial units, which have been set up and which have commenced commercial production within the specified period and by the specified date under Original Notification No. 39/2001-C.E. dated 31-7-2001, shall be entitled to the benefit of exemption in the form of refund of excise duty payable/paid on the goods (as specified) manufactured and cleared from such new units set up in the Kutch District without any restriction by operation of the two impugned notifications provided all other conditions stand satisfied.

36. Where Excise Duty has already been paid and only a part is refunded on the basis of calculation made in accordance with the impugned notifications the differential amount of duty that such units would become entitled to shall be credited and such units shall be permitted to take credit thereof to the said extent by treating every debit to the said account as being payment of Excise Duty in cash to the extent such differential amount of credit gets exhausted in relation to future liability required to be discharged in relation to such units. In other words, the credit shall be to their respective PLA accounts. This direction shall be applicable in each case on the facts as exist.

37. During course of hearing number of authorities have been cited by both the sides. The Court has not found it necessary to burden the judgment by reproducing extracts from various authorities. Suffice it to state that ratio of all the judgments cited have been considered by the Court.

38. The petition is allowed accordingly in the aforesaid terms. Rule made absolute to the aforesaid extent with no order as to costs.

Sd/ [D.A. MEHTA, J.]

ORDER

S.R. Brahmbhatt, J.

39. As I am unable to agree with the views of Hon''ble Justice D.A. Mehta in this group of petitions I have to set out my views, and conclusion separately as under:

40. In these group of petitions, the Petitioners - Kutch Chamber of Commerce and Industry, a Voluntary Association of Industrial Units, and other Industrial Units operating in the Kutch District of State of Gujarat, have challenged the Notifications issued by Respondent No. 1 bearing No. 16/2008-C.E., dated 27-3-2008 as well as Notification No. 33/2008-C.E., dated 10-6-2008 on the ground that they have effect of depriving the Petitioner s and other similarly situated industries and industrial units, set up pursuant to the Notification No.

39/2001-C.E. dated 31-7-2001, providing for the exemption from payment of excise duty for five years from the date of commencement of commercial production, to the newly set up industrial units with specific minimum investments as an incentive to set up new industries in Kutch region after the devastating earthquake. The Government of India in exercise of power conferred upon it under Sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), read with Sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and Sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, issued Notification No. 39/2001-C.E. dated 31-7-2001 providing incentives in form of exemption from payment of excise duty for period of five years from the date of commencement of commercial production to newly set up industrial units with minimum specific investments, in the Kutch district so as to help the entire Kutch region to over come untold miseries and hardships befallen it in wake of devastating earth quake of 2001. The incentives of exemption from payment of excise duty to newly set up industries was for bringing about some succor to the people of region in helping them rehabilitating themselves on securing employment in and on account of newly set up industries. The nature of total exemption from payment of duty to Industrial units set up after 31-7-2001 up to 31-7-2003 and thereafter extended up to 2005 came to be substantially changed as the Respondent No. 1 issued impugned notifications dated 27-3-2008 and 10-6-2008, where-under, the existing exemption from payment of excise duty came to be substantially withdrawn. Being aggrieved and dissatisfied with these notifications, the Petitioners and other similarly situated, have approached this Court under Article 226 of the Constitution of India seeking appropriate writ in the nature of mandamus, prohibition or any other writ, order or direction for quashing and setting aside the notifications dated 27-3-2008 and 10-6-2008 being contrary to establish principles of law, arbitrary and discriminatory and also violative of Article 14 of the Constitution of India. All these petitions were heard together and are being disposed of by common judgment as they involved identical question of law and almost similar facts.

41. The facts in brief deserve to be set out as under.

In the year 2001, to be more precise, on 26-1-2001 a calamity of devastating earthquake had befallen the State of Gujarat, particularly the district of Kutch. The entire country was under deep shock on seeing the plight that it brought about of the people of the district and surrounding areas. The Union of India had to take appropriate measures for ameliorating plight of people of Kutch. In order to revive the economy in Kutch district, it was essential to encourage the entrepreneurs to put up new industries in the district so as to generate more employments and opportunity of employment which in turn would help Kutch district and its people to be brought back in the main stream with the nation.

42. The Respondent No. 1 in exercise of powers conferred by Sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), read with Sub-section (3)

of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and Sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, issued Notification No. 39/2001 (hereinafter referred to as the "Exemption Notification") dated 31-7-2001 on being satisfied that it was necessary in the public interest so to do exempting the goods specified in the First Schedule to the Central Excise Tariff Act, 1985 and other than the goods specified in the Annexure appended to the Notification and cleared from a unit located in the Kutch District of Gujarat from so much of the duty of excise or the additional duty of excise, as the case may be, leviable under provisions of the said Acts as is equivalent to the amount of duty paid by manufacturing of goods till then the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001 on certain terms and conditions mentioned therein.

43. Under the said Notification, eligible industrial units were entitled to exemption of so much of the duty leviable on the goods cleared, as was actually paid, i.e. in cash, by such unit. The said exemption was made available by way of refund as provided in Paragraph No. 2(b) of the said Notification. The refund was granted on the basis of a statement furnished by the unit under Paragraph No. 2(c) of the said Notification. Paragraph No. 3(i) of the said Notification provides that the exemption would be available to New Industrial Units, which are set up on or before 31-7-2003. Compliance with the said condition was to be certified under Paragraph No. 3(ii) by the Chief Commissioner of Central Excise, Vadodara and the Principal Secretary to the Government of Gujarat, Department of Industry (hereinafter referred to as the "said Committee"). The unit interested in availing of the exemption was also required to furnish a declaration as to the original value of investment in plant and machinery installed in the factory, as on the date of commencement of commercial production, in order to show that the requirement of minimum specific investment on or before specified date was fully complied with. The exemption was available for a period not exceeding five years from the date of commencement of Commercial Production. The said Notification came to be amended from time to time vide a series of Notifications, bearing Nos. 42/2001, 45/2002, 60/2002, 5/2003, 16/2003, 65/2003, 9/2004 and 55/2004. Pursuant to said exemption notification, the Petitioner and other similarly situated persons have set up their industrial units for availing the benefits of exemption from payment of excise duty. The details of the units have been stated in the memo of petition and need no elaborate dwelling upon at this stage, as by and large there is no dispute with regard to the factum of putting up the industrial units as per the notification and terms and conditions of the Notifications. It is also required to be noted that all the Petitioners have mentioned with regard to their action and investment pursuant to the exemption notifications. By and large, they have remained undisputed and therefore, the same also need not detain the Court for dealing with the same in more elaboration. Of course the Respondent Central Government has not accepted the

contention of the Petitioners that they have put industries only for and on account of excise exemption. Suffice it say that it was the say of the Petitioners in these petitions that all the Petitioners set up their units and made investment of huge amount of money for putting up the units in Kutch so as to seek benefit of excise duty exemption as envisaged under the Exemption Notification.

44. As submitted by the Petitioner, the Respondent No. 1 issued the impugned notifications, which is made effective from 1-4-2008 and altered the entire basis on which the benefits were available to the eligible units, during the period of five years as originally promised. The Petitioners submit that under the impugned notifications, the basis of exemption has been arbitrarily changed to value addition undertaken in the manufacturing of goods, instead of exemption on total duty actually paid. The refund available is limited to, the duty payable on value addition undertaken, which shall be equivalent to the amount calculated as a percentage of total duty payable on the excisable goods at the rate specified in table given in the said impugned Notification. The Petitioners have on page-9 produced it in a more articulated manner, which is reproduced hereunder:

S. No. Chapter of the First Schedule Description of goods Rate (1) (2) (3) (4) 1. 29 All goods 29 2. 30 All goods 56 3. 33 All goods 56 4. 34 All goods 38 5. 38 All goods 34 6. 39 All goods 26 7. 40 Tyres, tubes and flaps 41 8. 72 or 73 All goods 39 9. 74 All goods 15 10. 76 All goods 36 11. 85 Electric motors and generators, electric generating sets and parts thereof. 31 12 Any chapter Goods other than those mentioned above 36

45. In order to understand the effect of Notification, it is appropriate to set out the contention of the Petitioners in Special Civil Application No. 6298 of 2008 in its own wordings. It is the case of the Petitioners that the goods manufactured by the members of the Petitioner No. 1 and the Petitioner No. 2 are covered at Sr. No. 8 of the said table and the rate specified is 39%. Thus, while the entitlement of a manufacturer was to the tune of 100% of the duty paid by cash, the impugned Notification restricts the said entitlement to 39% of the total duty payable on the goods being cleared. Under Paragraph Nos. 2A, 2B and 2C of the impugned Notification, options are provided, to a unit, of either availing further credit or seeking fixation of a special rate by the concerned Commissioner for the purpose of determining the quantum of refund. All options, ex facie, appear detrimental to the Petitioners and are also contrary to the Exemption Notifications. The Petitioners further submitted that by introducing the impugned Notification, an anomalous situation has been created, whereby the business of the units set up by the members of the Petitioner No. 1 and the Petitioner No. 2 will be rendered unviable and will face closure. The Petitioners apprehend that it would be impossible for the Petitioners to have a special rate fixed so that the refund is equal to 100% of value addition. Further, those units that were established soon after the issuance of the said Notification have enjoyed the benefits, as promised, for almost 5 years. However, the members of the Petitioner Nos. 1 and 2, who also acted on the promise contained in the

Exemption Notifications, will be left high and dry, after having invested huge sums of money and undertaken irreversible steps in order to avail the benefit promised. The Petitioners have further submitted that the entire basis of the benefit available to them has been altered to their detriment without any reason, rationale or justification, more so when the Exemption was available for a period not exceeding 5 years. Thus, the Petitioners being aggrieved with the issuance of Notifications dated 27-3-2008 and 10-6-2008, preferred present petitions under Article 226 of the Constitution of India.

46. The counsel for the Petitioners has mainly contended that the impugned Notifications are contrary to the scheme of exemption contained in the Exemption Notifications, without any basis, rationale or justification, discriminatory, unfair and unscientific, vague and with inherent contradictions. The counsel for the Petitioners further contended that the alteration of basis is inherently contrary to the Exemption Notifications and also prejudicial to the members of the Petitioners. The manufacturers came forward to make huge investments and incurred huge expenses on the basis that they would be entitled to refund of the entire duty paid by them, in cash. In cases, where the manufacturers were not using dutiable inputs, the refund was of 100% of the duty paid. In fact, in so far as the major activity of manufacturing Sponge Iron, DI Pipes, Bars and Sections are concerned, the prime raw material, namely, Iron Ore is exempt from duty.

47. The impugned Notifications have, without any note of caution or alert, completely altered the exemption by permitting it on actual value additions made by a manufacturer. The refund available for the same is equivalent to 39% of the total duty payable. Thus, the Petitioners are put to loss, losing out on the benefit of 61% of the total amount refundable to it for the manufacture of steel related products. The said loss is estimated around Rs. 100 crores, making the unit unviable and facing inevitable closure. The Petitioners submit that not only the basis of value addition unworkable, the same is in direct conflict to the scheme of the Exemption Notifications. Such substantial change to the basis ought not to have been done without according a reasonable opportunity of explaining the situations by the Respondent No. 1.

48. The counsel for the Petitioners has further contended that the action of Respondent No. 1 of issuing the impugned Notifications is in breach of the principles of Promissory Estoppel. The exemption Notifications persuaded the manufacturers to make investment in the Kutch areas in view of the promise of a complete exemption from duty of excise, actually paid by them. The exemption Notifications contained various eligibility conditions in respect of quantum of investment, period of setting up a New Industrial Unit, period for commencing commercial production etc. and the procedure to be complied with in order to avail the exemption. The manufacturers thus came forward, in aid of rehabilitation and redevelopment of the Kutch area of Gujarat, and set up their units. Without the exemption as originally promised, the investment made and

units set up would be completely unviable. While the said Notification dated 31-7-2001 came to be amended from time to time, and the date for setting up a New Industrial Unit and the date of commencement of commercial production came to be extended till 31-12-2005, the said promise of availability of 100% exemption of actual duty paid, for 5 years remained constant. The Petitioners submit that thus the promise contained in the Exemption Notifications, the intend and conduct of the authorities, including the Respondents, was to provide exemption for a period of 5 years, after which only, the manufacturers will join the usual duty regime. The impugned Notifications thus constitutes a breach and contravention of the promise by the Respondents, of their promise. Such breach would cause the investment made by the manufacturers useless and unviable and the Petitioners as well as the beneficiaries of the said investment, including the Kutch area, will suffer a death-blow. The Respondents are thus bound to continue their promise and not to change their stand, after having led the manufacturers to alter their position. The impugned Notifications are thus required to be struck down on the ground of Promissory Estoppel. The counsel for the Petitioners submitted that the exemption Notification solicited investment and participation of industry in redevelopment of Kutch area by offering benefits, since otherwise, the said area was not a desirable location for setting up commercial activity, especially, after the earthquake in 2001, given the lack of skilled labour, high power costs and scarcity of water. From the beginning, the representation being made was that the exemption would be available for a period, not exceeding 5 years. No clarification worth the name, when investments far exceeding the minimum requirement of Rs. 20 crore were made, was given that the period of 5 years is liable to be reduced and thus the manufacturers may proceed with caution. The Respondent No. 1 did not even consider it necessary to indicate to the manufacturers before withdrawing the exemption, as granted, vide the impugned Notification, knowing full well that such withdrawal would deal a death-blow to the manufacturing units who acted on the representation made by the Respondent No. 1 vide the Exemption Notification. The Petitioners further submitted that they are at the mercy of the Respondent No. 1 without any say or right of representation, even when the Respondent No. 1 completely negates its promise and render the investment made by the manufacturers useless, it was obligatory on the part of the Respondent No. 1 to give suitable opportunity to the manufacturers and take measures to protect them from the impending losses and closure before issuance of the impugned Notification and thus, the impugned notifications are unfair, prejudicial and unilaterally issued without consultation or consent and therefore, the same are required to be quashed and set aside. The counsel for the Petitioners further submits that the impugned Notification is ex facie an action to discriminate between those units that were set up early after the issuance of the said Notification dated 31-7-2001, than, those like the Petitioners, who have set up their unit later. The units set up early would have completed the entire benefit period of 5 years and there is no reason why the manufacturers who have complied with all conditions of the exemption Notifications not be given the same

treatment and benefit as others. In fact, by providing the exemption for a full term of 5 years, from the date of the said Notification dated 31-7-2001 and by extending the period for being eligible for exemption the Respondent No. 1 has led the manufacturers to believe that they too shall enjoy the benefits as promised for the full term of the exemption Notifications. In the circumstances, the impugned Notifications is violative of Article 14 of the Constitution of India and also seriously impairs the freedom conferred by Article 19(1)(g) of the Constitution of India and is also hit by the principles of legitimate expectation and is required to be struck down. The counsel for the Petitioners further submits that the impugned Notifications are unfair, unscientific, unworkable and treats all divergent situation with a common yardstick, making its application extremely harsh to a few and beneficial to others. The impugned Notifications clubs all types of factories in one category. The impugned Notifications also does not distinguish between efficient units employing state of the art technology as opposed to units employing old and archaic methods of manufacturing. The counsel for the Petitioners further submits that the impugned Notification ex-facie discriminates between those units who use only Iron Ore as an input as against such units who may be using other duty paid/non-duty paid inputs. The said classification of goods falling under the same chapter head on the basis of inputs, only for the purpose of refund under the exemption Notification, is clearly arbitrary. Nonetheless, the said classification is in essence an admission that benefit under the Exemption Notification is sought to be curtailed by impugned New Notification and said New Notification is falling under Sr. No. 8 of the table, stands to lose even if it uses a minimal percentage of inputs other than Iron Ore, without any justification, rationale or basis. Thus, in view of the aforesaid submissions, learned Counsel for the Petitioners submits that the petitions are required to be allowed by quashing and setting aside the impugned notifications.

49. Learned Counsel for the Petitioners have relied on the following authorities in support of their submissions.

- (i) U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others,
- (ii) Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others,
- (iii) 2006 (206) E.L.T. 6, MRP Ltd. v. Assistant Commissioner (Assessment) Sales Tax.
- (iv) Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others,
- (v) State of Punjab Vs. Nestle India Ltd. and Another,
- (vi) Dai-Ichi Karkaria Ltd. Vs. Union of India and Others,
- (vii) M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others,

(viii) Pournami Oil Mills and Others Vs. State of Kerala and Another,

(ix) Unicorn Industries Vs. Union of India (UOI),

50. The Respondents have mainly contended that the impugned Notifications are well within the powers and purview of Respondent No. 1 and therefore, they are just and proper. The public interest required the issuance of Notification dated 27-3-2008 and 10-6-2008. The Respondents have in their affidavit-in-reply contended that there was enough justification for issuance of Notifications impugned in these petitions. Counsel for the Respondent has invited this Court's attention to paragraph No. 7 of the affidavit-in-reply and contended that the provision of granting refund of cash paid portion of duty and eligibility of credit of entire amount of duty to the buyers of such excisable goods had prompted certain unscrupulous manufacturers to indulge in different types of tax evasion tactics. An analysis of cases booked by the Excise Department and the representations received from the Industry Associations has revealed that the following modus operandi is broadly being followed:

(i) The incorrect and false reporting of production by mere issuance of sale invoices without actual production of goods and supply/clearance of excisable goods, would result in availment of CENVAT credit by buyers of such excisable goods in other parts of the country without actual production being carried out and in absence of actual receipt of goods.

(ii) The incorrect and bogus reporting of production by such units in these areas whereas the actual production takes place elsewhere in the country.

(iii) Overvaluation of goods resulting in availment of excess of credit by buyer.

(iv) Goods are supplied by manufacturers, importers to these units without issuance of sales invoice and these are backed by bogus sale invoices issued by traders who do not undertake actual supply of goods. The actual supplier of these goods issues bogus duty paid invoices to other manufacturers who take credit based on such invoices without receipt of goods. To elaborate above modus operandi, the Respondents gave following illustration.

(1) A Unit in Kutch reports fictitious production of Rs. 100, which has actually not taken place and pays full duty of Rs. 16/- in cash. It is submitted that obviously there is no CENVAT credit available inasmuch as no input or raw material has been purchased by him. Such a purchaser claims full refund from the Government under the Scheme. No doubt one can argue that there is no loss to the Government as the Government has collected Rs. 16/- and refunded only the same amount. However, the fact remains that the said manufacturer issues sales invoice showing excise duty payment to another buyer/manufacturer in other parts of the country entitling and making the buyer eligible to take CENVAT credit of Rs. 16/-. The subsequent buyer/manufacturer utilizes this credit of Rs. 16/- for payment of excise duty on goods manufactured by him and as a result, he pays excise duty less in cash to the extent of Rs. 16/- for which CENVAT credit

though ineligible (on account of actual non-production of goods) is availed by him. In this way, there is a clear loss to the Government of Rs. 16/- and the manufacturer in Kutch illegally gains that amount as he is recovering this amount from his customers. Learned Counsel for the Respondent has also submitted that as a result of such modification which has been considered by the Central Government to be expedient in public interest and in the interest of the Revenue, such a modification has been brought out. The effect of such modification is as follows:

(i) It is submitted that genuine manufacturers are not likely to be affected inasmuch as they would be getting the refund of same amount under the scheme before and after the modification, because if the inputs are duty paid then the refund under the earlier scheme and modified scheme should be of the same amount.

(ii) Unscrupulous manufacturers reporting bogus production and who are resorting to fictitious purchase of inputs on the strength of invoices which are non-duty paid invoices would be getting excise duty refund of duty paid on actual value addition made by such manufacturers who have industries in these specified areas.

(iii) The excise duty exemption would be available only to the extent of actual value addition made in these areas and not for the value of raw material manufactured in other part of the country, which are received by the units in these areas without cover of duty paying invoices. The counsel for the Respondent has justified the methodology of Value Addition and submitted that in order to keep the scheme simple and litigation free, the modified scheme has prescribed value addition percentages for broad industry groups based on all India average of percentage of duty paid in cash and through CENVAT credit. In other words, all India percentage of PLA payment by excise paying units in the country has been considered as value addition for an industry. However, in case of few units the said percentage may be at variance with actual value addition carried out by the unit. Keeping this eventuality in mind, option is also made available to a manufacturer in specified areas to have the actual value addition calculated in his case from his financial records. These facts evidently show that the action of the Government which is sought to be challenged is neither illegal nor arbitrary nor irrational and therefore, the petitions are required to be dismissed. Learned Counsel for the Respondents has invited this Court's attention in case of *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, more particularly para 20 of the said judgment, on the plea of promissory estoppel and submitted that when the Central Government had withdrawn a time bound exemption notification No. 66 dated 15-3-1991, withdrawal notification No. 205 dated 16-10-1980 was issued after examining the scope and ambit of the doctrine of promissory estoppel. Learned Counsel for the Respondent has also invited this Court's attention in case of *Excise Commissioner v. Ram Kumar*, reported in 1976 SC 2237 and in case of *M.P.*

Sugar Mills case and submitted that the Courts will only bind the Government by its promise to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government acts in its governmental, public or sovereign capacity. It is further held in the said judgment in para 22 that it is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". It is further held in the said judgment that the courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. It is also held that the Government has to be left free to determine the priorities in the matter of utilization of finances and to act in the public interest while issuing or modifying or withdrawing an exemption Notification. It is also held in the said judgment that the power of exemption is with a view to enable the Government to regulate, control and promote the industries and industrial productions in the country. Where the Government on the basis of the material available before it, bona fide, is satisfied that the "public interest" would be served by either granting exemption or by withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so.

51. Learned Counsel for the Respondent has relied on the decision in case of D.P.F. Textiles Ltd. v. Union of India, reported in Civil Appeal No. 1742 of 1984 decided on 12-9-1996 United Copiex (India) Pvt. Ltd. Vs. Commissioner of Sales Tax, wherein, the Supreme Court while reiterating the decision referred to in Kasinka Trading and Anr. v. Union of India and Anr., has further held that though the judgment do not expressly refer to the public interest which moved the Respondents to curtail the period of an exemption Notification but, in the circumstances, it must be assumed that such public interest exists. That in yet another judgment rendered in the case of Dai-Ichi Karkaria Ltd. Vs. Union of India and Others, it is held that doctrine of promissory estoppel, is not applicable. That in respect of exemption for modification made by the Government, the doctrine of promissory estoppel, will not be applicable if the change in stand of the Government is made on account of public policy. The said judgment also reiterates the settled legal position as enunciated by the Hon'ble Supreme Court in Kasinka Trading v. Union of India.

52. Learned Counsel for the Respondent has also relied upon the decision in case of R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others, in the context of consideration of a separate industrial policy announced by the Government of India for North-Eastern Region of the country, which proposed to stimulate "Synergetic" development of industries in the region by giving a package of incentives which included exemption from excise duties, it is held that the competence of the Parliament and the State Legislature to repeal, amend or supersede an exemption Notification is unquestionable. It is further held that as far as fiscal legislation is concerned, the limitation is implicit in Article 265 which provides that no tax shall be levied or collected except by authority of law. The

Hon''ble Supreme Court in context of the exemption Notification that was issued in the said case u/s 5A of the Central Excise Act held that such notification was issued u/s 5A of the Central Excise Act, 1944 as delegate of Parliament. It is further held that in a Cabinet form of Government, the Executive is expected to reflect the views of the Legislature since it would be impossible for the Legislatures to deal in detail and cater to the innumerable problems which may arise in implementing a statute.

53. Learned Counsel for the Respondent also relied upon the decision in case of R.K. Garg and Others Vs. Union of India (UOI) and Others, wherein, the Hon''ble [Court] in para-8 observed as under:

"Para-8: The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry", "that exact wisdom and nice adaptation of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterrupted experience." Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Co. be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any Legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must thereafter adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse of any of its provisions come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues."

54. Learned Counsel for the Respondent has also invited this Court's attention to a judgment reported in 1975 S.C. 994, wherein, the Supreme Court held that a classification made by Legislature is almost always sustained because, the Courts with respect, would lack both expertise familiarity with the local problems so necessary for making considered decisions with respect to raising and disposing public revenue. It is submitted that such action taken by the authorities on the

basis of knowledge and information are valid. In view of above submission, learned Counsel for the Respondent submitted that petitions deserve to be dismissed.

55. This Court has heard learned Counsel for the parties and perused the documents on record.

56. The list of authorities on the aspect of promissory estoppel is as under.

57. Let us first summarize the position of law as on date with regard to plea of promissory estoppel against the State.

- (i) Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.,
- (ii) Banwari Lal and Others Vs. Sukhdarshan Dayal,
- (iii) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,
- (iv) Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another,
- (v) 1981 SCC 11 in case of Jit Ram v. Union of India;
- (vi) R.K. Garg and Others Vs. Union of India (UOI) and Others,
- (vii) Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,
- (viii) Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.,
- (ix) Shri Bakul Oil Industries and Another Vs. State of Gujarat and Another,
- (x) 1990 (3) SCC 609, in case of R. Vora v. Board of Trustees;
- (xi) Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another,
- (xii) Union of India and others Vs. M/s. Jalyan Udyog and another,
- (xiii) Kasinka Trading and another, etc. etc. Vs. Union of India and another,
- (xiv) S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others,
- (xv) Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc.,
- (xvi) Tamil Nadu Electricity Board and Another Vs. Status Spinning Mills Ltd. and Another,
- (xvii) M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others,
- (xviii) Sales Tax Officer and Another Vs. Shree Durga Oil Mills and Another,
- (xix) 1999 (107) E.L.T. 582, in case of Union of India v. Bharat Commerce & Industries;

(xx) 1999 (110) E.L.T. 3 (S.C), in case of Indian Express Newspapers;

(xxi) Dai-Ichi Karkaria Ltd. Vs. Union of India and Others,

58. The Apex Court has in case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, observed as under: (The most relevant paras are extracted from the judgment so as to avoid any possibility of missing out real ratio of the decision though it has effect of lengthening the judgment)

"Para-19. When we turn to the Indian law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel, has also been applied against the Government and the defense based on executive necessity has been categorically negated. It is remarkable that as far back as 1880, long before the doctrine of promissory estoppel, was formulated by Denning, J., in England, a Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel, and recognized a cause of action founded upon it in the Ganges Mfg. C. v. Sourujumull, ILR (1880) Cal 669. The doctrine of promissory estoppel, was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay v. Secy. of State, ILR(1905) 29 Bom 580.

20. The facts of this last-mentioned case in Municipal Corporation of Bombay v. Secy. of State (supra) are a little interesting and it would be profitable to refer to them. The Government of Bombay, with a view to constructing an arterial road, requested the Municipal Commissioner to remove certain fish and vegetable markets which obstructed the construction of the proposed road. The Municipal Commissioner replied that the market were vested in the Corporation of Justices but that he was willing to vacate certain municipal stables which occupied a portion of the proposed site, if the Government would rent other land mentioned in his letter, to the Municipality at a nominal rent, the Municipality undertaking to bear the expenses of levelling the same and permit the Municipality to erect on such land "stables of wood and iron with rubble foundation to be removed at six months" notice on other suitable ground being provided by Govt." The Govt. accepted the suggestion of the Municipal Commissioner and sanctioned the application of the Municipal Commissioner for a site for stabling on the terms set out above and the Municipal Commissioner thereafter entered into possession of the land and constructed stables, workshops and chawls on the same at considerable expense. Twenty-four years later the Government served a notice on the Municipal Commissioner determining the tenancy and requesting the Municipal Commissioner to deliver possession of the land within six months and in the meantime to pay rent at the rate of Rs. 12,000 per month. The Municipal Corporation declined to hand over possession of the land or to pay the higher rent and the Secretary of State for India thereupon filed a suit against the

Municipal Corporation for a declaration that the tenancy of the Municipality stood determined and for an order directing the municipality to pay rent at the rate of Rs. 12,000 per month. The suit was resisted by the Municipal Corporation on the ground that the events which had transpired had created an equity in favour of the Municipality which afforded an answer to the claim of the Government to eject the Municipality. This defence was upheld by a Division Bench of the High Court and Jenkins, C.J., speaking on behalf of the Division Bench, pointed out that, in view of the following facts, namely,

".... the Municipality gave up the old stables, levelled the ground, and erected the moveable stables in 1866 in the belief that they had against the Government an absolute right not to be turned out until not only the expiration of six months notice, but also other suitable ground was furnished: that this belief is referable to an expectation created by the Government that their enjoyment of the land would be in accordance with this belief: and that the Government knew that the Municipality were acting in this belief so created."

an equity was created in favour of the Municipality which entitled it "to appeal to the Court for its aid in assisting them, to resist the Secretary of State's claim that they shall be ejected from the ground". The learned Chief Justice pointed out that the doctrine which he was applying took its origin "from the jurisdiction assumed by Courts of Equity to intervene in the case of or to prevent fraud" and after referring to *Ramsden v. Dyson*, (1866) 1 HL 170 observed that the Crown also came within the range of this equity. This decision of the Bombay High Court is a clear authority for the proposition that it is open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution. That is how this decision has in fact been interpreted by this Court in *Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.*,

21. We don't find any decision of importance thereafter on the subject of promissory estoppel, until we come to the decision of this Court in *Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others*, The facts giving rise to this case were that in 1865 the Government of Bombay called upon the predecessor in title of the Municipal Corporation of Bombay to remove old markets from a certain site and vacate it and on the application of the Municipal Commissioner, the Government passed a resolution approving and authorizing the grant of another site to the Municipality. The resolution stated further that "the Government do not consider that any rent should be charged to the Municipality as the markets will be like other public buildings, for the benefit of the whole community."

The Municipal Corporation gave up the site on which the old markets were situated and spent a sum of Rs. 17 lakhs in erecting and maintaining markets on the new site. In 1940 the Collector of Bombay assessed the new site to land revenue and the Municipal Corporation thereupon filed a suit for a declaration

that the order of assessment was ultra vires and it was entitled to hold the land for ever without payment of any assessment. The High Court of Bombay held that the Government had lost its right to assess the land in question by reason of the equity arising on the facts of the case in favour of the Municipal Corporation and there was thus a limitation on the right of the Government to assess u/s 8 of the Bombay City Land Revenue Act. On appeal by the Collector to this Court, the majority Judges held that the Government was not, under the circumstances of the case, entitled to assess land revenue on the land in question, because the Municipal Corporation had taken possession of the land in terms of the Government resolution and had continued in such possession openly, uninterruptedly and of right for over seventy years and thereby acquired the limited title it had been prescribing for during the period, that is to say, the right to hold the land in perpetuity free of rent. Chandrasekhara Aiyer, J., agreed with the conclusion reached by the majority but rested his decision on the doctrine of promissory estoppel. He pointed out that the Government could not be allowed to go back on the representation made by it and stressed the point in the form of an interrogation by asking:

"if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed?"

He observed that even if the resolution of the Government amounted merely to "the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfill it. Whether it is the equity recognized in Ramsden's case (supra) or it is some other form of equity, is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power." This was of course the solitary view of Chandrasekhara Aiyer, J., but it was approved by this Court in no uncertain terms in Indo-Afghan Agencies case (supra).

22. Then we come to the celebrated decision of this Court in the Indo-Afghan Agencies case (AIR 1968 SC 718) (supra). It was in this case that the doctrine of promissory estoppel, found its most eloquent exposition. We may briefly state the facts in order to appreciate the ratio of the decision. Indo-Afghan Agencies Ltd. who were the Respondents before the Court, action in reliance on the Export Promotion Scheme issued by the Central Government, exported woollen goods to Afghanistan and on the basis of their exports claimed to be entitled to obtain from the Textile Commissioner import entitlement certificate for the full f.o.b. value of the goods exported as provided in the scheme. The Scheme was not a statutory Scheme having the force of law but it provided that an exporter of woollen goods would be entitled to import raw material of the total amount equal to 100% of the f.o.b. value of his exports. The Respondents contended that, relying on the promise contained in the Scheme, they had exported woollen goods to Afghanistan and were, therefore, entitled to enforce the promise

against the Government and to obtain import entitlement certificate for the full f.o.b. value of the goods exported, on the principle of promissory estoppel. This contention was sought to be answered on behalf of the Government by pleading the doctrine of executive necessity and the argument of the Government based on this doctrine was that it is not competent for the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises and no promise or undertaking can be held to be binding on the Government so as to hamper its freedom of executive action. Certain observations of Rowlatt, J., in *Rederiaktiabolaget Amphitrite v. R.* (1921) 3 KB 500 (supra) were sought to be pressed into service on behalf of the Government in support of this argument. We have already referred to these observations earlier and we need not reproduce them over again. These observations undoubtedly supported the contention of the Government but it was pointed out by this Court that these observations were disapproved by Denning, J., in *Robertson v. Minister of Pensions* (1949) 1 KB 227 (supra) where the learned Judge said that

"the Crown cannot escape by praying in aid of the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action.....the defence of the executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect or that is the true meaning of the contract"

and this statement of Denning, J., was to be preferred as laying down the correct law on the subject. Shah, J., speaking on behalf of the Court, observed (at p. 723 of AIR SC):

"We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law - common or statute - the Courts will be competent to and indeed would be bound to, protect the rights of the aggrieved citizen".

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

23. It was also contended on behalf of the Government that if the Government were held bound by every representation made by it regarding its intention, when the exporters have acted in the manner they were invited to act, the result would be that the Government would be bound by a contractual obligation even

though no formal contract in the manner required by Article 299 was executed. But this contention was negated and it was pointed out by this Court that the Respondents

"are not seeking to enforce any contractual right: they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme, and we are of the view that even if the Scheme is executive in character, the Respondents who were aggrieved because of the failure to carry out the terms of the Scheme were entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out".

It was thus laid down that a party who has, acted in reliance on a promise made by the Government, altered his position, is entitled to enforce the promise against the Government, even though the promise is not in the form of a formal contract as required by Article 299 and that Article does not militate against the applicability of the doctrine of promissory estoppel, against the Government.

24. This Court finally, after referring to the decisions in the *Ganges Mfg. Co. v. Surujmull* ILR (1880) Cal 669 (supra), *Municipal Corporation of the City of Bombay v. Secy. of State for India* ILR(1905) 29 Bom. 580 (supra) and *Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others*, (supra), summed up the position as follows:

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisalment of the circumstances in which the obligation has arisen."

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Every one is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel? Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is

not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations, but, let it be said to the eternal glory of this Court, this doctrine was emphatically negated in the Indo-Afghan Agencies case (AIR 1968 SC 718) and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel, and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the Legislatures must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel, is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel, is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel, would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can be Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisalment of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what

are the subsequent events on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability, the Government would have to show what precisely is the changed policy and also its reason and justification so the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If however, the promisee cannot resume his position, the promise could become final and irrevocable. Vide *Ajayi v. Birscoe* (1964) 3 All ER 556.

25. The doctrine of promissory estoppel, was also held applicable against a public authority like a Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, The question which arose in this case was whether the Ulhas Nagar Municipal Council could be compelled to carry out a promise made by its predecessor Municipality that the factories in the industrial area within its jurisdiction would be exempt from payment of octroi for seven years from the date of the levy. The Appellant -company, in the belief induced by the assurance and undertaking given by the predecessor Municipality that its factory would be exempt from octroi for a period of seven years, expanded its activities, but when the Municipal Council came into being and took over the administration of the former Municipality, it sought to levy octroi duty on the Appellant -company. The Appellant -company thereupon filed a writ petition under Article 226 of the Constitution in the High Court of Bombay to restrain the Municipal Council from enforcing the levy of octroi duty in breach of the promise made by the predecessor Municipality. The High Court dismissed the petition in limine but, on appeal, this Court took the view that this was a case which required consideration and should have been admitted by the High Court. Shah J., speaking on behalf of the Court, pointed out (at p. 1024 of AIR):

"Public bodies are as much bound as private individuals to carry out

representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a person who acts upon the promise: when the law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be if the contract be not in that form be enforced against it in appropriate cases in equity."

The learned Judge then referred to the decision in the Indo-Afghan Agencies case (AIR 1968 SC 718) and observed that in that case it was laid down by this Court that "the Government is not exempt from the equity arising out of the acts done by citizens to their prejudice relying upon the representations as to its future conduct made by the Government." It was also pointed by the learned Judge that in the Indo-Afghan Agencies case this Court approved of the observations made by Denning J. in *Robertson v. Minister of Pensions* (1949) 1 KB 227 (supra) rejecting the doctrine of executive necessity and held them to be applicable in India. The learned Judge concluded by saying in words pregnant in the hope and meaning for democracy:

"If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

This Court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel, is concerned.

26. We then come to another important decision of this Court in *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, where the doctrine of promissory estoppel, was once again affirmed by this Court. Hedge, J. speaking on behalf of the Court, pointed out:

"Estoppel" is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel, i.e. promissory estoppel, has come to be recognised by the courts in this country as well as in England. The full implication of "promissory estoppel." is yet to be spelled out."

The learned Judge, after referring to the decisions in *High Trees case*, (1956 1 All ER 256) *Robertson v. Minister of Pensions* (1949) 1 KB 227 (supra) and the *Indo-Afghan Agencies case* (AIR 1968 SC 718) pointed out that

"the rule laid down in these decisions undoubtedly advances the cause of justice and hence we have no hesitation in accepting it."

27. We must also refer to the decision of this Court in *M. Ramanatha Pillai Vs. The State of Kerala and Another*, because that was a decision strongly relied upon on behalf of the State for negating the applicability of the doctrine of estoppel, against the Government. This was a case where the Appellant was appointed to a temporary post and on the post being abolished, the service of

the Appellant was terminated. The Appellant challenged the validity of termination of service, inter alia, on the ground that the Government was precluded from abolishing the post and terminating the service, on the principle of promissory estoppel. This ground based on the doctrine of promissory estoppel, was negated and it was pointed out by the Court that the Appellant knew that the post was temporary, suggesting clearly that the Appellant could not possibly be led into the belief that the post would not be abolished. If the post was temporary to the knowledge of the Appellant, it is obvious that the Appellant knew that the post would be liable to be abolished at any time and if that be so, there could be no factual basis for invoking, the doctrine of promissory estoppel, for the purpose of precluding the Government from abolishing the post. This view taken by the Court was sufficient to dispose of the contention based on promissory estoppel, and it was not necessary to say anything more about it, but the Court proceeded to cite a passage from American Jurisprudence, Vol. 28 (2 d) at 783, paragraph 123 and observed that the High Court rightly held

"that the courts exclude the operation of the doctrine of estoppel, when it is found that the authority against whom estoppel, is pleaded has owed a duty to the public against whom the estoppel, cannot fairly operate."

It was this observation which was heavily relied upon on behalf of the State but we fail to see how it can assist the contention of the State. In the first place, this observation was clearly obiter, since, as pointed out by us, there was on the facts of the present case no scope for the applicability of the doctrine of promissory estoppel. Secondly, this observation was based upon a quotation from the passage in para 123 at page 783 of Volume 28 of American Jurisprudence (2 a), but unfortunately this quotation was incomplete and it overlooked, perhaps inadvertently, the following two important sentences at the commencement of the paragraph, which clearly show that even in the United States the doctrine of promissory estoppel, is applied against the State "when justified by the facts":

"There is considerable dispute as to the application of estoppel, with respect to the State. While it is said that equitable estoppel, will be invoked against the State when justified by the facts, clearly the doctrine of estoppel, should not be lightly invoked against the State."

(emphasis supplied).

Even the truncated passage quoted by the Court recognised in the last sentence that though, as a general rule, the doctrine of promissory estoppel, would not be applied against the State in its governmental, public or sovereign capacity, the Court would unhesitatingly allow the doctrine to be invoked in cases where it is necessary in order "to prevent fraud or manifest injustice." This passage leaves no doubt that the doctrine of promissory estoppel, may be applied against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. It is difficult to imagine that the Court

citing this passage with approval could have possibly intended to lay down that in no case can the doctrine of promissory estoppel, be invoked against the Government. Lastly, a proper reading of the observation of the Court clearly shows that what the Court intended to say was that where the Government owes a duty to the public to act differently, promissory estoppel, cannot be invoked to prevent the Government from doing so. This proposition is unexceptionable, because where the Government owes a duty to the public to act in a particular manner, and here obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel, cannot be invoked for preventing the Government from actioning in discharge of its duty under the law. The doctrine of promissory estoppel, cannot be applied in teeth of an obligation or liability imposed by law.

28. &.. It may also be noted that promissory estoppel, cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel, against the exercise of legislative power. The Legislature can never be precluded from exercising its legislative function by resort to the doctrine of promissory estoppel. Vide State of Kerala and Another Vs. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.,

(emphasis supplied)

59. The Apex Court in case of Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, has observed as under:

"56. The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty. Halsbury has noted this sensible nicety.

"Where a statute, enacted for the benefit of a section of the public, imposes a duty of positive kind, the person charged with the performance of the duty, cannot by estoppel, be prevented from exercising his statutory powers."

[Maritime Elec. Co. Ltd. v. General Diaries Ltd. 1937 AC 610 and Halsburys Laws of England para 1515.]

"A Petitioner in a divorce suit cannot obtain relief simply because the Respondent is estopped from denying the charges, as the court has a statutory duty to inquiry into the truth of a petition." [Hudson v. Hudson (1948) P. 292 and Halsburys Laws of England Para 1515].

The luminous footnote cites rulings and states that -

"This rule probably also applies where the statute bestows a discretion rather than imposing a duty."

(Emphasis supplied)

60. The Apex Court in case of Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, made observations which were not in conformity with the

view expressed by the Apex Court earlier in case of Motilal Padampat (supra), however, few observations made in this decision also deserve to be cited for highlighting and underlining the consistency of approach of the Courts and the Benches so far as the principle of promissory estoppel and its applicability to the executive legislative and statutory function of the "State" are concerned.

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

(emphasis supplied)

It is important to note at this stage that in subsequent ruling in case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., three judges Bench rendered its judgment on 3-9-1985, overruled many of the observations in the decision in case of Jit Ram (supra) however some observations in case of Union of India v. Godfrey Phillips (Supra) read as under:

"14. Of course we must make it clear, and that is also laid down in Motilal Sugar Mills case (AIR 1978 SC 621) (supra), that there can be no promissory estoppel, against the Legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel, cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. 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. This aspect has been dealt with fully in Motilal Sugar Mills case (supra) and we find ourselves wholly in agreement with what has been said in that decision on

this point."

(emphasis supplied)

61. The Apex Court in case of Shri Bakul Oil Industries and Another Vs. State of Gujarat and Another, observed as under:

"11. For the purposes of this appeal we do not think it necessary to go into the question whether the earlier Notification had created existing rights and whether the impugned Notification had the effect of only taking away the existing rights. We are taking this view because we have already pointed out that the State Government was under no obligation to grant exemption and that the granting of tax exemption was only by way of a concession. Having regard to this conclusion there is no need for any probe to be made to determine whether the Notification had created vested rights or only existing rights. The exemption granted by the Government as already stated, was only by way of concession for encouraging entrepreneurs to start industries in rural and undeveloped areas and as such it was always open to the State Government to withdraw or revoke the concession. We must, however, observe that the power of revocation or withdrawal would be subject to one limitation viz. the power cannot be exercised in violation of the rule of Promissory Estoppel. In other words, the Government can withdraw an exemption granted by it earlier if such withdrawal could be done without offending the rule of Promissory Estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation having regard to the fact that Promissory Estoppel cannot be claimed against a statute. In the present case the Appellants had not raised the plea of Promissory Estoppel before the High Court. This is understandable because the principle of Promissory Estoppel had not found crystallized acceptance by courts of law when the Special Civil Application came to be heard by the High Court in the year 1972. Be that as it may, we find that the Appellants have not made out any case of Promissory Estoppel either on the basis of the averments made in their petition or with reference to the facts which have emerged from the affidavits filed in the case. In order to claim the benefit of Promissory Estoppel the Appellants must establish:

(i) that a representation was made to grant the exemption for a particular period to a new industry established in view of the representation held out by the State Government; and

(ii) that the Appellants had established the new industry acting upon the representation made by the State Government.

The facts in the present case do not go to establish that the Appellants had put up the new industry in question subsequent to and in pursuance of the promise

held out by Notification dated 29-4-1970 granting exemption. Putting it differently the Appellants have not proved that but for the concession offered in the first Notification, they would not have established the industry in question and that the entire venture was attributable only to the inducement offered by the Government. From the facts set out supra it may be seen that the first Notification was made on 29-4-1970 while the oil mill constructed by the Appellant came to be commissioned on 17-5-1970 itself. It is not the Appellants' case and indeed it can never be so contended that they launched the project and commenced the construction of the oil mill only after the Notification of 29-4-1970 was made and that the entire construction was completed in about two weeks' time so as to enable the Appellants to commission the plant on 17-7-1970. What is envisaged under the Notification is that the project must have been undertaken and construction work itself should have been started in response to and acting on the Notification. It is not sufficient to rely on the commissioning of an industry after completion of construction work which had been commenced long before the Notification was made by the Government. In respect of such an industry as the present one, the issuance of a Notification granting tax exemption would only constitute a fortuitous circumstance and by no stretch of imagination can it ever be said that the commissioning of the industry was directly the outcome of the Government's Notification granting tax exemption. The concession offered by the Government under the first Notification dated 29-4-70 did not prescribe any period or time limit, and hence the Appellant cannot claim anything more than the benefit of the Notification for such period the exemption was in force. Once the Government decided, in exercise of the powers vested in it, to revoke the original Notification, the benefit of exemption from sales tax enjoyed by the Appellant came to an automatic end. The period of five years mentioned in the second Notification will have no reference to the Appellants' oil mill commissioned much earlier because the Notification had only prospective effect. We have, therefore, to affirm the view of the High Court that the Appellants will be entitled to the benefit of tax exemption only for the limited period during which the concession was offered by the Government." (emphasis supplied)

62. The Apex Court in case of *Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another*, observed that the promise to refund sales tax is unconstitutional and against public policy - Not enforceable in Court.

63. The Apex Court in case of *Kasinka Trading and another, etc. etc. Vs. Union of India and another*, has observed as under:

"&.... The exemption Notification, was therefore, issued with a view to offset those losses to the extent possible. The exemption Notification was not issued as a potential source of extra profit for the importer. Again at the time when the Notification was withdrawn by the Government there was no scope for any loss to be suffered by the importers. The exemption Notification did not hold out to the Appellants any enforceable promise. Moreover, the Notification cannot be said

to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable, to invoke the doctrine of promissory estoppel, against the State. A Notification issued u/s 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said Notification. It cannot, therefore be said that even if the public interest so demanded and the Central Government was satisfied any further, it could still not withdraw the exemption. In such a case, merely by mentioning the date as 31st March, 1981, as the date up to which the exemption Notification was to be operative, no unequivocal representation could be said to have been made that it could not be rescinded or modified before that date even if the Government was satisfied that it was necessary in the public interest to rescind it. Since, the Notification had been issued u/s 25 of the Act, the very same power was available to the authority for rescinding or modifying that Notification and the dealer ought to have known that the said Notification was capable of or liable to be revoked, modified or rescinded at any time even before the expiry of 31st March if the "public interest" so demanded. Moreover, it was not permissible to postpone the compulsions of "public interest" till after 31st March, 1981 if the Government is satisfied as to the change in the circumstances before that date." (Emphasis supplied)

64. The Apex Court in the case of S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others, also reported in S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others, has observed as under:

"10. So far as the argument of promissory estoppel, is concerned, it is equally unsustainable in the facts and circumstances of the case. Having regard to the nature of the advance licence - import first and export later -there is no room for this argument. The discretion inhering in the authority to take into consideration the exports effected after the date of filing of the application for advance licence does not detract from its essential character, as explained hereinabove. We may also mention that no precise data has been furnished by the Appellant in support of the said plea. In the absence of such data, the plea of promissory estoppel, is misconceived. The Appellant has to establish the various ingredients of this rule, as enumerated by this Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and other subsequent decisions. It is not a pure question of law."

(Emphasis supplied)

65. The Apex Court in case of Pawan Alloys and Casting Pvt. Ltd. v. U.P. State Electricity Board reported in AIR 1997 3910 observed as under:

"24. Shri Dave, learned Senior Counsel for the Board next contended that the Board in exercise of its statutory powers had earlier decided to grant rebate of 10% on the bills of electricity consumed by new industries. In the exercise of the

same statutory power it was open to the Board to withdraw the said concession or rebate on the ground of public policy and doctrine of promissory estoppel, cannot be pressed in service for thwarting such an exercise by the Board. For supporting this contention he vehemently pressed in service two decisions of this Court in the case of Kasinka Trading and another, etc. etc. Vs. Union of India and another, and in the case of Shrijee Sales Corporation and Another Vs. Union of India (UOI), In fact these two decisions were the sheet anchor of the challenge mounted by Shri Dave for the Board against the finding of the High Court on Issue No. 1. We, therefore, now proceed to deal with these decisions.

25. In the case of Kasinka Trading and another, etc. etc. Vs. Union of India and another, (supra), a Bench of two learned Judges of this Court consisting of M.N. Venkatachaliah, C.J. and Dr. A.S. Anand, J., had to consider the question whether a notification issued u/s 25 of the Customs Act, 1962 granting complete exemption from payment of customs duty to PVC resin imported into India by manufacturers of certain products requiring the said resin as one of the raw materials, which was issued in public interest and which had stated that it would remain in force up to and inclusive of 31st March, 1981 could be withdrawn before the expiry of the said period by fresh notification issued by the Government in exercise of the very same power u/s 25 of the Customs Act. This Court speaking through Dr. Anand, J. took the view that as the said notification was issued in public interest it could be withdrawn even before the time fixed therein for its operation also in public interest and while issuing such a notification no promise can be said to have been held out or any representation made to the importers in general on the basis of which they could insist on the doctrine of promissory estoppel, that the customs duty exemption granted earlier by the first notification could not be reduced by the second one. The following pertinent observations are found in paragraphs 11 and 12 (of SCC): (Paras 12 and 13 of AIR) of the Report:

"The doctrine of promissory estoppel, or equitable estoppel, is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted 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 or are intended to take place between the parties.

It has been settled by this Court that the doctrine of promissory estoppel, is applicable against the Government also particularly where it is necessary to

prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the 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". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel, cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the Court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."

It may, however, be mentioned that in paragraph 21 of the Report the Court has observed that the notification which was impugned before it was not designed or issued to induce the Appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued by the Central Government "being satisfied that it was necessary in the public interest so to do". Strictly speaking, therefore, the notification could not be said to have extended any "representation" much less a "promise" to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel, against the State. It must, therefore, be held that the aforesaid decision had clearly proceeded on the basis that by issuing the earlier notification u/s 25 of the Customs Act no promise was held out to any of the importers that the notification's life will not be curtailed earlier. Nor was the issuance of the notification based on any claim of incentives to be offered to anyone. It was issued in exercise of statutory powers vested in the Government which could be exercised from time-to-time in public interest. Earlier the public interest might have required issuance of such a notification granting cent per cent exemption from customs duty on import of PVC resin. Under changed circumstances public interest itself required reduction of such an exemption and as no promise was held out that this could not be done at any time the Court on the facts of that case justifiably rejected the plea of promissory estoppel. It is also to be observed that the said notification was issued in exercise of sovereign taxing power and had created no legal relationship between the authority issuing the notification on the one hand and the prospective importers of PVC resin on the other. The said decision is not an authority for the proposition that even if a claim of exemption from import duty

was resorted to in public interest by way of an incentive for a class of importers and even though such public interest continued to subsist during the currency of such an exemption notification and that promisees for whose benefit such exemption was granted had changed their position relying on the said exemption notification, it could still be withdrawn before the time mentioned therein even though public interest did not require the said exercise to be undertaken and even though there were subsisting equities in favour of the promisee-importers. As such a situation had not arisen in that case it was not adjudicated upon.

26. The said decision, therefore, cannot be of any real assistance to learned Senior Counsel Shri Dave for the Respondent-Board on the facts of the present group of matters. In the present case, as we have seen earlier a clear-cut scheme of incentives for new industries was put forward by the Board presumably at the behest of the U.P. Government so that more and more industries could be attracted to State of U.P. The Board also in its wisdom adopted the said scheme of incentives while fixing schedule of tariff rates as that was also in the interest of the Board for the obvious reason that thereby more and more new industries as consumers of high power electricity would be attracted to the region and would be paying higher electricity rates/charges to the Board.

27. Shri Dave next invited our attention to a three-Judge Bench judgment of this Court in the case of *Shrijee Sales Corporation and Another Vs. Union of India (UOI)*, (supra), wherein A.M. Ahmadi, C.J., speaking for the Bench considered the correctness of the aforesaid decision in *Kasinka Trading (AIR1995 SCW 680)* (supra). As the decision in *Shrijee Sales Corporation (supra)* has laid down the parameters of the field in which the doctrine of promissory estoppel, can apply it is necessary to closely refer to the relevant observations found in the said judgment. It may be mentioned that the very same customs exemption notification which was considered by the Bench of two learned Judges in *Kasinka Trading (supra)* was considered by a three-Judge Bench in *Shrijee Sales Corporation (supra)*. While upholding the said notification Ahmadi, C.J., in paragraphs 3 and 4 of the Report observed as under:

"It is not necessary for us to go into a historical analysis of the case-law relating to promissory estoppel, against the Government. Suffice it to say that the principle of promissory estoppel, is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exists. The law on this aspect has been emphatically laid down in the case of *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, The portion relevant for our purpose is extracted below:

"It is only if the Court is satisfied, on proper and adequate material placed by the

Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Emmanuel Ayodeji Ajayi v. Briscoe, (1964) 3 All ER 556

Two propositions follow from the above analysis:

- (1) The determination of applicability of promissory estoppel, against public authority/Government hinges upon balance of equity or "public interest".
- (2) It is the Court which has to determine whether the Government should be held exempt from the liability of the "promise" or "representation".

In the present case, the first notification exempting the customs duty on PVC itself recites ... Central Government being satisfied that it is necessary in public interest to do so In the notification issued later which gave rise to the present cause of action, the same recitation is present."

It is, therefore, obvious that even though it may be found that the Government or any other competent authority had held out any promise on the basis of which the promisee might have acted, if public interest required recall of such a promise and such a public interest outweighed the interest of the promisee then the doctrine of promissory estoppel, against the Government would lose its rigour and cannot be of any avail to such promisee. In the aforesaid decision the further contention canvassed on behalf of the Appellant -promisee was also examined. That centered round the question whether the notification having fixed a time limit for its operation could be rescinded prior to the expiry of the said period. Rejecting the said contention and upholding the right of the authorities to recall such a notification even earlier it was observed in paragraph 7 of the Report that once public interest is accepted as the superior equity which can override individual equity, the principle should be applicable even in cases where a period has been indicated. It was further observed that the Government is competent to resile from a promise even if there is no manifest public interest involved, provided, of course, no one is put in any adverse situation which

cannot be rectified. To adopt the line of reasoning in Emmanuel Ayodeji Ajayi v. Briscoe quoted in M.P. Sugar Mills even where there is no such overriding public interest, it may still be within the competence of the Government to resile from the promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, provided, of course, it is possible for the promisee to restore the status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable.

(emphasis supplied)

66. The Apex Court in case of Sales Tax Officer and Another Vs. Shree Durga Oil Mills and Another, observed as under:

13. There are several reasons why we are unable to uphold the contention based on the principle of promissory estoppel, raised by the Respondents in this case. No particulars have been given by the Respondents as to when the decision was taken to set up the industry, the date when the loan was obtained from the bank, and exactly when land was purchased or the plant and machinery were acquired for setting up of the small scale industrial unit. The IPR on which reliance has been placed by the Respondent was issued on 18-7-1979. A provisional registration certificate in respect of the Respondent's industry was issued on 28-11-1979. The Respondent has not given factual details of how in the short span of about four months, it set up its industry on the basis of the IPR.

14. Moreover, the Government may change its industrial policy if the situation so warrants. Merely because, the IPR was announced for the period 1979-1983, it does not mean that the Government cannot amend or change the policy under any circumstance. As a matter of fact, in this case the Government had published another IPR on 31-7-1980 modifying the earlier IPR. The vires of the second IPR has not been challenged. The two IPRs have not been issued under any particular statute. A general announcement was made by the Government that certain economic policy would be pursued for the acceleration of the growth of the industrial sector in the State of Orissa. For that purpose, a package of measures for stimulating the growth of industries were announced. It was specifically made clear in the IPR dated 18-7-1979 that:

"Government orders will issue laying down the mode of administering the concessions and incentives by concerned departments."

15. In other words, the IPR dated 18-7-79 by itself did not grant any exemption to the persons who set up industries pursuant to that IPR. The IPR merely promised that orders will be issued laying down the mode of administering the concessions and incentives by concerned departments. Exemption of sales tax can only be granted in the manner laid down by the Sales Tax Act. The Government by an executive order cannot override the requirement of the statute. The method and manner of granting exemption has been laid down in Section 6 of the Orissa Sales Tax Act. This Section specifically says that

exemptions have to be granted by a notification. It further provides that exemption granted by a notification issued u/s 6 can be modified or withdrawn by the State Government at any point of time. The State Government in the instant case, initially issued the exemption notifications u/s 6. The State Government subsequently decided to withdraw the exemption notification in respect of some of the industries which had commenced production after 1-4-1977. The State Government was fully competent to do so under the provisions of Section 6 of the Act. The Respondent must have been aware of this when its industry was set up. Everybody is presumed to know the law. Section 6 of the Orissa Sales Tax Act which empowers the State Government to issue a notification granting exemption from sales tax, also empowers the State Government to withdraw, amend or modify any such notification as and when it thinks necessary to do so. Section 6 of the Orissa Sales Tax Act is as under:

"6. Tax-free Goods. - The State Government may, by notification, subject to such conditions and exceptions, if any, exempt from tax the sale or purchase of any goods, or class of goods and likewise withdraw any such exemption."

16. When the Respondent set up its Oil Mill and was granted exemption from sales tax, it should have known that the notification granting exemption of tax u/s 6 could be withdrawn at any point of time. Therefore, the case of promissory estoppel, is without any basis. There cannot be any estoppel, against statute.

17. Moreover, it is well settled that any EPR can be changed if there is an overriding public interest involved. It has been stated on affidavit by the State of Orissa that after a package of incentives was given to the industries, the Government was faced with severe resource crunch. On a review of its financial position, it was felt that for the sake of the economy of the State, it was necessary to limit the scope of exemption granted to various industries. Accordingly, further notifications were issued u/s 6 of the Orissa Sales Tax Act from time-to-time. Because of this new perception of the economic scenario, the scope of the earlier notifications was restricted by subsequent notifications issued u/s 6. This also led to issuance of the second IPR dated 31-7-1980.

&...24. In our opinion, the plea of change of policy trade (sic) on the basis of resource crunch should have been sufficient for dismissing the Respondent's case based on the doctrine of promissory estoppel. Public interest demanded modification of the earlier IPR.

25. Moreover, as it has been noted earlier that the IPR itself had not granted any exemption but had indicated that orders will be issued by various departments for granting the exemptions. The exemption order under sales tax could only be issued u/s 6 which could be amended or withdrawn altogether. This is expressly provided by Section 6. If the Respondent acted on the basis of a notification issued u/s 6 it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to do so in public interest. That is exactly what has happened in this

case.

67. The Apex Court has also in case of Dai-Ichi Karkaria Ltd. Vs. Union of India and Others, observed as under:

".....para 8. In Indian Express Newspapers (Bombay) Private Ltd. v. Union of India, (1985) 2 SCR 287: (AIR 1986 SC 515) scope of interference in the notification issued u/s 25 of the Customs Act, 1962 is considered. This Court held that power to grant exemption u/s 25 of the Customs Act is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation, even then the notification is liable to be questioned on the ground that it is an unreasonable one inasmuch as a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of grounds on which plenary legislation can be challenged; (i) that it does not conform to the statute under which it is made; (ii) that it is contrary to some other statute inasmuch as subordinate legislation must yield to plenary legislation, (iii) that it is unreasonable in the sense that it is manifestly arbitrary. The embargo of arbitrariness is embodied in Article 14 of the Constitution. An enquiry into the vires of delegated legislation must be confined to the ground on which the plenary legislation may be questioned, except that subordinate legislation cannot be questioned on the ground of violation of the principle of natural justice on which administrative action may be questioned. In cases where power vested in the Government is a power has got to be exercised in public interest, as is the case in the present case, the court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The mere fact that a notification issued u/s 25 of the Customs Act is required to be laid before Parliament u/s 159 of the Customs Act does not make any substantial difference as regard the jurisdiction of the court to pronounce on its validity. Section 25 of the Customs Act under which notifications are issued confers a power on the Central Government coupled with a duty to examine the whole issue in the light of public interest. If the Central Government is satisfied that it is necessary in the public interest so to do, it may exempt generally either absolutely or subject to such conditions, goods of any description, from the whole or any part of the customs duty leviable thereon. Power exercisable u/s 25 of the Customs Act is no doubt discretionary, but it is not unrestricted. The pattern of the law imposing customs duties and the manner in which it is operated to a certain extent exposes the citizens who are liable to pay customs duties to the vagaries of executive discretion. While Parliament has imposed duties by enacting the Customs Act and the Customs Tariff Act, 1975, the executive Government is given wide power by Section 25 of the Customs Act to grant exemption from the levy of customs duty. It is ordinarily assumed that while such wide power is given to the Government, it will consider all relevant aspects governing the question whether exemption should be granted or not."

68. The Apex Court in case of U.P. Power Corporation Ltd. and Another Vs. Sant

Steels and Alloys (P) Ltd. and Others, held that Notification issued u/s 499 for giving the benefits of exemptions for new industrial units in the hill areas was in the nature of delegated legislation and not an Act framed by the State Legislature. Therefore, the distinction made between the subordinate legislation and primary legislation. The promissory estoppel, therefore, would not be whittled down in case of delegated legislation.

69. The Apex Court in case of Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, has held that it cannot be accepted that the exemption from tax is a mere concession defeasible by the Government and does not confer any accrued right to the recipient. Right of exemption with a valid notification issued gives rise to an accrual right. The doctrine of promissory estoppel, would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. The doctrine of promissory estoppels would also apply to Statutory Notification (Paras 121 and 128).

70. The Apex Court in case MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, the Supreme Court has held that the findings of the High Court that the Notification being statutorily no plea of estoppel would be applicable to the statutory notification was found to be erroneous and the plea of promissory estoppel, is required to be determined in case of each and every case. (Paras 30 and 35).

71. The Apex Court in case of Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, held that subordinate legislature cannot take away accrued right.

72. The Apex Court in case of State of Punjab Vs. Nestle India Ltd. and Another, held that plea of promissory estoppel would be available for establishing the right.

73. The broad proposition of law developed over the years as could be seen from the aforesaid authorities could be summarized as under.

74. The Doctrine of Promissory Estoppel was originated as valid defense rather than ground giving rise to any actionable or enforceable rights to the party wielding the same. In good old days it was a strong proposition of law that the Doctrine of Promissory Estoppel being a Doctrine available for resisting a claim of the other side, it presupposed existing contractual relationship between the parties. Thus, it was held as a shield rather than sword in the hands of the Defendant.

75. Before the ruling of the Apex Court in case of Motilal Padampat (supra), the five judges Bench of Apex Court in case of M. Ramanatha Pillai Vs. The State of Kerala and Another, held that there shall be no applicability of promissory estoppel against the State. But that has been explained by the Apex Court in case of Motilal Padampat (supra) in para-27 and held that the Doctrine of

Promissory Estoppel is applicable to the State against the Statutory prohibition. But at the same time, it is very important to note that in case of *Motilal Padampat* (supra), the Apex Court has stated unequivocally that the principle of law of Promissory Estoppel shall have no applicability to the Statute and Legislation. As could be seen from the observations made in Para-28 highlighted with emphasis hereinabove. Thus, till *Motilal Padampat* (supra) was decided, the Apex Court was also absolutely and emphatically of the view that there shall not be any estoppel and applicability of promissory estoppel against the legislation.

76. In fact the majority of the decisions cited herein above go to show that there cannot be promissory estoppel against statute and legislation. The following principles of law in respect of Promissory Estoppel could be culled out as under:

i. The doctrine of promissory estoppel has no more remained a ground of defense only. The doctrine of promissory estoppel is now considered as an independent ground conferring right upon a party i.e. promisee to lay his claim based thereon.

ii. The doctrine of promissory estoppel is nonetheless a principle originating from and pertaining to equity jurisdiction. In our legal system, the doctrine of promissory estoppel has been recognized as such and is being now permitted to be wielded as sword rather than merely a shield. Thus, the old principle that promissory estoppel is a shield and not a sword has undergone sea change in its application.

iii. As it is observed by the Apex Court in case of *Motilal Padampat Sugar Mills* (supra), since the doctrine of promissory estoppel is an equitable doctrine it must yield to the requirement of equity.

iv. When the State based on subsequent events show that it would be inequitable to keep its promise then the Court would not raise an equity in favour of the promisee, the doctrine of promissory estoppel would be displaced in such a case and the State would not be bound by such promise.

v. It would be open to the State, and the Government against whom the doctrine of promissory estoppel is invoked, to convince the Court that the public interest requires the State to act unfettered by its earlier promises and in such situation the Court would not be justified in enforcing the promise against the Government and State.

vi. The doctrine of promissory estoppel cannot be invoked to compel the Government, State or even a private party to do and act prohibited by law. There cannot be any promissory estoppel against the exercise of legislative power. The legislature cannot be precluded from exercising its Legislative function by resorting to doctrine of promissory estoppel as per Apex Court decision in matter of *State of Kerala and Another Vs. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.*,

vii. As observed by the Apex Court in case of *B.N. Bhattacharji* (supra), the soul

of estoppel is equity and not facility for inequity nor is estoppel against statute permissible because public policy animating a statutory provision may than become the causality. The Apex Court quoting from the Halsbury noted that where a statute, enacted for the benefit of a section of public, imposes a duty of positive kind, the person charged with the performance of the duty cannot be estopped and be prevented from exercising statutory powers.

viii. The Apex Court in case of Union of India v. Godfrey Philips (supra) has made it clear 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 fettered by promissory estoppel from enforcing the statutory duty.

ix. As observed by the Apex Court in case of Shri Bakul Oil Industries (supra) in order to claim the benefit of doctrine of promissory estoppel the party must establish that it, in fact acted pursuant to the promise held out to it and but for the promise it would not have so acted.

x. The doctrine of promissory estoppel is essentially a principle evolved by equity to avoid injustice. Thus, the party invoking promissory estoppel has, essentially, to establish injustice to them on account of State resiling from its promise.

xi. The Courts have time and again held that for invoking the doctrine of promissory estoppel clear, sound and positive foundation is required to be laid by the Petitioner invoking the doctrine of promissory estoppel. Thus, the party invoking the promissory estoppel has to establish his claim on clear foundation based upon the facts and material in support of his submission.

xii. The recent decisions of the Apex Court has made distinction between the delegated legislation and primary legislation and viewed delegated legislation on a little different footing as the Apex Court in case of U.P. Power Corporation Ltd. v. Sant Steel (supra) held that the delegated legislation is not an Act framed by the State Legislature and the principle of doctrine of promissory estoppel would not get whittled down in case of delegated legislation.

xiii. The Apex Court in case of MRF Ltd. (supra) has held that the findings of the High Court that the Notification being statutory no plea of estoppel could be applicable, was erroneous. The Apex Court held that the plea of estoppel is required to be determined in facts and circumstances of each case.

xiv. At this stage, it is required to be noted that the Apex Court in case of Kamla Prasad Khetan Vs. The Union of India (UOI), observed that a statutory order can be amended and revoked under the same authority which had issued the same meaning thereby, the authority which is exercising delegated functions has a right to revoke the same in exercise thereof and the same was found just and proper. The five Judges Bench of the Apex Court in case of Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, every notification and orders issued under the statutorily power of rule making authority has to be read as if they are forming part of the Statute and rule

making.

xv. The Apex Court has in case of Union of India Vs. Paliwal Electricals (P) Ltd. and another, observed that the burden of proof lies upon the person who challenge the legality and propriety of the notification that it is against the public interest. The Five Judges Bench of the Apex Court in case of State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, held that the effect of legislation when validly made is a same of Statute under which it is made, (paras 120, 105 and 119).

xvi. The Apex Court in case of Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, has held that the notification issued under statute has to be regarded as a part of the statute. The similar view was taken by the Apex Court in the judgment reported in Chief Forest Conservator (Wild Life) and Others Vs. Nisar Khan, that the rule/statutory orders validly made form part of the statute wherein they are made.

77. Against the aforesaid backdrop of law prevailing on the subject, now let us examine the rival contentions of the counsel for the respective parties.

78. The provision of Section 5A of the Central Excise Act, 1944 unequivocally provides that the Central Government on being satisfied that it is necessary in the public interest so to do, it may by issuing notification in the Official Gazette exempt generally either absolutely or subject to such conditions as may be specified in the notification excisable goods of any specified discretion from the whole or any part of the duty of excise leviable thereon, the relevant portion of Section 5A is extract hereunder:

Section 5A: Power to grant exemption from duty of excise. (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured -

(i) in a free trade zone or a special economic zone and brought to an other place in India; or

(ii) by a hundred per cent. export-oriented undertaking and brought to any other place in India.

Thus, Section 5A of the Act provides for various exigencies and the power vested in the Central Government to deal with the same. In a way, therefore, it can be said that Section 5A is a code within itself to be operative in the arena of exemption.

79. Thus it is required to be noted that Petitioners have prayed for judicial review

of the impugned Statutory Notifications under Article 226 of the Constitution. The Scope of Judicial Review of Legislative action needs no elaborate discussion. The court has to examine the impugned notification within its limited jurisdiction of judicial review of legislative action of the State. The Court also need to be mindful of the fact that it is called upon to take judicial review of statutory notifications in realm of fiscal policy of Union of India.

80. It is also required to be borne in mind that Original Notification dated 31-7-2001 contained that for getting benefit of exemption the Unit with specific minimum investment had to start commercial production on or before 2003 and than it was to enjoy the exemption for period of five years namely till 2008. Of course later on the time for starting commercial production was extended up to December, 2005 but all the industries put up in the initial period and which have commenced commercial production as per the initial dates have exhausted their period of five years in the year 2008 itself, in which the impugned notifications amending the scheme were issued. In fact Petitioners have therefore taken up a specific pleas of discrimination qua those industries which were put up in the initial period that they enjoyed full benefit whereas the industrial units like Petitioners who were established subsequently within the extended period did not receive the identical benefits.

81. The fact remains to be noted that the Central Government has in fact exercised power of granting exemption in many regions of the country. The affidavit-in-reply contains averments that similar exemptions have been granted in regions of Jammu and Kashmir, North-Eastern Region, Sikkim, etc. This Court is therefore, of the view that the Kutch district as such cannot claim a different and distinctive treatment only on account of fact that in their case the exemptions came to be granted on account of devastating earthquake. The purpose of granting exemption in other areas of Jammu and Kashmir and North-Eastern side like Sikkim is similar namely helping the region in improving its economy as the exemption in payment of excise duty would encourage entrepreneur to setting up industries which in turn would generate more employment for the people of region. Thus, the motive and object of exemptions notification so far as Kutch district and other region like area of J&K and Sikkim and north-east region cannot be said to be different so as to claim any different treatment. Of course, the reason for granting exemption in case of north-eastern region, Sikkim was backwardness and helping the people thereof in getting more employment opportunity, whereas, the reason for exemptions to Kutch district was for helping people in over coming the calamity and rehabilitating them in wake of the earthquake. Thus, the reasons for exemption may vary but the object of exemption being similar, the similar treatment was required to be accorded to the all these regions. The Court hastened to add here that it is always open to the Central Government to make appropriate modification in the scheme on account of peculiarity of the region but by and large the object of granting exemption would remain same and from that angle the impugned notifications are required to be viewed. When such duty exemption only on the

basis of actual value addition made on the article or goods in the beneficiary region is made applicable to all the industrial units in other regions also the Industrial Units of Kutch District cannot be permitted to contend that it amount to giving similar treatment to two differently situated parties. In fact as it is stated herein above there could be different reasons for promulgation of duty exemption schemes in different regions namely backwardness of region needing more incentives and regions like Kutch affected on account of natural calamities but that would not change the real object of introducing the exemption schemes and as such when it is noticed that on account of certain glaring lacunae in the original scheme the real purpose of exemption scheme is not served or is likely to be defeated than correctional measures like amendments notifications would always be required to be issued and if they are made applicable to all the regions then a region cannot claim or that as in their case the reasons for exemption scheme was different they cannot be treated at par with other regions.

82. It is required to be noted that in the instant case, the exemption in question was provided by way of notification issued u/s 5A of the Central Excise Act and as such it cannot be characterized as promise held out to any particular section, trade, industry or person. The Court hastened to add here that the exemption embedded in notification dated 31st July, 2001 nonetheless could be construed as scheme of incentive offered to the interested entrepreneur for putting up new industries in the Kutch region so as to infuse new life in the economic condition of the region which had received severe shock on account of devastating earthquake. The offer of incentive therefore, in a way could be construed as invitation for putting up new industries. The court is of the view that in a given case, promissory estoppel would be invoked in given facts and circumstances against the State and its instrumentality when such an invitation is held out and acted upon by the other side.

83. The fact remains to be noted that in fact the original notification dated 31st July, 2001 has been time and again undergone changes and amendments as could be seen from the record. It is also required to be noted that the Central Government has, as it is stated herein above, implemented the similar exemptions scheme in other region also, and wherein also the similar changes have been effected. The Petitioner s have challenged two notifications namely notification No. 16 of 2008 dated 27th March, 2008 as well as notification No. 33 of 2008 dated 10th June, 2008, whereunder, according to them the entire basis of granting exemption is substantially changed resulting into curtailing sizable benefits which was otherwise available to the Petitioner under notification dated 31st July, 2001.

84. The notification dated 31st July, 2001 and impugned notifications dated 27th March, 2008 and 10th June, 2008 are required to be viewed in their proper prospective. The question arises as to whether can it be said that by impugned notification dated 27-3-2008 and 10-6-2008, the Central Government has made so drastic a change as to severely affect the industries in question. The answer is

emphatic "NO". The Section 5A of the Central Excise Act, 1944 provides that the Central Government has requisite power to implement change or revoke the scheme of exemption of payment of excise duty. The Petitioner s themselves have taken a plea of discrimination qua the industries which were established in an initially period as provided under a notification dated 31-7-2001 that those industrial units initially set up, enjoyed wider benefits than the industries like present Petitioners" which came to be set up subsequently during the extended period of eligibility namely around the end of November, December, 2005, as the impugned notifications came to be issued only on 27-3-2008 and 10-6-2008. Thus, it can be culled out from the submission of the Petitioner themselves that by and large the industries which were set up earlier by now must have exhausted the period of five years or must be in the verge of exhausted for five years when the impugned notifications came to be promulgated. These factors borne to be in mind while examining the impugned notification dated 27-6-2008 and 10-6-2008.

85. The purpose of the notification dated 31-7-2001 was to help the people of Kutch region in overcoming the crises that had befallen in the area on account of devastating earthquake. The incentive to entrepreneur for setting up industries in this area was to help the people of region in getting more employment opportunity. Therefore also it is required to be noted that the Central Government was under obligation to see to it that the benefit of duty exemption really gets trickled down to the people who were aimed for being helped under the same notification. The notification dated 31-7-2001 cannot be said to be for the purpose of benefiting the trade and industry as such. The notification naturally had been implemented for overall development of the Kutch district and its industrial growth which had suffered badly on account of devastating earthquake. Keeping this view in mind, the development during the period of exemption and the implementation and its outcome were therefore very material factors to be taken into consideration by the Central Government which was wielding its statutory power u/s 5 for granting exemption and implementing the same.

86. Against the said objective of the notification dated 31-7-2001, the Central Government"s stand justifying the requirement of issuance of notifications namely notification No. 16 of 2008 dated 27-3-2008 as well as Notification No. 33 of 2008 dated 10-6-2008 are required to be examined.

87. The Apex Court has observed in R.K. Garg (supra) that the court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex that many problems are singular and contingent, that laws are not abstract proposition and do not relate to abstract units and are not to be measured by abstract symmetric that exact wisdom and nice adoption of remedy are not always possible. Every legislation particularly in economic matters is essentially empiric and is based on experimentation or what one may call trial and error method and therefore it

cannot provide for all possible situation or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that count alone it cannot be struck down as invalid. The Apex Court has further observed that the courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Reig Refining Co.* be converted into Tribunal for relief from such crudities and such inequities. There may be even possibilities of abuse but that itself cannot be the ground for invalidating a legislation because it is not possible for any Legislature to anticipate as if by some divine prescience distortion and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortion and abuses. The Court must therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudity or inequity or by the possible hardships that may cause to a section. The Apex Court in the very same judgment further observed that if any crudities, inequities or possible abuse of any of its provisions come to a light, the Legislature always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues. Thus, when the Central Government upon noticing the various abuses and misuses of the provisions of notification dated 31-7-2001, brought about suitable amendment in form of Notification Nos. 16 and 33 respectively dated 27-3-2008 and 16-6-2008 cannot be said to be unjustified in exercising its power u/s 5A of the Act.

88. The learned Counsel for the Respondent Central Government has elaborately pointed out in the course of the hearing as to how the various agencies participated in deliberation for bringing about the appropriate changes and amendments in the existing scheme of exemption applicable to regions, the Respondent Central Government has aptly demonstrated unscrupulous practices of duty evasion and misuse by unscrupulous dealers and traders which resulted into tremendous losses to the Government on account of illegal duty evasion available on account of loopholes in the notification dated 31-7-2001. The Court need not reiterate what is stated in paragraphs on page 22 of this judgment. The mis-use of provisions of Notification dated 31-7-2001 in fact did not help in generating more employment in Kutch region itself. It is required to be noted that the goods and articles not requiring any value addition would naturally not add into the opportunity of employment and would still entitled the trader and/or dealer to seek benefit of duty exemption in terms of the original provision of notification No. 39 of 2001 dated 31-7-2001. This aspect cannot be brushed aside lightly as it goes to the route of controversy and defeat the very purpose of promulgating the exemption scheme. The Court hastened to add here that the similar exemption scheme operating in other areas are also suitably amended and therefore, the Petitioner s alone cannot have grievances that the people of Kutch Region should be treated alike others though the reason for issuing exemption notification was earthquake and not backwardness of area. It is required to be noted at the cost of repetition that the distinction with regard to

object of the implementation of the exemption scheme in Kutch district as well as other backward areas would be not sustainable as could be seen from the underline purpose of helping the people of region on account of establishment of new industries in that area and the connected opportunities thereunder.

89. Thus, in the first instance it can be said that by impugned notification dated 27-3-2008 as well as 10-6-2008 no drastic change affecting the basis objective of notification dated 31-7-2001 is said to have been made so as to give any reason for grievances to the Petitioners. At this stage, it is essential to note that the possibility of creating anomaly voiced by the Petitioner in the representation to the Central Government has been taken care of, as could be seen from the amendments. The economic legislation therefore as stated by the Apex court has to be viewed from its proper prospective.

90. The Court while taking judicial review of fiscal statutory Notification would certainly not examine the adequacy of reasons warranting any amendment in the fiscal scheme promulgated by the Respondent No. 1. The scope of judicial review of such fiscal policy and measures under Article 226 would not permit the Court to substitute its own reasoning with regard to the requirement of amendment and adequacy of reasons warranting such amendments.

91. This Court is of the view that the principles of promissory estoppel stricto-sensu cannot be invoked by the Petitioner in challenging the notifications dated 27-3-2008 and 16-6-2008. The notification though statutory in nature has nonetheless effect of carving out an exception to statutory obligation of paying duty. The Petitioners were therefore under duty to establish manifest injustice in promulgating of said notifications. The Respondent Central Government has pointed out the dire need of bringing out the amendments which were aptly demonstrated and therefore, the said notifications cannot be struck down on the ground of plea of promissory estoppel alone. At this stage it would not be out of place to reiterate that the benefits which have so far been taken are not to be taken away on account of issuance of impugned notifications. The impugned notifications are of 2008 only and the Petitioners have so far not established that on account of implementation of new scheme they are in fact on the verge of being close down as they have expressed their apprehension in the memo of petition. The court therefore, is of the view that the impugned notification did not call for any interference under Article 226 of the Constitution of India.

92. The plea of promissory estoppel even if assumed to be applicable in light of the latest decision of the Supreme Court to the subordinate legislation like the notification, then also, as discussed hereinabove, the said principles being principle of equity cannot be invoked so as to place fetters upon the Central Government in implementing, effecting and carrying out its constitutional obligation to its citizens as such. The interest of so called promisee would certainly not outweigh the public interest and the public interest is aptly served on account of those notifications as could be seen from the record. The interest of entrepreneur cannot be understood as interest of people of Kutch. In fact, the

Petitioners have lost sight of the interest of the people of region for whose benefits the notification dated 31-7-2001 was promulgated.

93. The public interest should outweigh the interest of the Petitioner entrepreneur. This Court reiterates at the cost of repetition that the distinction with regard to implementation of the scheme qua region of backward areas and Kutch people would have really held to be discriminatory. That being not so and the implementation of exemptions only to value addition would certainly be correct and in furtherance of the avowed object of helping the people of region in getting more job opportunities and other incidental opportunities. This Court is therefore of the view that the impugned notifications cannot be said to be suffering from any infirmity so as to call any interference under Article 226 of the Constitution of India.

94. Section 38A of the Act also would be of no avail to the Petitioners as in fact a plain reading of Section 38A would go to show that it is meant for not undoing the benefits which have been so far received under the existing and/or repealed notification amendments etc. Section 38A of the Act reads as under:

Section 38A.: Effect of amendments, etc. of rules, notifications or orders. -

where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not-

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

And any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.]

95. It is also required to be noted that Section 38A clearly provides that "unless

a different intention appears", now that contingency would go to show that it is open to the amending agency to specifically provide for exigency despite provision of Section 38A of the Act. Moreover, Section 38A is in the nature of saving clause, which will not naturally compel the beneficiary to repay or nullify the benefits which have been accrued so far. In other words the amendments and notifications are made in prospective in nature. In the instant case, it is also not the case of the Petitioners that the impugned notification in any case has such adverse impact. The notifications as could be seen from its language are prospective from their respective date and therefore in my view Section 38A would be of no avail to the Petitioners.

96. The petitions therefore, being bereft of merits, deserves dismissal and accordingly they are dismissed. Rule discharged in each matter.

97. The court hastened to add that the aforesaid observations would not preclude the Petitioners from approaching Central Government for any anomaly that may in their view would work hardship in implementing the scheme and Central Government in term would thus not be precluded from considering the said representation on merits in accordance with law.

98. Registry is directed to keep copy of this order in each matter.

Sd/- S.R. Brahmbhatt, J.

99. [Order per: D.A. Mehta, J. (Oral)]. - In view of the difference of opinion between the members constituting the Division Bench, Registry is directed to obtain necessary orders from the Hon''ble the Chief Justice for placing the matters before Hon''ble Third Judge.

Registry to place a copy of this order in connected matters.

Sd/- D.A. Mehta, J

Sd/- S.R. Brahmbhatt, J.

100. [Judgment per: Jayant Patel, J. (Oral)]. - I have heard Mr. Mihir Joshi, learned Senior Advocate with Mr. Mathur, Mr. Paresh Dave, Mr. Modh, Mr. B.Y. Mankad and Mr. H.D. Dave for the concerned Petitioners, and Mr. Harin Raval, Additional Solicitor General with Mr. Chayya, learned Standing Counsel to the Central Government.

101. I had the benefit of going through the reasons and conclusions recorded by brother D.A. Mehta, J. as well as by brother S.R. Brahmbhatt, J.

102. On the factual aspects, both my brother Judges have elaborately dealt with. However, I find that the factual aspects may be required to be recorded, in order to consider the controversy and the issues arise for consideration, therefore, to that extent, the same shall be narrated at appropriate places.

103. Following aspects arise for considering the controversy in the present group of petitions.

(1) Whether any declaration was made by the Central Government in formulating fiscal policy and if yes, whether the same was by way of exemption simplicitor or by way of an incentive offered for establishment of the industry in a particular area or a specific region, to new entrepreneur?

(2) Whether the Petitioner could be said to have altered the position based on the aforesaid declaration of fiscal policy brought into force?

(3) Whether bar of promissory estoppel would apply and if yes, to what extent in fiscal matters?

(4) Whether the impugned policy could be said to be for withdrawal of the benefit/incentive retrospectively, assured to the Petitioners or can be said as rationalising the benefit by making it retroactive?

(5) Whether the bar of promissory estoppel would operate to the Respondent Central Government, if yes, to what extent?

(6) Whether the impugned change in fiscal policy could be said as acting in contravention to the bar of promissory estoppel, if yes, to what extent?

104. Following facts deserve to be recorded.

105. On 31-7-2001, vide Notification No. 39/2001-CE., the Central Government in exercise of powers u/s 5A(1) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") read with the other Act providing for the additional duties, for the units located in Kutch District of Gujarat exempted so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under the relevant Act as equivalent to the amount of duty paid by the manufacturer of goods other than the grant of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2001. Clause 3 of the said notification provided that the exemption contained in the notification shall be subject to the condition that it will apply to only new industrial units, i.e., the units which are set up on or after the date of publication of this notification in the Official Gazette, but is not later than 31-7-2003. It also provided that the exemption shall apply for a period not exceeding 5 years from the date of commencement of the commercial production by the unit. The notification also provided that the expression "set up on or after the date of publication of this notification in the Official Gazette " shall mean that any civil construction work on its factory premises and any installation of the plant and machinery therein commences only on or after the date of publication of this notification in the Official Gazette.

106. Notification No. 42/2001 dated 21-9-2001, provided for the original value of investment in plant and machinery, which has no relevance to the controversy to be considered in the present petitions. Thereafter on 2-9-2002, the aforesaid period of 31-7-2003 was substituted by 31-7-2004. On 13-2-2003, the amendment was made in the notification by adding the proviso that such refund would not exceed the amount of duty paid less the amount of CENVAT credit availed of in respect of the duty paid on inputs used or in relation to the

manufacture of goods cleared under this notification. Thereafter, there were changes in the modalities, but until the impugned notification dated 27-3-2008, it is undisputed position that the policy was continued for granting exemption to the duty paid less the CENVAT credit availed of. To say in other words, the duty was to be refunded, if paid in actual, either in cash or in personal ledger account of the unit concerned.

107. On 27-3-2008, vide notification No. 16/2008, the words and the figure "to the amount of duty paid by the manufacturer of the goods other than the amount of duty paid by utilisation of the CENVAT credit under CENVAT Credit Rules" was substituted by the words "to the duty payable on value addition undertaken in the manufacture of the said goods by the said unit". In the said notification, the duty payable on the value addition was made as equivalent to the amount calculated as a percentage of total duty payable on the said excisable goods as per the table contained in the said notification. The said table provided for various rates in different chapters of the First Schedule for different categories. In the said notification, it did provide for an option available to a particular manufacturer to move for modification of the rates prescribed in the table and the enabling powers were given to the Commissioner of Customs or Central Excise to alter the rates. It is under these circumstances, all the Petitioners have approached to this Court by the present petitions.

108. It may be recorded that pursuant to the interim order passed in the present petitions, the representation was made by the Petitioners to the Central Government for reconsideration of the policy and thereafter, vide notification dated 10-6-2008, it is the case of the Central Government that based on the material supplied, the rates are altered as stated in the table. In the very notification, vide para 2.2, it was inserted that the refund shall be available only on the condition that the total refund made to the unit during the year including the differential amount does not exceed total duty payable on the value addition whether at the rates specified in the table or at the special rates fixed in paragraph 2.1. To say in other words, the embargo was put on the quantum of refund not exceeding the table or not exceeding the rate fixed by para 2.1 of the earlier notification dated 27-3-2008. The Petitioners by the amendment has also challenged the said notification dated 10-6-2008.

109. If the aforesaid factual position is examined in light of the above referred aspects to be considered, it is apparent that the declaration was made by the Central Government while formulating fiscal policy as to a specific fiscal policy for the refund of the excise duty paid less the CENVAT credit for the area of Kutch District in Gujarat State to the new industrial units, which are set up on or after the date of publication of the notification in the Official Gazette, but not later than 31-7-2003 which was subsequent to 31-7-2004. It was not by way of an exemption to be made available productwise for the whole or part of the country, but was an exemption making the full refund made available to the actual duty paid to the new industry to be established in the Kutch District. The whole tenor

of the notification if considered as it is with the language used in the notification, is for the incentive to be given for establishment of the industrial unit in Kutch district of Gujarat for a period of 5 years from the date of the commencement of the commercial production of the unit. Therefore, it was a specific incentive given to only new industrial units to be established in the Kutch district. Hence, the first aspect remains answered accordingly.

110. On the second aspect for establishment of the new units by the Petitioners in Kutch District, it appears that there is no change nor withdrawal or the alteration in the policy on account of non-compliance of conditions for establishment of new industrial units. If based on the aforesaid fiscal policy of the Central Government by way of incentive for establishment of new industrial unit in Kutch District, the Petitioners have established their industrial unit in Kutch District, it could hardly be said that the Petitioners have not altered their position. Even otherwise also, if the condition of notification of new industrial units is not fulfilled. Even otherwise also, none of Petitioners would be entitled to the benefit of the policy of refund of the actual duty paid, but since such is neither pleaded nor comes up for consideration, the same is not required to be examined further. However, if the Petitioners have established new industrial units in Kutch district based on the aforesaid policy of the Central Government by way of a special incentive of refund of actual duty paid, it can be said that the Petitioners have altered their position and such alteration of the position would be the making of requisite investment for establishment of the new industrial unit in Kutch District within the specific time period. The second aspect shall remain answered accordingly.

111. In order to examine the aspect of bar of promissory estoppel and the limits operating therein, reference to the case laws on the subject may be relevant. The Apex Court in the case of Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, after considering its earlier decisions, at para 130, has made the following observations:

"We therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved."

112. The Apex Court in the case of U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others, after considering the earlier decisions, observed at para 27 as under:

"27. In this background, in view of various decisions noticed above, it will appear that the Court's approach in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable. When the State Government makes a representation and invites the entrepreneurs by showing

various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fide make investment and thereafter if the State Government resile from such benefits, then it certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot any estoppel against a Statute are exceptions.

28. Learned senior counsel for the Appellant has cited nine instances which can be loosely categorised into two i.e. (i) that there cannot be any estoppel against the statute and (ii) overriding public interest. So far as the first part is concerned i.e. the revocation has the statute flavour i.e. the benefit which was extended u/s 49 of the Act of 1948 and the notification had been issued revoking the same benefit u/s 49 of the Act of 1948 by invoking the provisions of the General Clauses Act that an authority granting exemption has a right to revoke the same also. It is true that it has a right to revoke the same but if the other party has suffered on that account then such representation will be against the public policy and the morality. Notification issued u/s 49 of the Act of 1948 for giving the benefit of exemption for the hill areas was in the nature of delegated legislation and not an Act framed by the State Legislature.

The pertinent aspect is that in the very decision, the Apex Court while exercising the question as to whether the State could withdraw the exemption on the alleged ground of misuse of the policy by certain entrepreneurs, observed at paras 30, 31, 32 and 33 as under:

30. Therefore, if such benefit has not been extended then a different stand will follow but so far as the delegated legislation is concerned, this kind of revocation cannot be sustained. It is highly against the public morality that the incumbent who have felt persuaded on account of the representation made by the State Government that they will be given certain benefits and they acted on that representation, it does not behave on the part of the Appellant -Corporation to withdraw the said benefit before expiry of the stipulated period by issuing the notification revoking the same which the Respondents were legitimately entitled to avail. We fail to understand why the Appellant -Corporation which made a representation and allowed the other party to act upon such representation could resile and leave the citizens in a lurch. In such a situation the principle of promissory estoppel which has been evolved by the Courts which is based on public morality cannot permit the State to act in such an arbitrary fashion.

31. Other grounds for the purpose of public interest which have been pleaded; namely that there are two methods of tariff provided by the amendment and the actual consumption has been reduced based on the calculation of energy charges per KV from 308 paise to 100 paise and there was large scale theft or that units were closing down and there was no mala fide intention in the matter of revocation of the notification and the cost of production of power has gone up to Rs. 2.50 per unit, are considerations which hardly involve any public interest. They were more of a nature of losses which has been suffered by the Corporation

and in order to make these losses, these methods were evolved to reduce and to make good of the losses. Restructuring benefit to 17% of the Tariff 4(A) (demand charges) are the factors which are aimed at to make the losses good for the Corporation. This is not case in which serious public repercussion was involved. These are not the factors which put together can constitute a public interest. Theft of the energy if it was proved by cogent datas that as a result of giving this benefit to the entrepreneurs in the hill areas, they were misusing it or there was theft of the energy at a large scale by these persons to whom the concession had been given then of course such factors, if all the datas were brought on record of course could have persuaded the Court to take a different view of the matter. But simply because there was theft of energy allow the State cannot persuade us to hold that the revocation of such concession can be said to be in public interest. Since the benefit was given to these units in the hill areas, there should have been overwhelming evidence to show some mala fide on the part of these consumers which have persuaded the Corporation to revoke it. If there was no misuse of the energy by these units in the hill areas to whom the concession had been granted then in that case it cannot be taken that there was really public interest involved which persuaded the Corporation to revoke the same.

32. No person can be permitted to misuse the concession or benefit and invoke promissory estoppel. Promissory estoppel is not one sided affair, it is rather two sided affair. If one party abuses the concession then it is always open to the other party to revoke such concession but if one party avails the benefit and is acting on the same representation made by the other party then the other party who has granted the said benefit cannot revoke the same under the garb of public interest. Therefore the grounds that the revocation notification was issued in public interest and that same has the flavour of the statute, cannot persuade us to uphold it sustained.

33. There is no gain saying that the public interest is paramount and the private interest has to be sacrificed for the larger interest. But, after survey of all these cases on the subject, the judicial consensus that emerges is that whenever the State has made a representation to the public and the public has acted on that representation and suffered economically or otherwise, then in that case the State should be estopped from withdrawing such benefit to the detriment of the such people except in public interest or against the Statute. So far as the public interest as involved in the present case is concerned, we have found that there was no overwhelming evidence to revoke the benefit granted to the industrial units in the hill areas. So far as the Statute is concerned, the notification was issued u/s 49 of the Act of 1948 and the same was revoked u/s 49 of the Act of 1948 though there was no such provision contained in Section 49 that it will be open to the Corporation to revoke the same but could be possible by invoking the principle of General Clauses Act. But in such delegated legislation such withdrawal could only be permitted if larger public interest is involved or if the Act is passed by Legislature.

(Emphasis supplied)

113. The contention of the learned Additional Solicitor General Mr. Raval is that such right of promissory estoppel is a defeasible right and not indefeasible. He further contended that when any entrepreneur acts based on the exemption policy of the Government, he is well aware that such policy are coupled with the power of the Government to withdraw the same, therefore, if withdrawn, no valid grievance can be raised since such withdrawal is permissible in public interest. He also contended that there are limitations while invoking the doctrine of promissory estoppel. One is that such cannot be operated against the statute and if the statute has permitted the power on withdrawal to the same authority, it may result into allowing the doctrine to operate in contravention to the statute. He also contended that even if it is read that such power is to be exercised in public interest, then also, in the affidavit in reply, there is enough material shown with the facts and figures that the duty paid in such exempted area is much more in comparison to other area where exemption is not granted on the same product. Such prima facie shows that since the refund is made available by way of exemption, such policy is misused by the industrial units. He submitted that if it came on record before the Government that the policy is being misused, it has tried to rationalise the same by fixing a particular rate prescribed for the duty and the refund as per the impugned notification. In the submission of the learned Additional Solicitor General, such rationalisation is not having retrospective character, but is having retroactive character. He further submitted that the powers for fixation of rates are expressly provided to enable the concerned authority to alter the same if sufficient material is produced, therefore, he submitted that such could be said to be made permissible in fiscal policy to the Government in exercise of the power u/s 5A of the Act. He therefore contended that in the facts of the present case, the bar of promissory estoppel would not operate and the change in policy deserves to be maintained. He also contended that the approach of the Court would be with the presumption of validity of such policy since whether there is public interest or not is to be left to the Government on the basis of the material available before it and the Court would not undertake judicial scrutiny in a microscopic manner by weighing the sufficiency of the material. He contended that the doctrine of promissory estoppel cannot be permitted to be invoked in the facts of the present case nor such doctrine of promissory estoppel would operate as bar in the impugned notification.

114. Whereas, learned Counsel for the Petitioners maintained that the action on the part of the Government by impugned notification is against the doctrine of promissory estoppel and it was submitted that so far as Kutch District is concerned, there is no substantial change in the actual duty paid in comparison to its past record and even if it is, such cannot be termed as a valid basis for withdrawal of the exemption policy. It was also contended that by the impugned notification, the full refund of actual duty paid is altered by the specified rates and even it is considered as with the inbuilt power for alteration for rates, then also, such would curtail the benefit of duty of 100% refund as was assured in the

notification of 2001 on the basis of which, the Petitioners have set up the new industries. It was submitted that there is no sufficient material produced on record to show that there was any overwhelming public interest nor by delegated legislation, the State could withdraw the exemption benefit with retrospective effect. It was submitted that the contention of rationalisation of the refund is an eyewash and such cannot be termed as having a retroactive character, but is in effect retrospective which is only permissible by the Act of Parliament and not by way of a delegated legislation. It was submitted that even if it is considered that there was any misuse by some other industries, the same would not be sufficient ground for retrospectively changing the policy to the industries which are already established and therefore, the impugned notification cannot be sustained.

115. It appears that the doctrine of promissory estoppel and its scope and ambit is by now well settled and the same can be summarised as under:

- (1) The doctrine of promissory estoppel is to be treated as a preserved right, but such right is subject to the limitation that -
- (2) Such promise or the representation made must be given under the authority of law and in consonance with the statute and not unauthorisedly or in contravention to any statutory provision on the principle that there cannot be any estoppel against the statute.
- (3) Such cannot be permitted to be invoked against the overwhelming public interest.
- (4) The Legislature or the Parliament has power for diluting its effect retrospectively by enacting any law.

116. If the facts of the present case are examined in light of the aforesaid, it is apparent that by the notification dated 31-7-2001 and others, special incentive was given to the entrepreneur for establishment of new industrial units in Kutch district granting full refund of the actual duty paid as observed in the earlier paragraph and further, as observed earlier, for establishment of new industrial undertaking, the Petitioners have altered their position and right has accrued based on the doctrine of promissory estoppel. It does appear that it is not the case of the Respondent Central Government that such representation or the promise given for granting exemption was unauthorisedly given or was given in contravention to any statutory provision. The contention that the power to grant exemption would include power to withdraw the exemption as per the General Clauses Act, even if accepted, the same has to be in public interest. Such public interest for withdrawal of the exemption if considered for prejudicing the rights of the party who has altered its position, must be having direct nexus to the object as was to be achieved by formulation of the policy or in alternative, it should be overwhelming public interest. The intention for grant of exemption to new industries in Kutch District of Gujarat State was that the new industries in Kutch District may be established which may generate opportunities for employment, etc. in the area, may be on account of underdevelopment or on account of the

earthquake. Had it been the case of the Respondent Central Government that sufficient material came on record before the Central Government that more than expected industries are already established and the object has been achieved or in alternative, there was material before the Central Government that in spite of the policy, no new industries are established or has not achieved its object, they might stand on different footing and different consideration. Such may be contended as valid ground for enabling the Government to exercise the power for withdrawal of the incentive. There could also be other overwhelming public interest, for e.g., new industries have created health hazard to the residents of the area or that there is huge fiscal deficit created, which has resulted financial crunch to the Central Government to fulfil its obligation to the going project of larger public interest etc., or like such overwhelming public interest. When the ground sought to be canvassed of the public interest having direct nexus to the object as was to be achieved and is not achieved or an overwhelming public interest, the burden would heavily lie upon the Government to establish by authenticated reliable material in the event such an action is made subject to the judicial scrutiny. Sufficiency of the material or whether such material has been rightly relied upon while withdrawing the benefit or not may vary from facts to facts. But it will be for the State to satisfactorily demonstrate before the Court of such direct public interest to the object was to be achieved and is not achieved or the overwhelming public interest attracting the power of withdrawal. Unless such exceptions are satisfactorily demonstrated before the Court, it is not possible to hold that merely because there is power to withdraw the exemption granted by way of a special incentive can be permitted to be withdrawn with retrospective effect.

117. If the record produced on behalf of the Central Government is considered, it appears that none is concerning to the object which was at the time of formulation of the policy or achievement of the said object. On the aspects of public interest, the ground as sought to be canvassed is that the duty paid in such area where incentive provided was higher in comparison to the other places and it was orally contended by the learned Additional Solicitor General that such would show that the exemption policy was being misused or there were manipulations for getting the refund. The contention considered in either way may at the most attract for initiation of the action in accordance with law against the industry concerned, if there is manipulation or abuse of the policy. Even if it is considered that some units had misused or had abused the policy, the same can hardly be said to be a valid ground for withdrawing the benefit conferred upon the bona fide industrial units. Further, there is no satisfactory material demonstrated for such purpose. Even if such contention is considered for the sake of examination, it can hardly be termed as overwhelming public interest on the part of the Central Government to prejudice the rights of the new entrepreneurs who have altered their position by establishing industries based on such incentive. Further, as observed by the Apex Court in the above referred judgment in the case of *Power Corporation Ltd. and Anr.* (supra), such ground

cannot be uphold as sustained.

118. The contention that by the impugned notification there is rationalisation of the refund procedure or is retroactive and not retrospective, of the Central Government, if examined, it appears that as per the earlier notification of 2001, whereby the policy was floated, full refund to the actual duty paid is made permissible. By the impugned notification a specified rate to the actual duty is provided with the limitation that it shall not exceed the prescribed rate, which on the face of it, would curtail the entitlement of the refund to the fullest extent, i.e. 100% of the actual duty paid. Merely because there are enabling power for alteration of the rates specified in the impugned notification cannot be termed as rationalisation of the method of refund, but would create an additional obligation upon the new industrial unit which was not conceived nor was so provided at the time when the policy was formulated. If there is curtailment of the existing benefits of exemption policy to the new industrial undertaking in Kutch district, it cannot be termed as retroactive, but has to be termed as retrospective because those persons who have already altered their position by establishing new industries in Kutch District would not be eligible for the benefit of full refund of the actual duty paid as was declared by the Central Government vide notification dated 31-7-2001.

119. If the impugned notification is treated as that of having retrospective to the new industrial undertaking already established, it can be said that by the impugned notification which is a delegated legislation, the retrospective effect is given. It is by now well settled that the subordinate legislation or a delegated legislation can be made with prospective effect and cannot be made with retrospective effect. The reason being that once a retrospective effect is given, the accrued right of a person is altered or may be prejudiced, which can only be taken away by any express provision of the statute and not by way of any delegated or subordinate legislation. Under these circumstances, even if it is considered that in fiscal matter, the Government has power to alter or withdraw the exemption benefit, such cannot be permitted to be exercised with the retrospective effect de hors the doctrine of promissory estoppel, if it is established that a specific representation by way of a special incentive was made to attract new entrepreneur have established the industry in a particular area or region.

120. It is not the case of the Respondent Central Government that the Parliament has passed any Act to alter the rights accrued with retrospective effect. Therefore, the question as to whether such Act of Parliament or the Legislature would meet with the test of Article 14 of the Constitution being reasonable or not is not required to be examined in the present petitions.

121. If the observations made hereinabove are taken into consideration, it can be said that the impugned policy of withdrawal of the benefit/incentive to the Petitioners is retrospective and not retroactive. Consequently, the bar of promissory estoppel would operate against the Respondent Central Government

in withdrawal of the exemption benefit by way of full refund of actual duty paid to the new industrial undertaking as per the conditions specified in the notification dated 31-7-2001. As a result thereof, the impugned notification could be termed as in contravention to the doctrine of promissory estoppel and hence, cannot be sustained. All the remaining aspect shall stand answered accordingly.

122. Before concluding, it would be worthwhile to extract the observations of the Apex Court in the case of U.P. Power Corporation Ltd. and Anr. (supra) while reading the public morality into the action of the State at para 35 as under:

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

123. In view of the aforesaid reasons recorded, I agree with the final conclusion recorded by brother D.A. Mehta, J. for allowing the petitions to the extent as stated therein. Consequently, the petitions shall stand allowed accordingly with no order as to costs.

Sd/- (Jayant Patel, J.)

124. After the pronouncement of the order, Mr. Chhaya, learned Standing Counsel prays that the Union of India is desirous to carry the matter before the higher forum, therefore, this Court may suspend the operation of the order for some time so as to enable the Respondent-Union of India to approach before the Apex Court.

125. As such, in view of two different views expressed by two Hon''ble Judges, the matter was referred to me. The view is expressed and the reference would stand disposed of. However, if the final effect is to be stayed, the matter may be required to be placed before the appropriate Bench.

126. It will be for the office to place the matter before the appropriate Bench after obtaining suitable orders of Hon''ble the Chief Justice on administrative side. Hence, at the request of Mr. Chhaya, learned Standing Counsel, matter be now placed before the appropriate Bench, preferably on 12th March, 2010.

Sd/- (Jayant Patel, J.)

127. [Order per: D.A. Mehta, J.]. - In light of the majority view, all the petitions are allowed in terms of the opinion expressed by the majority. Rule made absolute to the said extent. There shall be no order as to costs.

128. At this stage, learned Counsel for Respondent Department requests for staying operation of the judgment for a period of eight weeks. Request is opposed by the learned Counsel appearing on behalf of the Petitioners.

129. In light of the facts on record, considering the difference of opinion recorded originally, it would be just and proper if the operation of this judgment is stayed for a period of four weeks to enable the Respondents to challenge the same before the higher Forum. Registry to place copy of this order in all connected matters.