

(2011) 10 RAJ CK 0057

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4790 of 2009

Shree Cement Ltd.

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 11-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 166, 226, 32
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16(1)
Evidence Act, 1872 — Section 115
General Clauses Act, 1897 — Section 21, 6
Income Tax Act, 1961 — Section 263

Citation : (2011) 188 ECR 275

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vineet Kothari, J.—How negative executive interventions, lack of political will and wisdom can cause laggard, sluggish and distorted industrial growth in a State, though rich in minerals, lime stone in present case in the State of Rajasthan and sufferer is a cement manufacturing unit, will be borne out from what follows in this case.

2. Another caveat on legislative practices, particularly subordinate legislation and executive policy decisions and the decision making process, which is amenable to judicial review by courts is that, it is high time that subordinate legislations in the form of notifications issued by Executive should give the preamble, context, brief reasons and background and particularly defining their prospective a retrospective applications, should be adopted like statement of objects and reasons and memorandum explaining provisions are given with legislative Bills, so that the judicial review becomes an effective exercise and one liner amendments like the notification dated 28.04.2006 in the present case, which have far reaching consequences are not allowed to become missile attacks on the budding industries.

FACTUAL MATRIX

3. The Petitioner, a cement manufacturer, is before this Court under Article 226 of the Constitution for challenging the impugned order dtd.31.3.2009 passed by the Principal Secretary, Finance, Government of Rajasthan, Jaipur under the provisions of Clause 13 invoking his revisional jurisdiction under "Rajasthan Investment Promotion Scheme, 2003 (hereinafter referred to as the RIPS,2003) at the instance of Commissioner, Commercial Taxes Department with respect to two orders of State Level Screening Committee (SLSC, for short) dtd.29.7.2006 and 27.6.2007 in two matters pertaining to the investment made by the Petitioner M/s Shree Cement Ltd.

4. The facts giving rise to the present writ petition in nut shell are like this.

5. The Petitioner is an ISO-9001/14001/OHSAS 18001/SA 8000 company and on the occasion of the "Resurgent Rajasthan - Partnership Summit" held at Jaipur on 30.11.2007, a MOU was signed between the State Government and the Petitioner - Company for expanding its cement production capacity by making new investment and under the said MOU, the Petitioner company made investment of over Rs. 200 crores for setting up its 3rd, 4th and 5th Units at Bangur City, village Ras, Tehsil Jaitaran, Dist. Pali and another grinding unit at Kushkhera, Tehsil Bhiwadi, Dist. Alwar. Both the units had already commenced commercial production on 21.12.2005 at Pali and 26.3.2007 at Bhiwadi respectively.

6. The State of Rajasthan issued "Rajasthan Investment Promotion Scheme, 2003 (for short "RIPS, 2003)" vide notification dtd.28.7.2003 and operative period of the said Scheme was from 1.7.2003 till 31.3.2008 and inter alia subclause 7 of the said Scheme provided for grant of subsidy to the eligible units making new investment during operative period of the said scheme in the form of interest subsidy and wage subsidy subject to a maximum limit of 50% of the tax payable and deposited under the Rajasthan Sales Tax Act, 1994, the Central Sales Tax Act, 1956 and the Value Added Tax Act as and when introduced in the State, which Value Added Tax Act, 2003 came into force in the State of Rajasthan with effect from 1.4.2006. In case of investment made in Modernization/ Expansion/ Diversification, the amount of subsidy shall be subject to a maximum of 50% of the additional amount of Rajasthan Sales Tax and the Central Sales Tax or VAT payable or deposited whichever is higher, in any of the three immediately preceding years known as base years. Proviso to Clause 7 (i)(b) further provided that the maximum limit of 50% prescribed under Clause 7((i)(a) and Clause 7(i)(b) may be raised by the BIDI (Board of Infrastructure Development and Investment Promotion, Government of Rajasthan) to 60% in such cases where the investment exceed Rs. 100 crores but are less than or equal to Rs. 200 crores; and this maximum limit may be raised further to 75% in cases where the investments exceed Rs. 200 crores. Clause 7 (iii) provided that the subsidy shall be available to the investors for seven years from the date of first repayment of interest in case of Interest Subsidy, and first payment of wages/ employment in case of wage employment subsidy and in case of

expansion/modernization/diversification, the unit shall be eligible for subsidy under the scheme from the date of payment of sales tax over and above the highest sales tax paid in the immediately preceeding three years before such expansion / modernization/diversification.

7. The said RIPS, 2003 came to be amended vide notification AnnEx. 8 dtd.2.12.2005 and following Clause 7 (vi) and (vii) were inserted in the RIPS, 2003 by the said amending notification for cement manufacturing units:

(vi) Notwithstanding anything contained in sub clauses (i) to (v) above, in case of new cement unit having investment exceeding Rs. 400 crores and with a minimum regular employment of 200 persons, the amount of subsidy shall be subject to a maximum limit of 75% of the tax payable or deposited under Rajasthan Sales Tax, 1994 or Value Added Tax Act (as and when introduced in the State) and Central Sales Tax Act, 1956 for a period of 7 years from the date of the commencement of production, subject to the following conditions, namely -

1. The investor shall submit an option to the Member Secretary, SLSC to avail benefit under this scheme within 180 days of this amendment;

2. The unit shall start commercial production within 5 years of filing of application for option; and

3. The sum total of 75% subsidy shall be calculated in the following manner: -

(a) Subsidy of 45% of the Rajasthan Sales Tax or Value Added Tax and Central Sales Tax shall be allowed upfront on the basis of actual tax liability; and

(b) The remaining subsidy to the extent of 30% of Rajasthan Sales Tax or Value Added Tax and Central Sales Tax liability shall be allowed in form of interest subsidy, wage/employment subsidy out of which interest subsidy shall be limited to 5% of the documented rate of interest and the amount actually paid as interest shall not include penal interest, and wage/employment subsidy. A unit not claiming any interest subsidy can claim wage/employment subsidy to the extent of 30% subject to other conditions under this amendment.

4. The claim of subsidy shall be as per the provisions of this Scheme.

(vii) Notwithstanding anything contained in sub Clauses (i) to (v) above, in case of investments for expansion of existing cement unit having investment exceeding Rs. 200 crores and with a minimum regular employment of 100 persons, the amount of subsidy shall be subject to a maximum limit of 75% of the additional tax (calculated by taking the average of last 3 years) payable or deposited under Rajasthan Sales Tax Act, 1994 or Value Added Tax Act (as and when introduced in the State) and Central Sales Tax Act, 1956 for a period of 7 years from the date of commencement of production, subject to the following conditions, namely-

1. The investor shall submit an option to the Member Secretary, SLSC to avail benefit under this scheme within 180 days of this amendment;

2. The unit shall start commercial production within 5 years of filing of application for option; and

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4. The claim of subsidy shall be as per the provisions of this Scheme.

(F.12(20)FD/Tax/05-Pt)

(By order of the Governor,

sd/-

(Subir Kumar)

Deputy Secretary to Govt.

8. Thus, under clause (vii) applicable in present case, besides interest subsidy and wage subsidy, an upfront subsidy to be paid to the extent of 45% of the RST/VAT/CST was allowed to such eligible units having made investment exceeding Rs. 200 crores with further condition that minimum regular employment of 100 persons. It is not in dispute before this Court that the Petitioner - company made investment over Rs. 200 crores in aforesaid two expansion units at Pali and Bhiwadi and therefore, fell within the aforesaid Clause (vii) of the amending notification dtd.2.12.2005 (AnnEx. 8). In pursuance of said amendment, inter alia, requiring vide condition No. 1 of Clause (vii) as reproduced above, the investor to make an option before the Member Secretary of the SLSC avail benefit under this Scheme within 180 days of this amendment, the Petitioner - company exercised such option vide its letter AnnEx. 10 dtd.10.12.2005 immediately after the said amending notification was issued and vide its letter dtd.30.1.2006, AnnEx. 11 for its Ras, Dist. Pali Clinker unit, where the Company had already made investment of Rs. 285.98 crores upto 31.10.2005 as against total project cost of Rs. 490.41 crores. The said option for both the units was again reiterated vide AnnEx. 13 communication dtd.9.2.2006 addressed to the Commissioner of Industries, Member Secretary of SLSC, Jaipur for clinker unit at village Ras, Tehsil Jaitaran, Dist. Pali and grinding unit of village Kushkheda, Tehsil Bhiwadi with total new investment of approximately Rs. 450 crores.

9. By another notification AnnEx. 15 dtd.28.4.2006 Clause (vi) and Clause (vii)

inserted in RIPS, 2003 by previous notification AnnEx. 8 dtd.2.12.2005 were deleted after about 5 months of said clauses being inserted and this one liner amendment only says "Sub-clause (vi) and (vii) of Clause 7 of the said Scheme shall be deleted." Neither any reason nor any preamble containing such reasons for such deletion of these clauses was brought on record and that seems to be turning point in the present case giving rise to this litigation.

10. That even though said deletion was made vide notification dtd.28.4.2006, a copy of which was addressed to all the concerned authorities including the Commissioner, Commercial Taxes Department, in the 10th meeting of SLSC on 29.7.2006 after about 3 months of said deletion, comprising of Commissioner Commercial Taxes, Executive Director, RFC, Sr. Dy. General Manager, RIICO and Commissioner of Industries as Member Secretary, the case of the Petitioner - company was considered vide item No. 4 for grant of benefit in the form of subsidy @ 75% under the RIPS, 2003 and a decision in favour of the Petitioner - company was taken to the effect that "The unit has requested that its investment is covered under the order issued by the Finance Department on 2.12.2005 vide which sub Clause (vi) and (vii) were added into Clause 7 of the Scheme. The Unit has made an investment of more than Rs. 200 crores and has provided employment to more than 100 persons; therefore, it stands covered under the special dispensation provided for cement units vide F.D. Order dtd.2.12.2005." "The SLSC, therefore, perused the facts of the case and submission made by the representative of the unit, present during the meeting and the list of option submitted by the cement unit to the Member Secretary, SLSC under sub Clause (vi) and (vii) of Clause 7 of the Scheme. After considering all the relevant facts of the case, the committee decided to grant the eligibility to the unit for interest subsidy @5% and wage/employment subsidy @25% for a period of 7 years, to start with the commencement of commercial production/operation as per Clause 4(b) of the Scheme, which is 21.12.2005. The amount of subsidy will be subject to maximum limit of 75% of the additional tax (calculated by taking an average of last three years) deposited under RST Act, 1994/VAT and CST Act, 1956."

11. Consequent to the aforesaid decision dtd.29.07.2006 of said SLSC, an Entitlement Certificate was also issued to the petitioner vide AnnEx. 17 by Commissioner of Industries and Member Secretary of SLSC on 8.9.2006 for a period of seven years, for subsidy to the extent of 75%. This was for first expansion unit of Pali and similarly for second Unit at Bhiwadi also, the SLSC again met on 27.6.2007 after about eleven months of the previous meeting and the SLSC comprising of higher authorities, namely, Commissioner, Commercial Taxes Department, Managing Director of RIICO, Dy. Secretary, Finance and Commissioner of industries again considered the case of the Petitioner - unit for its Kushkheda, Tehsil Bhiwadi grinding unit and this time despite referring to amending notification dtd.28.4.2006, deleting Clauses (vi) and (vii) from clause 7, the said SLSC took a deliberate and conscious decision that since the Petitioner company had exercised its option prior to deletion of Clause 7 (vii) vide notification dtd.28.4.2006, it would be covered by the previous amending

notification dtd.2.12.2005 and would thus, be entitled to increased benefit of subsidy to the extent of 75% under the first amending notification dtd.2.12.2005 and fulfilling the conditions therein of having made investment of more than Rs. 200 crores and employed more than 100 persons, the Petitioner - company was held entitled to the benefit of 75% of subsidy for a period of 7 years. Again another Entitlement Certificate in prescribed form No. 6 under Clause 9(B)(iii) was issued in favour of the Petitioner - company for its Bhiwadi unit for a period of 7 years from 26.3.2007.

12. The Petitioner was accordingly given 75% subsidy under clause 7 (vii) inserted vide amending notification dtd.2.12.2005 for a period of about 21/2 years, out of 7 years entitlement when on 22.5.2008 vide AnnEx. 29, a clarification in RIPS, 2003 came to be issued by the Finance Department, Tax Division of Government of Rajasthan and under the garb of said clarification, the benefit already given to the Petitioner unit was sought to be undone and withdrawn. It is of importance to reproduce the relevant part of the said clarification dtd.22.5.2008, which reads as under :

State Government hereby clarifies that the benefits under the deleted provision cannot be granted on and after 28.04.2006, that is to reiterate that none of the types enumerated at Sl. No. 1 to 6 below, qualify for benefits under deleted Sub-clause (vi) and (vii) of clause 7 of RIPS 2003 on or after 28.4.2006:

1. Where the option was submitted before 28.4.2006 and benefits were also granted by SLSC before 28.04.2006.
2. Where the option was submitted before 28.04.2006 and benefits were granted by SLSC after 27.04.2006.
3. Where the option was submitted before 28.04.2006 and benefits have not been granted SLSC.
4. Where the option was submitted after 28.04.2006 but within 180 days of 02.12.2005 and benefits has not been granted by SLSC.
5. Where the option was submitted after 27.04.2006 but within 180 days of 02.12.2005 and the case has not been considered by SLSC, and
6. Where the option was submitted after 27.04.2006 but within 180 days of 02.12.2005 and the unit has still not applied for the benefits.

Kindly ensure necessary action accordingly.

By Order,

Sd/-

(S.S. Rajawat)

Spl. Secretary to Government

13. The case of the Petitioner- Company would apparently fall under Clause (2) of the said clarification, inter alia, "Where the option was submitted before 28.04.2006 and benefits were granted by SLSC after 27.04.2006" The clarification stipulated that the benefits under the deleted provision cannot be granted on and after 28.04.2006. The Petitioner made a representation against the said purported clarification to the Chief Minister of Government of Rajasthan, Jaipur vide AnnEx. 30 dtd.19.6.2008 and it was argued in the said representation that the said clarification issued on 22.5.2008 cannot be applied to the Petitioner company since under the notification dtd.2.12.2005 inserting Clause 7 (vi) and 7(vii) and clause 7(vii) being applicable to the Petitioner unit, the Petitioner unit was rightly given such benefit by SLSC being conscious of deletion of these clauses vide notification dtd.28.4.2006 and therefore, under the garb of said clarification issued on 22.5.2008, the benefit already granted to the petitioner - unit; a vested right, cannot be withdrawn. However, the Petitioner after the said clarification does not appear to have been paid any subsidy under the RIPS, 2003 even reduced quantum of 50% and that is why the relief in this respect has also been claimed in the present writ petition.

14. That two separate revision petitions under clause 13 of the RIPS, 2003 appear to have been filed by the Commissioner, Commercial Taxes Department before the Secretary to the Government, Finance Department on 18.7.2008 vide AnnEx. 38 in which the concerned Secretary was requested to invoke revisional powers for setting aside SLSC decisions dtd.29.07.2006 and 27.06.2007 under Clause 13 of the RIPS, 2003 which provision is akin to Section 263 of the Income Tax Act and Clause 13 and 14 are reproduced herein below for ready reference :

13. REVISION BY THE STATE GOVERNMENT:

(a) The State Government in Finance Department may suo motu or otherwise revise an order passed by any Screening Committee wherever it is found to be erroneous and prejudicial to the interest of the State revenue, after affording an opportunity of being heard to the beneficiary industrial unit.

(b) No order under the Sub-clause (a) shall be passed by the State Government after the expiry of a period of five years after the date by which the benefits under this scheme are fully availed of.

14. REVIEW OR MODIFICATION of SCHEME

The State Government in the Finance Department reserves the right to review or modify the Scheme as and when needed in public interest.

15. The Commissioner, Commercial Taxes Department, urged the Secretary Finance to revise both the orders of SLSC in favour of the Petitioner unit and the increased subsidy of 75% sanctioned under Clause 7(vii) of RIPS, 2003 to the unit were asked to be cancelled after 28.4.2006.

PRELIMINARY OBJECTIONS and CASE SETUP BY Petitioner BEFORE PRINCIPAL SECRETARY

16. The Petitioner unit contested the said revision petitions before the Principal Secretary, Finance and made detailed written submissions raising preliminary objections before him vide AnnEx. 39 dtd.31.3.2009. The same as noticed in the impugned order in para No. 7 are narrated hereunder for ready reference:

i. That the show cause notice issued for review is without authority of law as this power does not exist with the State Government in the Finance Department.

ii. Clause 6 of RIPS 2003 empowers the SLSC to grant benefits for investment above Rs. 7.00 crores. This committee comprises of six officers including the Secretary Finance. As a result one member of the committee cannot review the orders of the committee .

iii. The aggrieved party has not filed the review application within 60 days from the date of communication of the Committee, but only on 18.7.08 and, hence is without authority of law.

iv. The power of revision as provided under Clause 13 of RIPS 2003 lies with the Finance Department. This provision was picked up from RST/CST Exemption Scheme 1998. The SLSC provided under the RSRT/CST Scheme 1998 comprises five officers, excluding the Finance Secretary. Since Finance Secretary is not a member of this committee, he powers of revision in the State Government were given to Finance secretary. However in RIPS 2003, the SLSC itself consist of the Finance Secretary, and hence one of the members of the Committee cannot review its own decisions.

v. The Revisional Authority has not been appointed by the State Government under RIPS 2003, and hence revision powers cannot be exercised by the Principal Secretary or any other officer of the State Government.

vi. The Revisionist, i.e. the CCT has no locus standi to file the revision and the application is, therefore, liable to be dismissed.

vii. The revisionist (CCT), though himself present at the Committee meeting as one of its members, has not disclosed any justifiable reason to impugn the decision of the SLSC, which has been implemented for the last two and a half years, except for nonmention of the order dated 28.4.06. The plea that the members of the SLSC were not aware of the order dated 28.4.06 is not sustainable in view of the fact that the SLSC, in its second decision dated 27.06.07 (also under revision), had found the expansion project as entitled to avail subsidy, even after noting the deletion/amendment order dated 28.4.06.

viii. The decision of the SLSC was unanimous and the pleading that all the members were ignorant of the material fact of deletion is unwarranted.

ix. No clarification can curtail the scope and applicability of the provisions of the Scheme. All the conditions of Sub-clause (vii) of 7 of the Scheme have been fulfilled by the applicant, including submission of option, commencement of commercial production etc. In such circumstances, the decision of the SLSC

cannot be termed as erroneous.

x. The Applicant company had been representing to the State Government from time to time to make available incentives to encourage investment. The specific package for cement industries notified on 2.12.05 was intended for the purposes of attracting higher investment in the State. The notification dated 2.12.05 cannot be questioned on any ground whatsoever.

xi. Para 89 of the State Budget speech for the year 2004-05 presented in the Vidhan Sabha on 12th July 2004 had mentioned the intention of the State Government to make a separate industrial policy for some specified sectors, including cement. The State level Tax Advisory Committee held on 7.2.05 and invited suggestions in this regard from various Industrial and commercial Associations. Further, Para 179 of the Budget speech for 2005-06 had also announced the intention of the State Government to bring a special package for cement industry.

xii. Meetings were held in the Finance Department on 7.5.05 and 21.5.05 with regard to formulating a special package for cement.

xiii. The efforts made by the Rajasthan Cement Manufacturers' Association culminated in the issuance of the notification dated 2.12.05, whereby sub-clause (vi) and (vii) were added to Clause 7 of RIPS 2003.

xiv. In this para of the representation, Sub-clause (vii) of Clause 7 has been reproduced for ready reference.

xv. The Applicant Company Shree Cement submitted its option for registration of its unit being expanded at Ras, vide its letter No. SCL/BWR/05-06 dated 10.12.2005 addressed to Commissioner Industries, exofficio Secretary to SLSC.

xvi. The specific package for cement issued on 2.12.05 is harmonious with the intentions of the State to provide higher incentive where investments exceed Rs. 200 crores.

xvii. The Applicant Company commenced production in its expanded unit in Ras on 17.12.05 and tax on sale of cement produced was paid for the first time on 20.12.05; this date was informed to the Commissioner Industries vide letter of the Applicant No. SCL/05-06 dated 31.1.2006.

xviii. It is evident from the application that the investment for setting up the expansion unit was to the tune of Rs. 303.91 crores, out of which secured loans were sanctioned to the tune of Rs. 224.25 crores by financial institutions. The strength of the employees as on 31.12.05 increased by 650 owing to expansion. Accordingly, the Applicant company became entitled to avail the subsidies as provided in Sub-clause (vii) of Clause 7 of RIPS 2003.

xix. The compliance report on the suggestions made in the meetings of the State Level Tax Advisory Committee held on 7.2.05 and three different meetings of 11.2.05, circulated by the Finance Department on 15.2.05, state that the special

package for cement was announced on 2.12.05. Thereafter, the Applicant Company firmed up its investment plans for early implementation of the second phase of expansion. Accordingly, the company registered its option for setting up an expanded unit and a 30 MM Captive Power Plant with a proposed investment of Rs. 450 crores for availing benefits under the notification dated 2.12.05.

xx. The Company took steps for implementation of its project including placing orders for supply of plant and machinery, equipments etc.

xxi. One more option for registration was submitted on 9.2.06 stating that fresh investment would be made for its expanded cement plant at Ras and for a grinding unit at Khushkhera; this was received in the office of Commissioner Industries on 16.2.06. The option letter was submitted on 28.1.06.

xxii. The Applicant Company was granted provisional Entitlement Certificate for 50% exemption of Stamp Duty and/or conversion charges for the grinding unit at Khushkhera on 23.2.06 under RIPS 2003.

xiii to xvv. These paras record the actions taken by the Applicant Company in furtherance of setting up the industrial units, including placing its orders for machinery, civil works etc.

xxvi. The finance Department arbitrarily issued an order dated 28.4.06 deleting Sub-clauses (vi) and (vii) of Clause 7 of RIP 2003. The amendment order gave no reasons for the withdrawal of the benefits. The Applicant Company had already applied for registration of option on 10.12.05 and for proposed expansion on 28.1.2006 ad 16.2.06 before the amendment date 28.4.06.

xxvii. In the meantime, on 29.7.06, the SLSC considered the application of the company filed on 30.1.2006 and decided to grant eligibility to the company for subsidy under RIPS 2003.

xxviii. In pursuance thereof, the Commissioner, Industries issued the Entitlement Certificate to the Applicant Company for a period of seven years starting from 21.12.05, that is the date of commencement of commercial production as per the provisions of Clause 7 (vii) of the Scheme.

xxix. On 7.11.06, CTO Special Circle, Ajmer determined the average annual tax for the last three years (2002-03 to 2004-05) as Rs. 10.61 crores and vide his order dated 7.11.06 allowed subsidy for a sum of Rs. 8.07 crores for the period 21.12.05 to 31.3.06. The state Government is assured of an average tax base from the existing units as well as additional 25% revenue from the expansion.

xxx. On 12.5.07, the Company submitted the application for grant of subsidy for expansion undertaken in pursuance of its options dated 28.1.06 and 16.2.06, stating that its investment was for Rs. 1165 crores.

xxxi. On 27.6.07, the SLSCA granted eligibility to the units under Clause 7 (vii) of RIPS for a period of seven years from 26.3.07. The SLSC also started in its proceedings that since the option had been registered under the notification

dated 2.12.05 by the Company much before the deletion of the Sub-clauses (vi) and (vii) on 28.4.06, the unit is entitled to get subsidy.

xxxii. In pursuance of this decision, Entitlement Certificate was issued to the Company on 10.7.2007 for the amount of subsidy subject to a maximum of 75% of additional tax for a period of seven years from 26.3.07.

xxxiii. The SLSC granted the Entitlement Certificate after considering the provisions of RIPS 2003.

xxxiv. The SLSC deemed it proper to mention in its order that despite the deletion of the sub-clause 7 (vi) and (vii), in view of the fact that option had been filed before such deletion, the Company was liable to be granted subsidy under the scheme. In this connection two citations were given; a. Commissioner of Income Tax v. Max India Limited reported in I.T.A. 39 of 2004 286 ITR 128; and b. Malabar Industrial Company v. CIT (2000) 243 ITR 83.

xxxv. The Applicant company has filed the above options on the assurance given in Clause 7 (vii) of RIPS 2003: even if the said clauses are deleted, the vested right of the company cannot be denied once it has commenced commercial production. Loans had been taken by the company to the tune of Rs. 991 crores and repayment of Rs. 184 crores has been made by utilizing the upfront subsidy, without which it would not have been possible to repay. There are still loans of Rs. 807 crores secured loans outstanding and continuation of up front subsidy cannot be denied to the company. In this context, citation of the Uma Polymer Case of the Rajasthan High Court (S.B. Civil Writ Petition No. 3850/2008) has been given:

... the Respondent state is not precluded from interpreting any of the clauses of the scheme so formulated but, at the same time, it is expected that unnecessary harassment may not be practiced by any of the state authorities in ignorance of the fact that the scheme is meant to promote and protect the industrial Growth in the State." In support of the averments made, the applicant Company has also cited the following cases:

Birla Jute and Industries Ltd. v. State of MP 119 STC (SC)

... there is no justification for reviewing the certificate long after the time thereof had expired and long after its benefit had been availed by the Appellant.

b. MP High Court judgment in KP Enterprises v. Divisional Deputy Commissioner of Sales Tax, Raipur (1996) 102 STC 483:0

... the eligibility certificate for exemption from tax... has been withdrawn/revoked.. this cannot be permitted because it will amount to causing grater hardship to the Assessee... If the authority wants to withdraw the eligibility certificate, then effective of withdrawal shall be with effect from the date of order and it cannot be made retrospective.

c. State of Punjab v. Nestle India Ltd. reported in 2 VR 20 (SC) : 1998 AC 6449 of

Chief Minister and Finance Minister in his budget speech announced abolition of purchase tax on milk... the State Government's refusal to exercise its discretion to issue the necessary notification "abolishing" or exempting the tax on milk was not reasonably exercised...

d. Mahavir Vegetable Oils Pvt. Ltd. v. State of Haryana (Reported in 145 STC 350 (SC): In this case, the Industrial Policy of Haryana for 1988- 1997 announced incentive by way of sales tax exemption for industrial units set up in backward areas of the State. The Appellant had taken steps to set up a solvent extraction plant by purchase of land in August 1995 and commenced production in March 1997. In the meanwhile, solvent extraction plants were placed in the negative list by notification dated December 16, 1996 and hence the applicant's claim for exemption of tax was rejected. The Appellant's writ was dismissed in the High Court, but on appeal, the Supreme court held:

... during the period August 1996 to 16, December 1996, the Appellant had invested huge amounts. By operation of the rule of estoppel, the promises/ representations made in the Industrial Policy continued to operate in the field and the Appellant had also taken steps which could be only taken for the purpose of setting up a new industrial unit. The State had accepted that equity operated in favour of entrepreneurs by making the amendment in the notification dated December 16 1996, whereby solvent extraction plant was for the first time inserted in the negative list. The amendment carried out in 1996... could not have taken away the rights of the appellant with retrospective effect.

e. MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax reported in 6 VAT Reporter 159:

Promissory estoppel operates on equity and public

interest. What is granted cannot be withdrawn by the government unless the Government is precluded from doing so on the ground of promissory estoppel... The action of the State Government in depriving the benefit of tax exemption

to the Petitioner... was held to be highly arbitrary and unjust and unreasonable based on the principle of legitimate expectation and was violative of Article 14 of the Constitution of India.

xxxvi. The SLSC's decision was a consensus decision. The Assessing Authority had granted the sanction and hence the Entitlement Certificate cannot be withdrawn. The Supreme Court in Vadilal Chemicals Ltd. Vs. The State of Andhra Pradesh and Others, has held that eligibility certificate granted by the Department of Industries cannot be cancelled in revision.

xxxvii. The amendment dated 28.4.06 deleting the clauses (vi) and (vii) of Clause 7 will not affect the Applicant Company; this view is supported by:

a. Madras High Court case of Commissioner of Income Tax Vs. Kumudam Endowments,

... it is a settled law that a person who has complied with the law as it exists cannot be penalized by reason of amendment to the law affected subsequently.

b. Lokendra Industries v. State (1996) 89 STC 277. In this case, "oil extracting or manufacturing industry" and "cotton ginning industry" were added to the list of ineligible industries in Rajasthan on May 7, 1990 though the applicants had taken effective steps in setting up their industries as per the provisions of the 1989 Incentive Schemes. The High Court held that:

... in this circumstances, the Petitioners can very well invoke the principle of equitable and promissory estoppel against Respondents u/s 115 of the Indian Evidence act.

c. Pournami Oil Mills v. State of Kerala (1987) 65 STC 1: this case arose out of sales tax incentive given to small scale industries. The Court intervened and directed that:

... all parties who had set up industries prior to October 21, 1980 would be entitled to the exemption extended and/or promised under that order.

d. In the facts of the Civil Asbestos v. State of Gujarat (1995) 96 STC 154, the Petitioner was granted exemption certificate; but cement industry was included in the list of industries ineligible for benefits under the incentive scheme. The Gujarat High Court held that

... exemption granted under the Sales Tax Act, which State Government was entitled to grant under the statute, constitutes a promise to the entrepreneur... it is well established that though the government is entitled to withdraw benefits under such scheme, but that authority is operative only prospectively and does not affect the rights already vested in the entrepreneurs to claim the benefits of the scheme.

e. In TF Jose v. General Manager, District Industries Centre (1995) 97 STC 484, the High Court of Kerala pronounced judgment in the matter of coconut oil mills which were declared ineligible for the incentives under sales tax exemption subsequent to the announcement of the scheme. The Court held that:

... oil mills which have been set up before March, 31 1991 and which were existing as on that date cannot be deprived of benefits which they were enjoying.

f. As reported in 16 TW 222 (RHC) M/s Mohnot Stainless Steels Ind. Pvt. Ltd. v. State of Rajasthan which was decided in DB 392 of 1992 and DB CWP 468 of 1992, the Rajasthan High Court held that for

... those persons who started making fixed capital investment on the basis of earlier annexure C appended to Incentive Scheme, 1987... Sales Tax Incentive will be available to the extent of eligible fixed capital investment and it will not be restricted.

g. The clarification as issued by the Tax Division in the Finance Department as

last as on 22nd May 2008 cannot alter this legal position.

h. Later, the State Government amended the Scheme by amendment No. F. 12 (20) FD/Tax/2005 on 30.9.08 and a proviso was added under Clause 7 (iii):

Provided further that the investment made or committed before 22.05.08 or under MOU signed during Rajasthan Resurgent Summit for both the new cement unit or under expansion, having capacity more than 200 tons per day shall be eligible for subsidy under this clause on the condition that such unit shall start commercial production by 31.12.2011.

This amendment makes it clear that industrial units who already made investment or committed by the Government or SLSC shall be eligible for subsidy as they were getting as per SLSC order. The Applicant Company was getting the benefit of upfront subsidy before 22.5.08 on the basis of investment already made, and is therefore eligible for subsidy. The upfront subsidy of 45% cannot be denied on any ground. This view is supported by the decision of the Hon'ble Supreme Court in Corporation Bank v. Saraswati Abharanasala reported in 11 VR 39 (2009).

xl. The Applicant Company has requested that these preliminary objections may be decided first before proceeding in the matter and has quoted the case of M/s Assam Roller Flour Mill v. State of Rajasthan (1979) 13 TR 463 which states that:

The Authority should first decide the preliminary objections and in case he overrules them, he should give reasonable time to the Assessee to seek proper remedy for it.

xli. The Applicant Company has also requested that all record notes, agenda notes, submissions and other relevant material may be called and copies given to the applicant for the sake of natural justice so that submissions can be added, altered or modified if need be .

16A. The Principal Secretary, Finance, Government of Rajasthan passed the impugned order on 31.3.2009 against the Petitioner - unit and by the impugned order AnnEx. 43 dtd.31.3.2009 overruling the preliminary objections of Petitioner, the revision petitions filed by the Commissioner were allowed and SLSC decisions dtd.29.7.2006 and 27.6.2007 were quashed and SLSC was directed to consider the two cases afresh and issue new eligibility certificate to the extent that only the original dispensation as provided under Clause 7 and existing prior to the amendment made on 2.12.2005 shall continue to be enjoyed by the Petitioner company and the assessing authority shall make a reassessment of the tax liability of the Petitioner company and make necessary steps to recover tax in excess of its eligibility in terms of new eligibility certificates to be issued by the SLSC.

REASONS & FINDING of PRINCIPAL SECRETARY IN THE IMPUGNED ORDER DTD.31.3.2009

The relevant extracts from the impugned revisional order dtd.31.3.2009 to understand the reasons given therein are quoted below for ready reference:

25. Substantial Issue A: Now, I come to the first of the substantial issues involved in this revision, namely whether the Applicant Company has been adversely affected in financial terms as a result of the order dated 28.4.06, whereby clauses 7 9 (vi) and (vii) of RIPS 2003 deleted. To answer this question we have to examine two related questions, namely

(i) the effective rate of tax payable to the State Government and;

(ii) the quantum of tax subsidy retained by the Applicant Company.

(A) Effective rate of tax: When RIPS 2003 was originally introduced on 28.7.03, it provided for a 50% rebate in sales tax in the case of those units eligible for the same by virtue of the new investments made after the issuance of the scheme. At the point of time when Applicant Company filed its applications, the sales tax rate on cement was 19%. In other words, the effective tax rate under RIPS 2003 for eligible investors was 9.5%. Later, on 2.12.05, additional tax exemption benefits were made available specifically for cement units to the tune of a total of 75% i.e. by way of an upfront subsidy of 45% and a further subsidy of 25% and 5% for wage/employment subsidy and interest subsidy respectively. It was also specified that a unit not claiming any interest subsidy can claim wage/employment subsidy to the maximum extent of 30%. It is crucial to mention here that simultaneously, by another notification No. 1220 FD/Tax/05 Pt. 97 issued on the same date i.e. 2.12.05, the sales tax rate on cement was enhanced from 19% to 28%. The reason for this is obvious. While it was necessary to encourage cement industry to flourish in Rajasthan, the State Government also realized that in view of the substantial revenues involved in such tax concessions, the State should end up by losing precious revenues, invaluable for the development of the State. Thus, the tax rate on cement was raised to 28%. Assuming that the investor company utilizes the entire available subsidy limit of 75% under the new dispensation for cement plants, the effective tax rate after 2.12.05 became 7% (25% of 28%).

26. Yet another development of legislative significance took place on 1.4.06 when the State switched over from Sales Tax to Value Added Tax. This fact was not mentioned by the Applicant Company in such specific terms in the written representation submitted in the form of preliminary objections on 3.3.09. According to national consensus, the tax rate on cement was fixed at 1.5%. As a result, the units which had had taken the benefit of the revised sales tax incentive scheme intended for the cement with effect from 2.12.05, got the benefit w.e.f. 1.4.06 of an effective tax rate of 3.12% (25% of 12.5%).

27. This was undoubtedly an unexpected windfall for the Applicant Company. The previous paragraphs would reveal how the effective tax rate has been reduced on a sliding scale from 9.5% to 7% to 3.12% all within a period of less than six months. The State Government realized the significance of the change in the

effective tax rate, a trifle belatedly, and, four weeks later, on 28.4.06, withdrew the notification dated 2.12.05, thus deleting Clause 7 (vi) and (vii) from RIPS 2003. The benefit of Clause 7 (vi) and (vii), therefore, becomes unavailable henceforth. As a result, the special dispensation granted to cement companies came to an end, although the original provisions of RIPS 2003 for investment beyond certain levels of investment continued to get the benefit of 50% tax exemption. As a consequence, for the Applicant Company, the effective tax rate became 6.25%, i.e. 50% of 12.5%. It may thus be seen that there have been fluctuating levels of tax exemption benefits for the Applicant Company, namely, 6.25% (after 1.4.06) and 6.25% (post 28.4.06). It is in this context that we have to examine whether the Applicant Company has lost any financial advantage as a result of the withdrawal of the notification dated 2.12.05 along with the Clauses 7 (vi) and (vii) of RIPS 2003.

28. As already stated, the said advantage for cement companies, introduced on 2.12.05 by specifying a maximum of 75% tax exemption, had brought down the effective tax rate on cement to 7%. After the introduction of VAT in Rajasthan from 1.4.06, and the tax rate on cement was placed at 12.5%, the Applicant Company was blessed with an especially low effective tax rate of a mere 3.12% (75% of 12.5%). I have no hesitation in stating that undoubtedly, this could not have been the intention of the State Government. The State Government, therefore, withdrew the special dispensation allowed to the cement companies vide notification dated 2.12.05 and the impugned Clauses 7 (vi) and (vii), thus bringing the effective rate on cement to 6.25% (i.e. 50% of 12.5%). This current rate of 6.25% is marginally lower, and thus more beneficial than the 7% effective rate of tax enjoyed by the Applicant company immediately after the issuance of the notification dated 2.12.05 whereby Clause 7 (vi) and (vii) were introduced into RIPS 2003. The simultaneous and well-thought out enhancement of the tax rate on cement from 2.12.05 itself from 19% to 28% had reduced the effective tax rate from 9.5% to 7% (75% of 28%) so that the revenue interests of the State are protected. In other words, the tax exemption scheme intended for cement companies, which had been extended the benefit of an effective tax rate of 7% with effect from 2.12.05, stands today marginally lower at 6.25% because of the lowering of the tax rate on cement from 28% to 12.5% as a consequent of the replacement of Sales Tax with the VAT system and a revised tax structure. It was never the State Government's intention that effective sale tax rate on cement be reduced to 3.12%.

29. This anomalous position was rectified by withdrawal of Clause 7 (vi) and (vii), causing no hardship to the Applicant Company. In fact, as compared to the tax liability of 7% leviable from 2.12.05, the tax liability stands reduced to 6.25% after 28.4.06. I, therefore, decide the first of the substantial issues on the question of whether there has been financial loss to the Applicant company in negative. Indeed, the quantum of sales tax exemption enjoyed by the Applicant Company by virtue of the notification dated 2.12.05 (effective tax rate 7%), has not been reduced with the withdrawal of the Clause 9 (vi) and (vii) of RIPS 2003

with effect from 28.4.06, since the reduction of the basic tax on cement to 12.5% w.e.f. from 1.4.06 (effective tax rate 6.25%) ensures that the Applicant Company continues to enjoy an effective lower tax rate of 6.25%.

30. (B) The quantum of tax subsidy: In the above paragraphs we have looked at the declining rate of effective tax. We also must examine the quantum of tax subsidy enjoyed by the Applicant Company. Prior to 2.12.05, and the insertion of two clauses 7 (vi) and (vii) in RIPS 2003, the quantum of tax retained or retainable was 50% of the then rate on cement i.e. 19%. However, with the insertion of the two above stated clauses into the Scheme, w.e.f. 2.12.05 and the simultaneous increase in the tax rate on cement from 19% to 28%, the maximum quantum of tax subsidy rose to 75% of 28% i.e. 21%. This leads us to an important point of law, namely that the quantum of tax payable is directly related to the rate of tax leviable. As and when the rate of tax on cement undergoes change, the quantum of tax subsidy must also necessarily vary. The scheme of things does not contemplate of a principle of a fixed quantum of subsidy irrespective of, or independent of, the tax rate on cement. Once this principle is accepted, then it also stands to reason that as and when the tax rate on cement further changes, the quantum of tax subsidy would also change in tandem. Consequently, when the tax rate on cement was brought down to 12.5% as a result of the introduction of VAT and the national consensus for a tax rate of 12.5% on this commodity, the maximum quantum of tax subsidy also came down to 6.25%. It may be argued that the quantum of tax subsidy that was retained or was retainable by the Applicant Company has been brought down from 21%. But the prerogative of the State to change the tax rate on commodities is supreme. Tax subsidy is also, therefore, a variable as and when such tax rate is modified. The principle of promissory estoppel, which is examined in some more detail in the following paragraphs, and its alleged violation, cannot be raised in the face of the sovereign powers of the State government to decide on a applicable tax rate on cement. it is not possible for the State Government to put in place a tax rate on cement only for the benefit of a single Applicant Company, ignoring the tax burden on the common tax payer, so that it continues to receive the same quantum of tax subsidy. This would be indefensibly discretionary and discriminatory vis-a-vis other cement companies who are not receiving the benefit of the provisions of RIPS 2003 i.e. pertaining to the upfront subsidy that now stands deleted. In other words, the quantum of tax subsidy is directly related to the tax rate extant on the commodity at the point of time in question. To carry this point a little further, the effective tax rate and the quantum of tax subsidy would still be modified to that extant. There can be no immutable tax subsidy independent of tax rate levied at the point of time in question. It is also a matter to consider that if the Applicant Company is to be permitted to continue the avail to enhanced tax subsidy that it had been enjoying earlier, this would be possible only if the rate of tax on cement is increased from the current level of 12.5% to 28%; undoubtedly, this will be a burden the common tax payer shall have to suffer and that too, solely for the benefit of a

single entity, the Applicant Company.

31. Substantial Issue B: The second substantial issue pertains to the principle of promissory estoppel. The Applicant Company has quoted several citations and legal pronouncements which have been mentioned above. Predominantly, these include the case of Mahavir Vegetable Oils Pvt. Ltd. v. State of Harayana (Reported in 145 STC 350 (SC)), Birla Jute and Industries Ltd. v. State of MP (reported in 19 STC 14 (SC)), Madras High Court case of Commissioner of Income Tax Vs. Kumudam Endowments, Pournami Oil Mills v. State of Kerala (1987) 65 STC 1 etc.

32. According to the legal definition of the term promissory estoppel, section 115 of the Indian Evidence Act 1872 reads as follows; When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe such a thing to be true and act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

33. The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made, and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it.

34. Applicability of promissory estoppel on Government: there is, of course, much debate on the applicability of the principle of promissory estoppel on Government. Indeed, the Supreme court has held, for the first time in the case of Union of India v. Anglo-Afghan Agencies, that the government also can be made responsible for violating the principle of promissory estoppel if by its actions, such legal intervention becomes necessary. However, there are certain defining characteristics that give the Government a different status when compared to individuals who violate the principle of promissory estoppel. It may be stated that there are three essential characteristics to make a promise binding on Government namely;

(a) that the State makes the promise within the ambit of law.

(b) that there is an intention to enter into a legal relationship, and

(c) that the other party must do an act in furtherance of that promise or is forbidden to do anything.

35. Testing the present revisions under consideration, against these three precepts would help us to arrive at a decision. Yes, it is correct to state that State government had an intention to grant a special tax dispensation for cement industries, going beyond the provisions originally announced in RIPS 2003, where the limit of tax exemption was only 50%. When the notification dated

2.12.05 was introduced, the State had held out a promise to increase the subsidy on tax on cement units to a total of 75% (45% upfront and 25% and 5% for wage/employment subsidy and interest subsidy respectively). In this regard, it is to be seen whether the investment made by the Applicant Company arose out of the proclamation of this new scheme of tax exemption.

36. The facts, however, seem different. The Applicant Company submitted its option for its unit being expanded at Ras on 10.12.05, i.e. within eight days after the issuance of the new incentive package for investment in cement industry. Not only this, the date of commercial production as intimated by the Applicant company was 17.12.05 and tax on sale of cement was first paid by the company for the first time on 21.12.05. In other words, a mere 19 days after the issuance of the special tax exemption package for cement on 2.12.05, the Applicant Company achieved commercial production.

37. A promise made should propel a decision to invest. Projects which have already begun construction and merely commences production after the announcement of an incentive scheme, does not make such a project qualified for the incentives. This has been very strongly held by Supreme court in its judgment in the case of Bakul Oil Industries v. State of Gujarat (SC 1987 (1) 31). The view of Supreme Court is directly applicable in the referred cases. Para 11 of the said judgment states:

It is not sufficient to rely on the commissioning of an industry after completion of construction 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 fortuitous circumstances 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.

38. As investment predates the issue of notification dated 2.12.05, and particularly in one of the two cases the production commenced only 19 days after 2.12.05, therefore, be no doubt at all that the Applicant Company had started investment for expansion at Ras long before the new scheme was ever conceived. By a fortuitous coincidence the new revised tax exemption scheme came into existence on 2.12.05 and the Applicant Company was fortunately placed at the right point in time in the Ras unit of the Applicant Company did not arise because of the promise of higher tax exemption held out by the State Government. Rather the investment had commenced long before the announcement of the scheme. Clause 3 of the RIPS 2003 clearly stipulates the conditions attached to applicability of the scheme on any particular unit.

"The Scheme shall be applicable to all new investments and investments made by the existing units and enterprises for modernization/expansion/diversification, subject to condition that such units shall commence commercial production/operations owing to such investment during the operative period of

the scheme.

The investment made in the matter of this decision of SLSC dated 29.7.06 was initiated much earlier. When tested against the three premises mentioned above, it is clear that the applicant company has not acted in furtherance of that promise extended by the State Government, but prior to, and independent of it.

39. The facts with regard to the second matter of expansion approved by the SLSC in its meeting dated 27.6.07 are different. As per the facts of the case, the land was acquired on 24.2.06 and development of the site was started thereafter. It applied for registration of option on 10.12.05 for proposed expansion, on 28.1.06 and 16.2.06. These facts were, apparently, considered by the SLSC, which gave its decision on 26.07.07, despite the fact that the scheme had been withdrawn on 28.4.06. The impact of the withdrawal of the notification dated 2.12.05 will be examined in the succeeding paragraphs.

40. It has also been held that the doctrine of promissory estoppel cannot be invoked to prevent the legislative and executive organs of the Government from performing their duties. This view has been maintained by the Supreme Court in the case of *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, where a municipality was granted exemption from octroi for developing a mandi. Subsequently, the State revoked the exemption. Later, it again granted the exemption in keeping with the terms of the original sale of plots, but levied taxes again. Even so, a claim of estoppel against its legislative power was not allowed by the court. So is the case with tax laws. If the law requires that a certain tax be collected, it cannot be given up, and any assurances by the Government that the taxes would not be collected would not bind the Government, when it chooses to collect the taxes. Thus it was held that when there was a clear and unambiguous provision of law that provides for a certain level of taxation, (even though lowered to a reasonable level by the device of subordinate legislation through the notification), no question of estoppel arises. The sovereign authority of the State to levy taxes cannot be abridged on the principle of promissory estoppel since the levy of tax is for the purposes of the governance and the development of the State, which is greater than the rights of any individual person or entity.

... 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.

In other words, when applied to the case in hand, when the State Government is acting on the strength of the authority vested in it in the management and administration of taxes, estoppel cannot and does not apply.

41. The judgment quoted by the *Shri Bajrang Extraction Pvt. Ltd. and Another Vs. The Secretary to the Government of M.P. and Others*, in the case of *Shri Bajrang Extraction Pvt. Ltd. v. the Secretary to the Government of MP* is not relevant in the case at hand. This quoted judgment refers to the withdrawal of a

scheme of the year 1971 of the Government of India pertaining to grant of subsidy for industrial units set up in Backward area. A reading of the judgment would reveal that it pertains to the comparative merit of two application for such subsidy, one of which is processed fast and other is processed in a delayed manner. The High Court had held in this case that if the scheme is withdrawn by the Government of India on a particular date, the second of the applications pending on the date of withdrawal of the scheme cannot be dismissed solely on the grounds of its pendency on the date of withdrawal of the scheme simply because of the delay in processing. The essence of the judgment is not relevant to the issues raised in the case at hand.

42. The second judgment quoted by the Applicant Company i.e. Hossein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh delivered on 25.2.1953 quoted in STC 4 114 is again not germane to the case at hand. It deals with the right of appeal as a substantive right where the critical and relevant date is the date initiation of proceedings and not the decision itself. This judgment has been mentioned by the Applicant Company to emphasize that while the SLSC had approved the applications for tax subsidy on a date when the Clauses 7 (vi) and (vii) had been deleted, the SLSC's decision is not impaired since the vested right for claiming the subsidy had already accrued to the applicant prior to the deletion of the said clauses. Application of this judgment to the case at hand, is a little far-fetched and is not applicable since the facts of the present are different and the issues discussed are dissimilar.

43. Other general principles of estoppel: The doctrine of promissory estoppel has been crystallized over the years by various judgments of the Supreme Court on following grounds:

- (a) Any scheme promising some benefit should pass the test of equity. There should not be any dark exception.
- (b) A promise made, should not be broken detrimental to the interest of the promisee.
- (c) Doctrine of promissory estoppel should be tested against public interest if a promise is made based on public money.
- (d) An incentive scheme having an enabling provision to modify and amend any clause cannot create an unmodified right.
- (e) A project should qualify for promised benefits if the project comes into existence in consequence to promise made.
- (f) There cannot be any estoppel against law/state.

44. Examination of two cases under consideration here reveal that, neither the insertion of Clause 7 (vi) and (vii) in RIPS 2003 on 2.12.2005 nor its subsequent deletion on 28.4.2006 were iniquitous in any manner. Rather, making an exception by continuing the benefits, despite deletion of enabling clauses and

despite reduction of net incidence of tax from 7% to 6.25%, will actually be iniquitous.

45. This principle of equity in administering an incentive scheme has actually been concertized in case of *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*. In this case, Supreme Court has also pronounced clearly that if public interest suffers, the promise cannot be enforced; however, Government cannot claim exemptions from the liability to honor the promise on some indefinite and undisclosed ground of necessity or expediency. Under the light of the above it is evident that the scheme based on public money promised 75% exemption on the basis of tax rate of 28%, which a citizen was to pay to buy cement. On the basis of revenue so accrued, in the public interest, so as to get more such investments in the cement sector, effective tax rate was made 7% by promising 75% subsidy. However, when the entire country witnessed historic change in the field of tax administration by implementing VAT, Rajasthan was no exception and revised the rate tax on cement from 28% to 12.5%. As pointed out above, by giving 50% subsidy, the effective tax on cement became 6.25%. Therefore, in the public interest, it was logical to revise the scale of benefits available to the cement sector. Otherwise with upfront subsidy intact, the effective tax rate would have been 3.12%. By no stretch of arguments, while examining the principle of promissory estoppel on the touchstone of public interest, such massive reduction of tax of tax on a commodity based on non renewable natural resources, and that too for a single company, could have justified.

46. On this question of public interest vis-a-vis the principles of promissory estoppel, Supreme Court had made it remarkably clear in the following paragraph (*State of Rajasthan v. Mahaveer Oil Industries and other* SC 1999 357 (1999)).

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

47. An incentive scheme promises certain incentives but in the process, does it create infallible right? On this, Supreme Court in the case of "*State of Rajasthan v. J.K. Udaipur Udyog Ltd.* ((2004) 137 STC 433 (SC)) has observed that the:

State Government is competent to modify or revoke an exemption in the public interest using the same power under which it was granted. Thus, what is granted

can be withdrawn unless the Government is precluded from doing so on the ground the promissory estoppel. The principle itself is subject to consideration of equity and public interest.

Further, Supreme Court observed that the "exemption being a creature of the scheme is subject to the scheme. If any right under the scheme is held to be unmodified it would be contrary to the scheme itself".

48. The above observation of Supreme Court is not only unambiguous and cogent but also makes it fundamentally clear that a scheme cannot create a right which is unmodifiable. In RIPS 2003, Clause 14 empowers the Government to modify and amend the scheme at any point of time.

49. The question of public interest: Yet again it has been held that when the Government is able to show that facts have transpired subsequent to the promise being made, public interest would be prejudiced should Government carry out the promise made, then it would be necessary to balance the public interest with the promise made to a person or any other entity. In the case quoted by the Applicant Company, Mahavir Oil Mills Pvt. Ltd. v. State of Harayana (145 STC 350 SC), a new industry was set up on the basis of an incentive scheme from the Government wherein it promised some benefits. The Supreme Court held that the State Government was bound by its promise held out in such situation. Any alteration that adversely affected the investor was considered to be a violation of the principle of estoppel. It is interesting to note that in similar case quoted more fully later on (State of Rajasthan v. Mahaveer Oil Industries and Ors. SC 1999 357, the Supreme Court also held that it does not preclude the State Government from withdrawing the scheme prospectively. It could withdraw the scheme even during its continuance, if public interest so requires. In other words, if due to supervening circumstances, public interest requires the withdrawal of benefits, the benefits can be withdrawn or modified even retrospectively. The supervening public interest would prevail over promissory estoppel.

50. The provision of the RIPS 2003 including amendments made thereof on 2.12.05 by addition of clauses 7 (vi) and (vii), were withdrawn on 28.4.06, primarily because of the promulgation of the Rajasthan Value Added Tax Act, 2006, the new tax regime now been legislated across the country in a bid to have a common national taxation system. The consensus arrived at for the rate of tax for cement is 12.5% and this has been largely followed in every State. The provision of 75% exemption would have made the effective rate of tax on cement for the Applicant Company as 3.12%. As stated before, this is certainly not the intention of the statute or the RIPS 2003 scheme, which would have lowered effective tax rate from 7% to 3.12%. It is to correct this inequity that the notification dated 2.12.05 was withdrawn. This low rate would have militated against the very principle of equity with other cement producing industries under the new VAT regime. Public interest and the requirement of protecting the revenue interests of the State for the overall development and governance of the

people, cannot be subjugated to an agreement that provides uncalled for and unreasonably low levels of taxation benefits to a particular individual or company. As a result, the withdrawal of the scheme stands justified as a prerogative of the State for the purposes of the governance and development of the State. Indeed it can be rightfully argued that the State has maintained its promise of effective tax rate of 7% introduced by the incentive package of 2.12.05 because despite the withdrawal of the scheme on 28.4.06, the effective tax rate on cement as far as the Applicant Company is concerned, remains at 6.25%.

51. Clarification sought by CCT: It is a matter of some concern as to why the SLSC granted such benefits when the notification withdrawing the benefits of Clause 7 (vi) and (vii) had already been withdrawn earlier on 28.4.06. Indeed in the proceedings of the SLSC dated 29.7.2006, there is not even a mention of the order dated 28.4.06 whereby the benefits announced on 2.12.05 had been withdrawn. In the order of the SLSC dated 27.6.2007, there is mention of the rescinding notification dated 28.4.06, but the SLSC nevertheless decided to grant the benefit of such tax exemption. Since several applications were filed and were pending for disposal or were disposed of as pointed out above, the issuance of grant of benefits under the deleted Clause 7 (vi) and (vii) and its bearing on such cases was referred by Commissioner, Commercial Taxes Department to the Finance Department of Government of Rajasthan for clarification. CCT had sought clarification under six scenarios as detailed below: -

(a) Where the option was submitted before 28.04.06 and benefits were also granted by SLSC before 28.4.06.

(b) Where the option was submitted before 28.4.06 and benefits were also granted by SLSC after 27.4.06.

(c) Where the option was submitted before 27.4.06 and benefits have not been granted by SLSC.

(d) Where the option was submitted after 27.04.06, but within 180 days of 2.12.05 and benefits has not been granted by SLSC.

(e) Where the option was submitted after 27.04.06, but within 180 days of 02.12.05 and the case has not been considered by SLSC.

(f) Where the option was submitted after 27.04.06, but within 180 days of 02.12.05 and the unit has still not applied for benefit.

52. The issues so raised were examined by FD and the opinion on the same was sought from Additional Advocate General, Government of Rajasthan on file. AAG opined as under:

I am of the opinion that the deletion of the provisions contained in Clause 7 and its Sub-clauses (vi) and (vii) vide Government Order dt. 28.04.2006, neither the cases can be considered for the grant of benefit under the notification dt. 2.12.2005 nor the benefits can be granted by SLSC from the date of the deletion

of the above stated provisions. Thus in my view the CCT may be advised accordingly through the clarification as sought.

53. These unequivocal views strengthen the view that the withdrawal of the benefits stated under Clause 7 (vi) and (vii) vide the impugned notification dated 28.4.06 have the effect of barring the SLSC from granting any benefits in its meetings. The Applicant Company cannot get any benefit by seeking to continue with these benefits even after the reduction even after the reduction of the tax rate on cement to 12.5%.

54. In brief, the special tax dispensation made available to cement units by the issuance of the notification dated 2.12.05 lated but for just about five months. The first unit of the Applicant Company at Ras was certainly not initiated by the announced tax relief package, but had been begun much earlier. It cannot be stated, by any stretch of imagination, that the Ras unit was occasioned by, or propelled because of, the new tax exemption package and the clauses 7 (vi) and (vii). As far as the second unit at Khushkhera and the captive power plants are concerned, the effective tax rate of 7% has not been enhanced by the withdrawal of the notification dated 2.12.05, but has indeed resulted in a lowering of the effective tax rate to 6.25% w.e.f. 1.4.06 because of the promulgation of the Rajasthan Value Added Tax Act and the determination of the basic tax rate on cement at 12.5%. The Applicant Company cannot retain tax subsidy in excess of the provisions of the amended RIPS 2003. Accordingly, I hold that the principle estoppel has not been violated by the State Government.

55. Another peripheral issue would also require to be addressed in this decision. The passing reference to the notification dated No. F.12 (20) FD/Tax/2005 on 30.9.08 whereby a proviso was added under Clause 7 (iii) pertaining to investments made or committed before 22.05.08 or under MOU signed during the Rajasthan Resurgent Summit. It is correct that by a notification No. F(12) (20) FD/Tax/2005 dated 22.05.08, the cement industry was placed in the negative list for the purposes of available benefits under RIPS 2003. In the light of the investments already made, or were promised to be made by the signing of MOUs during the Rajasthan Resurgent Summit, it was decided that these cement units would continue to avail benefits under RIPS 2003: it is in this context that the above mentioned notification was inserted as proviso under Clause 7 (iii). In other words, such cement units would continue to get the benefit of 50% tax exemption, despite the fact that cement industry was placed in the negative list. Since the Applicant Company had already made the investment before the said date, they would not be placed in the negative list. They would continue to get the benefit of Clause 7 of RIPS 2003 to the extent of 50% tax exemption.

56. After a thorough examination of facts on record, various judgments pronounced by the apex court of the country and the two hearings granted to the Applicant Company on 3.3.2009 and 26.3.09, I come to my conclusions as stated below:

57. The first decision of SLSC dated 2.7.06 had extended fresh benefits of up front tax subsidy to a unit for which, investment was certainly not propelled by the insertion of Clauses 7 (vi) and (viii). The investment was made much earlier and cannot be said to have been motivated by the new scheme. Accordingly, the unit cannot claim eligibility under the scheme as has been discussed in detail above. There is also, therefore, no question of promissory estoppel and the Applicant Company cannot get any benefit thereof. As regards the second decision of the SLSC dated 27.06.07 for various arguments stated above, the Applicant Company can derive no extraordinary benefit beyond what it has been enjoying under the original provisions of Clause 7 of RIPS 2003. When the decision of the SLSC was given on 26.6.07, the enabling provisions of Clause 7 (vi) and (vii), already having been deleted on 26.4.08 did not exist in the Scheme. It is also pointed out here that there were only two such orders of the SLSC pertaining to the same Applicant Company which have sought to obtain benefits under the provisions of Clause 7 (vi) and (vii) of RIPS 2003 which lasted for a mere five months.

58. I hereby accept both the revision applications dated 18.7.08 submitted by the Commissioner, Commercial Taxes seeking revision of the decision of the SLSC dated 27.7.06 and 27.06.07. These decisions are hereby quashed and the SLSC is directed to consider these two cases afresh and issue new eligibility certificates to the extent that only the original dispensation as provided under Clause 7, and existing prior to the amendment made on 2.12.05, shall continue to be enjoyed by the Applicant Company. The Assessing Authority shall make a reassessment of the tax liability of the Applicant Company as mentioned above and take necessary steps to recover tax in excess of its eligibility in terms of the new eligibility certificates to be issued by the SLSC. Pronounced on 31.3.09

Sd/-

C.K. Mathew

Principal Secretary, Finance

Government of Rajasthan

17. Being aggrieved by the said order, against which, apparently, no alternative remedy is available to the Petitioner company, the Petitioner company has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India.

CONTENTIONS of Petitioner BEFORE this Court

18. Mr. S. Ganesh, Sr. Advocate assisted by Mr. Ramit Mehta submitted that the impugned order passed by the Principal Secretary is liable to be quashed by this Court for following reasons:

i) The impugned order of Principal Secretary quashes the order of SLSC in favour of the Petitioner company on the reasons other than the reasons mentioned in

the show cause notice or the reasons given in the application moved by the Commissioner, a copy of which was supplied to the Petitioner company and this being beyond of the power of revision under Clause 13 of RIPS, 2003 is not sustainable.

ii) The impugned order of the Principal Secretary dtd.31.3.2009 is contrary to the principles of promissory estoppel and legitimate expectation of the Petitioner company and increased benefit of 75% of subsidy under Clause 7(vii) inserted in RIPS, 2003 vide notification dtd.2.12.2005, the vested rights of the Petitioner - company to avail such increased benefits cannot be withdrawn by the State and the said decision being contrary to the principles of promissory estoppel and legitimate expectation deserves to be quashed.

iii) Amending notification dtd.28.4.2006 by which Clause (vi) and (vii) of Clause 7 of RIPS, 2003 were deleted can only be applied prospectively and to the cement industries coming into production after the said date or they have started taking the effective steps for setting up of the expansion units after 28.4.2006 and the same cannot be applied to the units like that of the Petitioner - company which had already taken effective steps or had commenced commercial production during the period for which the previous notification dtd.2.12.2005 held the field for the period of about 5 months upto 28.4.2006.

iv) That the amending notification dtd.28.4.2006 has hit only single unit within the State of Rajasthan and that of the Petitioner company, while no other cement manufacturing unit has been adversely affected by the said amending notification as the Petitioner's expansion units at Ras, Tehsil Jaitaran Dist. Pali and Khushkhera, Bhiwadi, Dist. Alwar only satisfied that twin conditions of notification dtd.2.12.2005 by making investment in expansion units of more than Rs. 200 crores and providing employment to more than 100 persons within the State of Rajasthan during the said period by commencing commercial production within 5 years.

v) That the argument of Respondents based on the reasoning given in the impugned order dtd.31.3.2009 of the Principal Secretary that quantum of subsidy was reduced from 75% to 50% as there was reduction in rate of Sales Tax/VAT from 19% to 12.5% w.e.f. 1.4.2006 with the introduction of VAT Act in the State of Rajasthan in harmony with uniform national rate on sale of cement, is misconceived and not tenable because with the reduction in rate of tax on cement, the quantum of incentive which was relatable to the total additional tax liability over and above average tax liability of base years was also bound to go down with the reduction of rate of tax and therefore, the quantum of subsidy was never and could not be relatable to the rate of tax applicable on the sale of cement. Moreover, when the rate of subsidy for other commodities also having gone down with the introduction of VAT w.e.f. 1.4.2006, their subsidy was not reduced from 50% to further down below percentage, therefore, the reduction in rate of sales tax on cement cannot be a reason for reduction of percentage of subsidy from 75% to 50% in case of cement industries.

vi) Higher incentive to the cement industries of 75% of subsidy of the total additional tax liability due to higher turn over due to expansion made by it was only to give competitive edge to such new units making investment within the State of Rajasthan, which has large deposits of lime stone, the basic raw material for cement manufacturing industries and the same would get lost, if the subsidy percentage is reduced contrary to the principles of promissory estoppel from 75% to 50% as new units made much higher capital investment for undertaking such expansion projects in the State of Rajasthan in comparison with the old existing units and their capital investment can only be recovered, if higher quantum of subsidy promised at 75% of additional tax liability under the notification dtd.2.12.2005 is continued to be given to them by seven years. The State of Rajasthan got all it wanted under the Scheme from the Petitioner company viz. the high investment of about Rs. 500 crores in both units, fresh employment to more than 200 people and other tax revenues and therefore, now State cannot be permitted to go back on its promise of assured subsidy of 75% of additional tax liability.

vii) That in any case, the view taken by the SLSC in its two meetings held on 29.7.2006 and 27.6.2007 in favour of the petitioner - company for giving it benefit of increased subsidy of 75% was a plausible, rational and correct view of law and even if the second view was possible, the orders of SLSC could not be revised by invoking revisional powers by Principal Secretary under Clause 13 of the RIPS 2003 which are akin to Section 263 of the Income Tax Act in view of settled legal position in this regard.

viii) That 45% upfront subsidy given under the notification dtd.2.12.2005 is not given in cash to the Petitioner but is also set off against the future sales tax liability of the Petitioner company and since the Respondents have not paid any subsidy either to the reduced extent of 50% which they admit was throughout payable to the Petitioner, though the Petitioner is entitled to get 75% as the Petitioner claims in the present writ petition ever since the clarification in the form of Circular dtd.22.5.2008 was issued by the Finance Department in exercise of its power under Clause 11 of the RIPS,2003 that no benefit of amendment dtd.2.12.2005 can be granted after 28.4.2006, the Respondents deserve to be directed to release over due amount of subsidy to the Petitioner with interest along with litigation expenses.

19. Elaborating further the aforesaid brief contentions raised on behalf of the Petitioner company, Mr. S. Ganesh, Sr. Advocate assisted by Mr. Ramit Mehta, submitted as under:

(a) the deletion of Sub-clauses (vi) and (vii) of Clause 7 made on 28.04.2006 did not and could not in law have any retrospective effect and the same did not and could not, in any way affect the rights and entitlements of Cement Units which had already come into existence before 28.04.2006 and exercised the option for availing benefits under Notification dated 2.12.2005, as in the first case and also in respect of second expansion where after registering options, the Petitioners

had taken effective steps to implement the same and obtained even concession towards stamp duty before the purported deletion on 28.4.2006 as in the present case. This issue is directly and squarely covered in favour of the Petitioner by the Judgments of the Hon''ble Supreme Court in the cases of MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, and S.L. Srinivasa Jute Twine Mills P. Ltd. Vs. Union of India (UOI) and Another,

(b) In any event, Clause 13 of RIPS, which is identical to Section 263 of the Income tax Act, does not authorise a revision of the SLSC's Orders if the issue is debatable or if the SLSC has adopted one of the two possible views. This issue is also squarely covered in favour of the Petitioner by the Judgments of the Hon''ble Supreme Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, and Commissioner of Income Tax Vs. Max India Ltd., In the present case, the SLSC, which consisted of persons at the highest levels of the Government and who were fully conversant with all aspects of the matter, took a considered and informed decision that the deletion of Clause 7(vi) and (vii) of RIPS on 28.04.2006 did not affect the undertakings like the Petitioner, who had earlier exercised their option as required before the purported deletion of the of Clause 7(vi) and (vii) on 28.04.2006 and had also duly complied with all other applicable requirements and terms and conditions of Notification dated 2.12.2005. This is not only a possible view but in fact is the only correct view, having regard to the Judgments of the Hon''ble Supreme Court in MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, and S.L. Srinivasa Jute Twine Mills P. Ltd. Vs. Union of India (UOI) and Another, Consequently, the attempt to "revise" the SLSC's Orders under Clause 13 is impermissible and without the authority of law.

(c) The said so called economic justification was not referred to at all in the two Applications filed by the Tax Authorities for Revision of the Orders, nor was the same at all put to the Petitioner at any time by the notices for hearing dated 27.1.2009 or 9.2.2009 nor even indicated while deciding the preliminary objections vide letter dated 13.3.2009 i.e. before the impugned Revisional Order dated 31.03.2009 was passed. It is the settled legal position that in such a situation, no reliance can be placed in the Revisional Order on such a new ground or reason, and the legality and validity of the Revisional Order must be determined without considering any such ground or reason. In this regard reliance is placed on the unreported judgment of the Hon''ble Delhi High Court dated 02.12.2008 in the matter of Commissioner of Income Tax v. Contimeters Electricals Pvt. Ltd. (IT Appeal No. 1366/2008) and the judgment of the Hon''ble Supreme Court in Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited, also the judgment of the Hon''ble Calcutta High Court in BAGSU DEVI BAFNA Vs. COMMISSIONER OF Income Tax AND OTHERS.,

(d) If any one of the above mentioned three submissions of the Petitioner is upheld, then the impugned Revisional Order dated 31.3.2009 would necessarily have to be struck down and quashed by this Court irrespective of whether there

was or was not valid economic justification for the withdrawal of the additional 25% subsidy by the said Order dated 28.4.2006, by deletion of sub-clauses (vi) and (vii) of Clause 7 of RIPS.

(e) Without prejudice to the above and in the alternative, it is also submitted on a demurer, that in any event, the said so-called economic justification for reduction in the rate of subsidy from 75% to 50% on the ground of reduction in the rates of Salestax leviable on cement, is devoid of any substance or merit and the said ground or reason, it is respectfully submitted, is only a red herring which is meant to obscure and confuse the real issue which arises for consideration in the present case. This is so inter alia, for the following reasons.

(f a) At the outset it needs to be clearly understood that Sales- Tax, at whatever rate, was applicable, was required to be recovered by the manufacturer and paid over to the Salestax authorities. The rate of Sales Tax was the same for manufacturers covered by RIPS and also for manufacturers not covered by RIPS. The general fall in rates of tax, therefore, does not result in any special gain to a unit covered by RIPS, because such a unit would be required to recover and pay over Sales-tax at the same rate as the other competing units. The general fall in the rate of Sales-tax therefore does not give any edge or advantage to a new industrial unit which has qualified for the benefit of subsidy under RIPS. It needs to be clarified that the general reduction in the rate of sales tax has the effect of sharply reducing the quantum of subsidy which the Petitioner is entitled to claim under RIPS. At the same time, the 7 year period within which the amount of subsidy will be paid remain unchanged. Consequently, for the same amount of capital investment if there is a general reduction in the rate of sales-tax, there is an equal and proportionate reduction in the quantum of subsidy payable to the Petitioner during the subsidy period of 7 years which straightaway diminishes the competitive advantage or the benefit which is given to the new industrial undertaking for having made huge capital investments in the State of Rajasthan. Therefore a general reduction in the rates of Sales-tax can never be a ground for justification, even from the purely economic point of view, for withdrawal of the additional 25% subsidy granted on 2.12.2005. This is all the more so because it was permissible for the Petitioner to have applied for a package under the proviso to para 7(i) (b) of RIPS which also provides for grant of subsidy upto 75%, if the investment exceeded Rs. 200 Crores. It is of vital importance to note that the proviso to Para 7(i) (b) has not in any manner been withdrawn or amended on the ground that there has been a general reduction in the rate of tax. Consequently, if the Petitioner had applied for the Para 7(i)(b) route, then, no reduction in the amount of subsidy would at all have been permitted on the ground that there was a general reduction in the Sales-tax rates. This by itself clearly proves and establishes that in the Scheme of RIPS, the prevailing rates of sales -tax are irrelevant for determining the rate of subsidy to which the Petitioner is entitled to. The rates of subsidy were not linked in any way to the current prevailing rates of Sales-tax.

(f b) A perusal of the provisions of RIPS shows clearly that the rate of subsidy granted was dependant only upon the quantum of capital investment made in the new industrial undertaking or for the expansion of the old undertaking, and the additional employment generated by it. The rate of subsidy was thus not in any manner dependent on or linked to the rate of Sales tax charged from time to time on the product in question. In the entire Scheme, there is no mention of "rate of sales tax" having any relevance to the quantum or percentage of incentives.

(f c) Para 3 of RIPS states that the Scheme shall be applicable not only to all new investments; but also investments made by existing units and enterprises for modernisation/expansion/diversifications, subject to the condition that such unit shall commence commercial production and operation owing to such investments during the operative period of the Scheme (2003-2008), which was later on extended till 31.3.2011. The applicability of or eligibility to the benefit of the Scheme is nowhere dependant on the rates of Sales Tax charged from time to time during the 7 years" period commencing from the date of commercial production. This position is further made clear by Clause 5 of RIPS (at page 102 of writ petition paper book) which states that the benefit of subsidy under Clause 7 of RIPS shall be available to all the units other than those covered by the list of ineligible units. The list of ineligible units has nothing to do with the rates of sales-tax charged from time to time during the 7 years period when subsidy is payable to the units.

(f d) Further the said State Level Screening Committee (SLSC) is required to dispose the application for subsidy within a period of 15 days and on finding that the industrial unit is eligible, is required mandatorily under Clause 9B(iii) (at page 108) to issue the Entitlement Certificate in the prescribed format to the industrial unit. The Entitlement Certificate (see format at page 201/227) expressly states that the unit would be eligible for the benefit of the subsidy (either at 50% or at 75%, according to its entitlement) throughout the period of 7 years starting from the date of the commencement of commercial production. This provision makes it abundantly clear that the right to subsidy at the stipulated rates (50% or 75%, as the case may be) for the entire period of 7 years crystallises on the basis of the exercise of the option and is evidenced by the eligibility certificate. The provisions of RIPS do not permit any variation in the rates of subsidy depending upon changes in the rates of sales tax leviable on the product in question during the subsidy period of 7 years.

(f e) The sanction of the claim for subsidy by SLSC also does not in any manner depend on the rate of tax chargeable on the product in question, but is only dependant on whether the Unit has fulfilled the relevant requirements stipulated by RIPS to become eligible for the benefit of subsidy thereunder. The Order of the SLSC sanctioning the grant of subsidy to an industrial unit, cannot therefore be faulted or questioned on the ground of any variation in the rate of Sales-tax chargeable on the product in question. The prevailing rate of Sales tax is not a

relevant or germane ground at all for the grant of subsidy under the RIPS. Further, the SLSC is required to decide on the sanction of the claim for subsidy and the issue of Entitlement Certificate within a period of 15 days and the Entitlement Certificate so issued would remain valid and operative for the entire period of 7 years, irrespective of the changes that take place in the rate of Sales Tax during the said period of 7 years.

(f f) It is also very important to note that neither in the proceedings of SLSC nor in the so called Order dated 28.04.2006 or the Clarification dated 22.05.2008 (at page 244) nor in the Departmental letters dated 27.01.2009 (Page 267); 09.02.2009 (page 269) and 13.03.2009 (P 316-319) nor in the applications for revision (at pages 272 to 275), is there any reference made to or reliance placed on general reduction in the Sales- Tax for the purpose of denying the additional 25% subsidy to the Petitioner. This clearly shows the contemporaneous understanding of the provisions of RIPS in the minds of the most highly placed officials in the Industries Department and also the Commercial Tax Department of the State Government, that the amount of subsidy has nothing to do with the prevailing rate of Sales- tax. The rates of subsidy were not linked in any way to the current prevailing rates of Sales-tax. There has been a significant reduction in the VAT w.e.f. 1.4.2006 as compared to Rajasthan Sales-tax earlier chargeable in respect of other product groups viz Air-conditioners, refrigerators, firearms, Pan masala, Transmission Towers, ASCR Conductors, Cables, Railway Wagons and sleepers, Nonferrous metals etc., to name few. However, the rate of subsidy available to the units engaged in the manufacture of these products has not in any manner been reduced. It is, therefore, extremely unfair and highly discriminatory that the reduction in the rates of sales-tax on cement should be considered to be the ground or reason for reduction of rate of subsidy to cement plant only but not in the case of any other product where also similar Sales-tax rate reductions had taken place. Such discrimination and arbitrariness cannot possibly be countenanced.

(f g) The reduction in the rate of sales-tax payable on cement is therefore not even a valid economic ground or reason or justification for the purported reduction in the rate of subsidy from 75% to 50%. In any event, even if it is considered to be a valid and adequate economic justification, it is no answer at all to the three fundamental legal issues raised by the Petitioner. In fact, higher quantum of investment required and additional employment being generated in the State are logical criteria for higher percentage of benefits and/or grant of customised package, so as to make it attractive for the entrepreneurs for selecting a particular state to make his investment."

20. On the other hand, Mr. G.S. Bafna, Sr. Advocate and Advocate General assisted by Mr. Vineet Mathur raised the following contentions:

i) That principles of promissory estoppel and legitimate expectation cannot be invoked by the Petitioner company as withdrawal of the increased benefit of subsidy of 75% with effect from 28.4.2006 is in the larger public interest, as the

public revenue would increase by 25% of additional tax liability of the Petitioner, which itself runs into crores of rupees.

ii) That with the rate of sales tax/VAT reduced on cement w.e.f. 1.4.2006 from 19% to 12.5%, if 75% of subsidy is given to the Petitioner - company, effective rate of tax applicable to them would be only 3.12% (25% of 12.5%) and such a lower rate of tax was never intended by the State Government for the cement unit, and therefore, with already reduced VAT rate of 12.5%, the Petitioner company is not entitled to the increased subsidy of 75% which was given on 2.12.2005 at the point of time when the rate of sales tax on sale of Cement was increased to 28% and therefore , effective rate of tax for the Petitioner company was maintained at 7% (25% of 28%).

iii) That since RIPS, 2003 was notified without any sanction from the Governor under Article 166 of the Constitution of India and the same is not a statutory scheme, therefore, the amendment of 28.4.2006 which is statutory amendment will prevail and principles of promissory estoppel cannot be invoked against such statutory exercise of powers.

iv) That as far as unit 1 at Ras, Tehsil Jaitaran, Dist. Pali of the petitioner company is concerned, the same commenced commercial production on 17.12.2005, only 15 days after the notification dtd.2.12.2005, giving increased subsidy of 75% and it is not possible for any cement unit to claim promissory estoppel on the ground that it set up such expansion unit on the faith/promise of increased subsidy of 75% within a short period of 15 days and as far as 2nd unit at Bhiwadi is concerned, except taking the land on lease from RIICO for its expansion unit there, the Petitioner company did not take any effective steps on the basis of promise allegedly made by the notification dtd.2.12.2005 and consequently, the Petitioner is not entitled to increased amount of subsidy. However, the Petitioner was entitled to 50% of subsidy of additional tax liability after 28.4.2006 and at the most only for the period between 2.12.2005 to 28.4.2006 for a period of 5 months, the Petitioner can be given subsidy of 75% of additional tax liability in terms of Clause 7(vii) of the RIPS, 2003.

v) That there is no error of law in the impugned revisional order dtd.31.3.2009 passed by the Principal Secretary and therefore, the writ of certiorari cannot be issued to quash the same.

vi) That subsidy is a concession and is not legally enforceable right and being defeasible right, it can be taken away in exercise of very power under which it was granted and the State Government can modify its policies in public interest and there being no arbitrariness in the same, the State Government cannot be bound down to provide increased subsidy of 75% of additional tax liability to the Petitioner company.

vii) That no vested right accrued in favour of the Petitioner company merely by exercise of option in terms of notification dtd.2.12.2005 and also on account of the fact that increased subsidy of 75% was given to it under a mistake after

28.4.2006 upto 22.5.2008 when the clarification was issued by the Finance Department and there is no deprivation of any vested right in the matter of subsidy and therefore, the present writ petition deserves dismissal.

viii) That the power of revision has been vested with the Finance Department under Clause 13 of RIPS, 2003 and the power to review the Scheme itself has been vested in the State Government under Clause 14 of the Scheme and therefore, neither the amendment dtd.28.4.2006 can be assailed nor the impugned revisional order of the Principal Secretary of the Finance Department dtd.31.3.2009 can be validly assailed by the Petitioner company.

21. Both the Learned Counsels have relied upon series of judgments of Apex Court and other High Courts which would be discussed hereinafter to the extent found relevant.

IMPORTANT DATE AND EVENTS

22. For better understanding of controversy involved in the present case, following important dates and events deserve to be noticed

28.7.2003 - The rate of sales tax on cement notified at 14% + surcharge of 15% i.e. 16.5%.

28.7.2003 - The Rajasthan Investment Promotion Policy, 2003 (for short the RIPS, 2003) introduced as policy statement and not by any statutory notification under any enactment. The operative period of the Scheme was 1.7.2003 till 31.3.2008 and the Scheme was applicable on all new investment and investment made by existing units for modernization/expansion/diversification subject to the condition that they shall commence commercial production during the operative period of the Scheme.

2.12.2005 - Clause 7(vi) and 7(vii) inserted in RIPS, 2003 increasing the quantum of subsidy for cement manufacturing units to 75% subject to stipulated conditions which inter alia require the option to be exercised within 180 days and that unit shall start commercial production within 5 years of filing such option and such 75% of subsidy to comprise of (i) 45% upfront subsidy on the basis of actual tax liability, 5% interest subsidy and 25 % wage/employment subsidy.

2.12.2005 - The rate of sales tax on cement increased to 28%.

10.12.2005 - The option of the Petitioner company for cement expansion unit at Ras, Tehsil Jaitaran, Dist. Pali.

17.12.2005 - The commercial production of the unit first expansion Unit of clinker at village Ras commenced.

28.1.2006 - The letter of the Petitioner to register the cement unit for availing the increased benefit under the notification dtd.2.12.2005.

30.1.2006 - The letter of the Petitioner company for grant of subsidy as it has invested 285.98 crores upto 31.12.2005.

9.2.2006 - The option letter for the second unit (grinding) unit at Khushkhera, Bhiwadi, given to Secretary, Industries.

13.2.2006 - The land taken at Khushkheda, Bhiwadi on lease from RIICO.

1.4.2006 - The Rajasthan VAT Act, 2003 came into force.

1.4.2006 - The rate of VAT on cement reduced from 28% to 12.5% in uniformity with the rate of tax on cement all over country.

28.4.2006 - The amendment in RIPS, 2003. Clause (vi) and (vii) inserted in clause 7 of RIPS, 2003 vide notification dtd.2.12.2005 deleted by a one-liner amendment. No preamble, reason or context explained.

29.7.2006 - The decision of SLSC to issue Entitlement Certificate in respect of Ras District Pali, Unit No. 1 of the Petitioner company in terms of notification dtd.2.12.2005 (without discussing the subsequent notification dtd.28.4.2006) even though the high powered SLSC met after 3 months thereof.

8.9.2006 - The Entitlement Certificate in respect of expansion unit at Ras, Tehsil Jaitaran, Dist. Pali issued to the Petitioner company for grant of subsidy @ 75% for a period of seven years.

12.5.2007 - The application in respect of second expansion unit at Ras and grinding unit at Khushkheda, Bhiwadi filed by the Petitioner company.

27.6.2007 - The decision of SLSC in respect of second expansion unit at Ras Jaitaran and Khushkheda Units and despite taking note of withdrawal notification dtd.28.4.2006, the SLSC decided to grant benefit of increased subsidy of 75% to the Petitioner company, holding that notification dated 28.4.06 - would not apply retrospectively for the Petitioner.

10.7.2007 - The Entitlement Certificate issued in respect of second expansion unit at Ras and Khushkheda and the Petitioner continued to be paid increased subsidy of 75% of additional tax liability by way of set off against its sales tax liability.

22.5.2008 - The clarification issued by the Finance Department that the increased subsidy of 75% cannot be given to cement units after 28.4.2006 even though the option exercised prior to that. Six categories of cases covered by this, in which, Petitioner's case fell in category No. 2.

18.7.2008 - The Commissioner, Commercial Taxes filed two revision petitions under Clause 13 of RIPS 2003 to the State Government for withdrawal of two orders of SLSC dated 29.7.06 and 27.06.07 for issuing entitlement certificate.

31.3.2009 - The impugned revisional order passed by the Principal Secretary, Finance Department quashing the two orders of SLSC.

5.5.2009 - The present writ petition filed in this Court.

FINDINGS and REASONS of JUDGMENT

23. Having heard the Learned Counsel for the parties and given my thoughtful consideration to the rival submissions and the judgments cited at the Bar, this Court is of the considered and firm opinion that not only the principle of promissory estoppel and legitimate expectation are attracted in the present case, but also the Petitioner got a sort of vested right in receiving incentive in the form of increased rebate/subsidy under the amending notification dtd.2.12.2005 inserting Clause 7 (vi) and (vii) in RIPS, 2003 which despite deletion of these Clauses (vi) and (vii) w.e.f. 28.4.2006 could not deprive the Petitioner company of such continued benefit of increased subsidy/rebate against the " additional tax liability" over and above its average tax liability for base years for the complete period of seven years.

24. The principles of promissory estoppel and legitimate expectation having been discussed in large number of judgments even by the Hon"ble Apex Court of the country and various High Courts, is not a new phenomenon and as the same operate in the realm of equity, fair play and good conscience and barring established exception, the same furnishes a cause of action to the aggrieved party for invoking Court's jurisdiction for binding down the promisor to his promise and to grant consequential relief to the promisee. To understand the applicability of these principles in the present case, a little peep into the history of introduction of RIPS 2003 which is exclusively an executive policy framed by the State Government and efforts made by the Petitioner company right from the beginning with the conception of setting up of its expansion units and making investment in the State of Rajasthan, is considered expedient.

25. The avowed objective of RIPS, 2003 given in the preamble of the said Policy, a copy of which is produced as AnnEx. 1 of the writ petition stipulates that the same has been introduced "with a view to provide investors an attractive opportunity to invest in the State of Rajasthan with operative period of 5 years from 1st July, 2003 to 31.3.2008". The Scheme was made applicable to all new investments and investment made by existing units for Modernization/Expansion/Diversification subject to the condition that such units shall commence commercial production/operations owing to such investment during the operative period of the Scheme. Clause 5 of the Scheme providing for eligibility stipulates that the benefits (subsidies as per Clause 7 and exemptions as per Clause 8) under this Scheme shall be available to all units, other than those covered in the list of ineligible units, subject to the fulfillment of the following conditions. The said conditions inter alia provide that the term loan has been sanctioned by the Financial Institutions and utilized during the operative period of the Scheme; (ii) the unit shall have minimum borrowing for investment of Rs. 10 lacs or having an investment of at least Rs. 10 lacs in land and /or building; (iii), for claiming wage/employment subsidy, the unit shall provide direct employment to at least 10 persons in case of a new unit; and twenty five percent additional direct employment subject to a minimum of ten persons in case of diversification,

modernization or expansion; (iv) the unit shall be eligible for interest subsidy and/or Wage/Employment Subsidy only if it commences first commercial production/operation during the operative period of the Scheme and there has been no default in repayment of dues against term loan of the concerned financial institution (s) and/or Bank(s) etc.

26. Clause 7 of the RIPS, 2003 providing for subsidies in for the form of interest subsidy and wage/employment subsidy provides that a maximal limit of 50% of the tax payable and deposited under the Rajasthan Sales Tax, 1994, the Central Sales Tax Act, 1956 and Value Added Tax Act as and when introduced in the State. Same amount of 50% of subsidy was made available in case of investment made in modernization/expansion/ diversification though provided that maximum limit of 50% may be raised by BIDI (Board of Infrastructure Development and Investment Promotion, Government of Rajasthan) to 60% in such cases were the investments exceed Rs. 100 crores but are less than or equal to Rs. 200 crores and this maximum limit may be raised further to 75% in cases were the investments exceed Rs. 200 crores. Clause 7(iii) provides that the subsidy shall be available to the investors for seven years from the date of first repayment of interest in case of Interest Subsidy and first payment of wages/ employment in case of wage employment subsidy. In case of Expansion/Modernization/ Diversification, the unit shall be eligible for subsidy under the Scheme from the date of payment of sales tax over and above the highest sales tax paid in the immediately preceding three years before such Expansion/ Modernization/ Diversification. Clause (vi) and (vii) introduced in RIPS, 2003 by notification dtd.2.12.2005 applied to new cement units and investment for expansion of existing unit respectively and provided for increased subsidy of 75% of the tax payable and deposited under the RST/CST/VAT Act for the period of 7 years which inter alia besides interest subsidy and wage/employment subsidy provided for 45% upfront subsidy on the basis of actual tax liability. As aforesaid Clause (vi) and (vii) had short life of 5 months only from 2.12.2005 to 28.4.2006. Other clauses of the Scheme not relevant to the controversy are skipped and coming to Clause 13, it stipulates that the State Government in Finance Department may suo motu or otherwise revise an order passed by any Screening Committee, wherever it is found to be erroneous and prejudicial to the interest of the State Revenue after affording an opportunity of being heard to the beneficiary industrial unit and no order under this clause shall be passed by the State Government after the expiry of a period of five years after the date by which the benefits under this scheme are fully availed of. Clause 14, the last clause provides that the State Government in the Finance Department reserves the right to review or modify the Scheme as and when needed in public interest.

27. The Petitioner - M/s Shree Cement Limited appears to have persuaded vigorously the State Government for grant of increased benefit under the RIPS, 2003 for cement industries which had been lagging behind despite large reserves of lime-stone in the State as no suitable incentives were available to it and in this regard, the Petitioner - company has produced a copy of the representation

made to the Chief Minister, Government of Rajasthan on 15.5.2004, a copy of which is placed as AnnEx. 2. It begins with the averments "We have been exploring the possibility of putting up new cement plant at Ras, Tehsil Jaitaran, District Pali. For this purpose, we had requested State Government to allow us required sales tax incentives and other incentives so that the new cement project can be viable. Considering our various requests, the State Government had looked into the matter and thereafter they had granted sales tax exemption to the extent of 35% only. Since our project was not becoming economically viable at 35% incentive, we had again requested for 75% sales tax incentive." In the same representation, the Petitioner unit had given out its plan of investing more than Rs. 200 crores in its expansion unit. In the meeting of the State Level Advisory Committee on 7.2.2005 under the Chairmanship of Hon"ble Chief Minister, the Rajasthan Cement Manufacturing Association suggested inter alia for 75% incentives for 11 years to new cement plants to be given vide AnnEx. 4. It would again appear from the representation of the petitioner - company to the Chief Minister vide AnnEx. 5 dtd.12.4.2005 that upon representation of the Petitioner - company, the Chief Minister had assured of looking into the matter besides allowing 75% Sales Tax Exemption to make the Expansion Project economically viable. Again in another representation dtd.5.5.2005 vide AnnEx. 7 to the Hon"ble Industries Minister, the Petitioner company brought it to the notice of the State Government that they intended to make capital investment of over Rs. 300 crores for setting up of new cement plant of 1.2 million tons at village Ras, Dist. Pali and even though it was given status of pipe line unit in BIDI meeting dtd.10.1.2002, they deserve to be given sales tax exemption to the extent of 75% in customized package to make the project economically viable. This would also provide level playing field to the Petitioner company.

28. It appears that with this persuasion, the Petitioner company at its own level and at the level of Cement Manufacturing Association succeeded in getting increased rebate/subsidy in the form of Clause (vi) and (vii) being inserted in RIPS, 2003 vide AnnEx. 8 notification dtd.2.12.2005. As already aforesaid, the Petitioner started getting this increased rebate/subsidy of 75% in accordance with the terms of Clause 7 (vii) and same continued upto 22.5.2008. The company has placed various correspondence in this regard and computation of increased benefit including the decisions of SLSC in its favour for this period on record of this writ petition and they are not in dispute. Even Entitlement Certificates in terms of Scheme were issued under which it appears that said increased benefits for the period of about 2 and 1/2 years were given.

29. On 28.4.2006 however, for the reasons best known to the State Government, one liner amendment notification was issued vide AnnEx. 15 (page 195 of the paper book) that "Clause (vi) and (vii) of Clause 7 of the said Scheme shall be deleted". The position of the Petitioner company getting increased subsidy of 75% continued notwithstanding this deletion, which used the words "shall be deleted" as against usual terms "are hereby deleted" upto the period 22.5.2008 when the Finance Department issued the purported clarification, a copy of which

is placed on record as AnnEx. 29 and after about 21/2 years, the Finance Department as if awakening from its slumber was reminded of its notification issued on 28.4.2006 deleting Clauses (vi) and (vii) from Clause 7 of RIPS, 2003 and under the garb of this purported clarification issued on 22.5.2008, it was clarified that in all the six categories specified in this clarification, the increased benefit of 75% of tax payable would not be available, namely (i) where the option was submitted before 28.4.2006 and benefits were also granted by SLSC before 28.4.2006; (ii) where the option was submitted before 28.4.2006 and benefits were granted by SLSC after 27.4.2006; (iii) where the option was submitted before 28.4.2006 and benefits have not been granted by SLSC; (iv) where the option was submitted after 27.4.2006 but within 180 days of 2.12.2005 and benefits has not been granted by SLSC; (v) where the option was submitted after 27.4.2006 but within 180 days of 2.12.2005 and the case has not been considered by SLSC and (vi) where the option was submitted after 27.4.2006 but within 180 days of 2.12.2005 and the unit has still not applied for the benefits. By this clarification, it was therefore, directed that for all these aforesaid six categories, none of the categories enumerated would qualify for benefits under deleted sub Clause (vi) and (vii) of Clause 7 of RIPS, 2003 on or after 28.4.2004. Thus, under the garb of this clarification issued on 22.5.2008, the State Government effectively put down all the cases to be deprived of increased benefit of 75% of subsidy after 28.4.2006 but in fact only one single unit was sought to be deprived of increased subsidy of 75% under category (ii) aforesaid, that of the Petitioner company.

30. Though the Petitioner company made a representation to the Chief Minister again on 19.6.2008 against the aforesaid purported clarification dtd.22.5.2008, the said benefit came to be denied to it by the impugned order dtd.31.3.2009 passed by the Principal Secretary of Finance in pursuance of revision petitions filed by the Commissioner, Commercial Taxes Department of State Government on 18.7.2008 for withdrawal of both the SLSC decisions in favour of the Petitioner company, though in the meanwhile, the Petitioner company continued to represent for disbursement of increased subsidy of 75% or at least undisputed quantum of 50% of subsidy, but unfortunately, the Respondent State altogether stopped the rebate/subsidy to the Petitioner company after 22.5.2008 and therefore, the Petitioner was constrained to file the present writ petition in this Court.

CASE LAWS CITED BY THE Petitioner DISCUSSED

31. this Court finds considerable force in the submissions made by the Learned Counsel for the Petitioner company Mr. S. Ganesh, Sr. Advocate that the State Government has gone back of its promise contrary to the principles of promissory estoppel and legitimate expectation and vested right of the Petitioner company to receive such increased benefit of 75% of the subsidy under the notification dtd.2.12.2005 and the Respondents are bound by the promise made by the said notification dtd.2.12.2005 and appropriate relief deserves to be

granted to the Petitioner company in this regard. In almost similar circumstances, the Hon''ble Supreme Court in the case of MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, wherein the Hon''ble Supreme Court held as under:

MRF made a huge investment in the State of Kerala under a promise held to that it would be granted exemption from payment of sales tax for a period of seven years. It was granted the eligibility certificate. The exemption order had also been passed. It is not open to or permissible for the State Government to seek to deprive MRF of the benefit of tax exemption in respect of its substantial investment in expansion in respect of compound rubber when the State Government had enjoyed the benefit from the investment made by MRF in the form of industrial development in the State, contribution to labour and employment and also a huge benefits to the State exchequer in the form of State's share i.e. 40% of the Central Excise duty paid on compound rubber of Rs. 177 crores within the State of Kerala. The impugned action on the part of the State Government is highly unfair, unreasonable, arbitrary and therefore, violative of Article 14 of the Constitution. The action of the State cannot be permitted to operate if it is arbitrary or unreasonable. Equity that arises in favour of a party as a result of a representation made by the State is founded on the basic concept of "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15.1.1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years is highly arbitrary, unjust and unreasonable and deserves to be quashed. In any event the State Government has no power to make a retrospective amendment to SRO No. 1729/93 affecting the rights already accrued to MRF thereunder.

The Apex Court further held as under:

On a conjoint reading of SRO No. 1729/93, SRO No. 38/98 and SRO No. 1092/99 the intention of the Government does not seem to take away the benefits of exemption in respect of manufactured products including compound rubber after 15.1.1998 (the date on which SRO No. 38/98) was issued) where commercial production had commenced prior to that date. By virtue of the certificate of eligibility and by virtue of the exemption order granted pursuant to SRO No. 1729/93 dated 3.11.1993, MRF Ltd. had acquired the right to avail tax exemption for a fixed period of 7 years from 30.12.1996 to 29.12.2003, in respect of products manufactured from raw rubber, including compound rubber. In the eligibility certificate and in the exemption order the date of commencement of commercial production of all manufactured products including compound rubber is stated to be 30.12.1996. The Government had itself recognized that the benefit of tax exemption for the fixed period of 7 years would remain available to the units which had fulfilled the prescribed conditions and had obtained the eligibility certificate etc. and had commenced commercial production before the date of any amendment to SRO No. 1729/93.

The High Court's finding that the notifications being statutory " not plea of

estoppel will lie against a statutory notification" is erroneous. The doctrine of promissory estoppel has been repeatedly applied by the Supreme Court to statutory notifications. Besides a plea of promissory estoppel is in the nature of an equitable plea and must be determined in the facts and circumstances of each case where it is raised.

32. Similarly, in the case of S.L. Srinivasa Jute Twine Mills P. Ltd. Vs. Union of India (UOI) and Another, the Hon''ble Supreme Court dealing with the case of Employees Provident Funds and Misc. Provisions Act, 1952 for the benefit of exemption for infancy period in terms of Section 16(1)(d) thereof, even against the statutory amendment where Section 16(1)(d) of the Act was omitted w.e.f. 22.9.1997, held that the Appellant shall continue to be entitled to protection for the full period of 3 years since the protection of exemption had accrued to them prior to amendment of 1997. The relevant extract is quoted below for ready reference:

The Appellants herein were establishments entitled to exemption from the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 for the infancy period in terms of Section 16(1)(d) thereof. Section 16(1)(d) was, during the currency of the infancy period of the Appellants, omitted w.e.f. 22.9.1997 by an ordinance which was followed by two other ordinances and ultimately by Act 10 of 1998. The Appellants filed writ petitions before the A.P. High Court for a declaration that the omission of Section 16(1)(d) would not affect their right to exemption for the balance of their infancy period in terms of the erstwhile Section 16(1)(d). The High Court dismissed the writ petitions. The appellants, then filed the present appeals.

Allowing the appeals, the Supreme Court held:

In terms of Section 6(c) of the General Clauses Act, 1897, unless a different intention appears the repeal would not affect any right, privilege or liability acquired, accrued or incurred under the repealed enactment. The effect of the amendment in the instant case is the same. The Appellants would be entitled to the protection as had accrued to them prior to the amendment in 1997 for the period of 3 years starting from the date the establishment was set up irrespective of repeal of the provision for such infancy protection.

33. That principles of promissory estoppel which were first unequivocally propounded by the Hon''ble Supreme Court in the case of Union of India v. Indo-Afghan Agencies reported in AIR 1968 SC 718 , were further concretized and glorified in the celebrated judgment of Hon''ble Justice P.N. Bhagwati in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and a short extract from the said judgment is quoted here:

Doctrine of promissory estoppel has been variously called "promissory estoppel", requisite estoppel", quasi estoppel" and "new estoppel". It is a principle evolved by equity to avoid injustice and though commonly named "promissory estoppel", it is neither in the realm of contract nor in the realm of estoppel. The true

principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. The doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence. There is no reason in logic or principle why promissory estoppel should also not be available as a cause of action, if necessary to satisfy the equity. It is not necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promise, acting in reliance on the promise, should have altered his position in reliance on the promise. But if by detriment we mean injustice to the promisee which would result if the promisor were to recede from his promise, then detriment would certainly come in as a necessary ingredient. The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise.

CASE LAWS CITED BY Respondent-STATE DISCUSSED

34. On the other hand, the arguments of learned Advocate General Sh. G.S. Bafna that the principle of promissory estoppel and legitimate expectation could not be invoked by the petitioner - company in the present case and reliance placed by him on the case of *Shree Sidhballi Steels Ltd. and Others Vs. State of U.P. and Others*, and the decision of Hon'ble Supreme Court in the case of *Shree Bakul Oil Industries v. State of Gujarat and Ors.* reported in 1987 (6) SCC 31 do not demolish the case of the present Petitioner-company in any manner.

35. In the case of *Shree Sidhballi Steels Ltd. (supra)*, the petitioner industrial units, which were located in hill area in the State of Uttarakhand, claimed continued grant of Hill Development Rebate of 33.33% on the power tariffs for a period of five years but the same was prematurely withdrawn upon enactment of U.P. Electricity Reforms Act, 1999 and when new tariff notifications were issued u/s 49 of the 1948 Act, the same were challenged by direct writ petition under Article 32 of the Constitution of India and negating the said claim and while overruling the earlier decision of two Judges bench in the case of *U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others*, the Hon'ble Supreme Court in the aforesaid case held as under:

The two Judge Bench in *U.P. Power Corporation Ltd. and Another Vs. Sant Steels and Alloys (P) Ltd. and Others*, was of the view that notification issued u/s 49 of

the 1948 Act can be revoked/modified only if express provision was made for the revocation/modification of the said notification u/s 49 itself and the Court found that as there was no such provision contained in Section 49, it was not open to revoke the same. Further, it added that the provisions of the General Clauses Act would be applicable in case of delegated legislation if withdrawal/curtailment of benefit was in larger public interest or if the legislation was enacted by the legislature authorizing the Government to withdraw/curtail the benefit granted by a notification. Under the circumstances the two notifications curtailing the benefit to 17% were treated as contrary to Section 49 of the 1948 Act. The above statement of law is not accurate.

The concept of the larger public interest introduced, before invocation of Section 21 of the General Clauses Act in *Sant Steels* case, in fact, amounts to amendment of the said provision, as Notifications dated 18.6.1998 and 25.1.1999, issued u/s 49 of the 1948 Act, as well as Notification dated 7.8.2000, issued u/s 24 of the U.P. Electricity Reforms Act, 1999, are in the nature of legislations and, therefore, the principle of promissory estoppel would not apply to them.

What is found is that several decisions some of which are rendered by a larger Bench were not considered in *Sant Steels* case. Hence, the same is overruled on this point. Thus, the Petitioners in the present writ petition are not entitled to claim promissory estoppel against the Government and would not be entitled to any benefit on the basis of *Sant Steels* case."

36. Explaining the doctrine of promissory estoppel and reiterating the well settled principles that the same cannot be invoked against the legislations, Hon'ble Supreme Court further observed in para 33 as under:

Normally, the doctrine of promissory estoppel is applied against the Government and defence based on executive necessity would not be accepted by the Court. However, 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. Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy public interest. However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute (including delegated or subordinate legislation which is deemed to be a part of the parent statute). Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law.

37. The said case relied upon by the Respondents is not applicable to the facts of the present case for more than one reasons. Firstly, RIPS 2003 is an executive

policy decision of the State Government involved here in this case; whereas upon enactment of U.P. Electricity Reforms Act, 1999, uniform tariffs for supply of electricity were introduced in the case before the Apex Court and thus obviously principle of promissory estoppel were held not applicable against the legislation. Secondly, quite a few number of industrial units set-up, 10 Petitioners, were before the Hon"ble Supreme Court in the hill areas, which were given Hill Development Rebate of 33.33% against the electricity bills but the said rebate was withdrawn uniformly for all; whereas in the present case Clause (vii) 7 of RIPS 2003 benefited only the single cement manufacturing unit of the Petitioner-company and withdrawal thereof vide notification dated 28.04.2006 also denied the said benefit to a single unit, however, the real and justifiable reason for which, could not be established before this Court. On the other hand, this Court is of the opinion that State got everything from petitioner industry, what it had asked for in return of its promise to give increased subsidy viz. huge expansion investment, increased employment increased revenue but it turned the tables on the Petitioner sooner than later, when the Petitioner had firmly put its feet in the State of Rajasthan.

Thirdly, the grant of rebate against the electricity charges by the power generating companies, which work on commercial principle is quite different from the rebate given against the sales tax liability in the present case through executive policy, for which undoubtedly the principles of promissory estoppel can be applied, therefore, the said decision is clearly distinguishable and not applicable to the facts of the present case.

38. As far as decision of Hon"ble Supreme Court in the case of Shri Bakul Oil Industries and Anr. (supra) is concerned, the Hon"ble Supreme Court held that the State Government was not under any legal obligation to grant sales tax exemption to the new industries, which were so exempted under the previous notification to achieve the dispersal of the industries to rural areas and to provide fillip and accelerate the development of industries in the State of Gujarat. The relevant extract from paras 8 to 11 of the said judgment are as under:

Since the first notification did not prescribe any period or time limit for operation of the tax exemption, the benefit thereunder could be claimed only for such period as the exemption was in force before being withdrawn by the subsequent notification. The second notification providing for a period of five years" operation of the exemption was prospective in operation. That notification was, therefore, to apply only to those new industries which were commissioned subsequent to issuance

thereof and not to those commissioned prior to its issuance. Moreover, the State Government was under no legal obligation to grant the tax exemption. What was granted by the first notification was only by way of a concession for encouraging entrepreneurs to start industries in rural and undeveloped areas. A concession can be withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. It was, therefore, fully within the power of the

Government to withdraw or revoke the exemption by means of a subsequent notification.

The said case law as well as others relied by the State are also of little avail to the Respondents in the present case for the same reasons, which distinguish the case of Shree Sidhballi Steels Ltd. (*supra*) as aforesaid. The facts obtaining in these cases relied upon by the learned Advocate General were quite different.

39. It has to be noticed here that RIPS, 2003 in the first instance is exclusively within the domain of executive and the Scheme itself was announced as a policy statement in the year 2003 without any legislative enactment to this effect. Acting bonafide, the notification dtd.2.12.2005 a subordinate legislation was issued by the Government of Rajasthan making amendment in RIPS, 2003 and it is the sheet-anchor of the Petitioner's case. That is where contention of respondent that RIPS 2003 was issued without compliance with Article 166 falls flat. The notification dtd.28.4.2006 withdrawing the said notification dtd.2.12.2005 by deletion of Clauses (vi) and (vii) was also issued by the State Government, but no statutory provisions of any Act enacted by the State Legislative has been referred in these notifications but both are in the form of subordinate legislation. Therefore, the principles of promissory estoppel which certainly apply to the executive decisions, would apply with all vigor and force in the present case unless (i) some legislative enactment is made to curtail or withdraw such benefit in public interest or (ii) there is over-riding public interest for such withdrawal or denial of increased benefit. None of these two exceptions has been brought on record and established with relevant data by the Respondent - State in the present case. Therefore, the contention of the learned Advocate General that principles of promissory estoppel cannot be invoked in the present case is without any substance and deserves to be negated. Accordingly, this Court comes to the conclusion that the Petitioner company could invoke principles of promissory estoppel as a cause of action for seeking appropriate relief from this Court on the strength of principle of Promissory Estoppel in the form of notification dtd.2.12.2005 which was issued on the vigorous efforts made by the Cement Manufacturers Association as well as the Petitioner company itself.

40. The distinguishing feature of RIPS 2003 providing for 75% of rebate against additional (increased) tax liability also has to be noticed vis-a-vis the fixed quantum of eligible investment, provided as an incentive under the Sales Tax Exemption Scheme of 1987, 1989 and 1998. Here the quantum of relief and incentive is only depending upon additional revenue generated by the company in the form of additional tax liability by increasing its turnover of additional production of cement by its expansion units. That is why the argument of State that increased subsidy and its reduction consequent upon increase and fall in rate of sales tax is misconceived and without any substance. Had it been so, subsidy for all other sectors manufacturing different items had also been reduced, when rates of tax had been reduced across the board for all such goods with the introduction of VAT in the State w.e.f. 01.04.2006. But, it was not to be

and only Petitioner's unit was chosen to be hit by notification dated 28.04.2006. The said argument, therefore, is liable to be rejected and is accordingly rejected.

41. As far as factual foundation for invoking principles of promissory estoppel is concerned, this Court is of the opinion that both the units by way of expansion project undertaken by the petitioner - company at Ras, Dist. Jaitaran, Dist. Pali and at Khushkheda, Bhiwadi, Dist. Alwar satisfied the criteria for invoking the principles of promissory estoppel. As far as unit No. 1 is concerned, even though investment in the same started prior to notification dtd.2.12.2005, but the MOU was signed with the State Government right after the issuance of RIPS, 2003 itself and constant efforts were made by the petitioner company for giving it increased rebate/subsidy which was envisaged even in original Scheme of 2003 at the time of its announcement on 28.7.2003. Therefore, the customized package was given by the BIDI and even announcement was made by the Chief Minister on the floor of the Legislative Assembly for giving such increased benefit. Therefore, it can be inferred that such promises were being assured just after 2003 after which the Petitioner made investment in its expansion unit at Ras, Pali, also which ultimately culminated in th notification dtd. 2.12.2005 and the Petitioner company immediately gave its option as required under Clause (vi) and (vii) on 10.12.2005 and commenced commercial production on 17.12.2005. Therefore, it cannot be said that the investment in expansion unit at village Ras, Tehsil Jaitaran, Dist. Pali was made being unaware of assurance or promise of rebate/subsidy against additional tax liability. The amending notification dtd.2.12.2005 nor the RIPS, 2003 itself sought initiation of effective steps just after such notification and the only condition imposed was that the option should be given within the stipulated period and commercial production should be commenced during the operative period of the Scheme and subject to investment being over Rs. 200 crores and employment provided to more than 100 persons, and all the conditions admittedly and undisputedly were satisfied by the Petitioner company. Therefore, it cannot be said that investment in expansion unit at village Ras, Pali was without the context of increased subsidy given by the notification dtd.2.12.2005.

42. As far as second unit at Khushkheda, Bhiwadi is concerned, even the initial effective steps were started after 2.12.2005 like land was taken on lease from RIICO on 13.2.2006 and the Petitioner company has also placed on record series of purchase and import orders placed by it for purchase of various plant and machinery and irrevocable letter of credit obtained in favour of foreign suppliers in para 37 of the writ Petitioner and which has not been disputed by Respondents, and investment to the extent of Rs. 165.51 crores was made during the period from 2.12.2005 to 28.4.2006 in the said unit. Therefore, it cannot be said that no effective steps were taken during the period when the increased benefit of subsidy was alive on the statute book under the RIPS, 2003. The fact that both the units commenced production from operative period of the Scheme is not even disputed by the Respondent - State.

43. Consequently, this Court is of the firm and clear opinion that the Petitioner company satisfied all the conditions for binding down the Respondent -State by the assurance and promise of increased subsidy of 75% of additional tax liability for entire period of 7 years especially in view of the fact that SLSC after being duly aware of the withdrawal of notification dtd.28.4.2006 granted such benefit and even the Entitlement Certificates issued for a period of 7 years for availing subsidy at the increased rate of 75%. Therefore, the question is whether the withdrawal notification dtd.28.4.2006 can be applied to the Petitioner company giving it virtually retrospective effect and whether the purported clarification issued after 21/2 years of the withdrawal notification dtd.28.4.2006 on 22.5.2008 can really shut up the increased subsidy of 75% for the Petitioner company. The answer has to be in clear negative. Lest the promise as made by the welfare State is allowed to be tinkered and withdrawn lightly and so casually especially ignoring that such withdrawal is going to affect only the single industry of the Petitioner company and not others, the very competitive edge which the Petitioner got because of this assurance of increased subsidy of 75% is bound to be lost and entire economical viability of the Petitioner company may be put in jeopardy if such withdrawal notification was to be applied to it with retrospective effect. The vested right to avail such increased subsidy of 75% for a period of 7 years definitely came into existence in favour of the petitioner company with the issuance of entitlement certificates in pursuance of considered decision of SLSC; a high powered one. If the revisional orders were allowed to be sustained in such circumstances, it would cause breach of promise by the Sate and serious prejudice to the Petitioner company. One such failure on the part of State and closure of one such industrial unit can spell the doom for the industrial and investment culture of the State. That is what the Executive should really guard against.

CONCLUSIONS

44. Now coming to the legality and sustainability of the revisional order itself and otherwise apparently well worded and well drafted order of the Principal Secretary but the same could not stand a deeper judicial scrutiny and the same is contrary to the well settled legal principles regarding invoking of revisional jurisdiction on the twin pillars of "erroneous" and "prejudicial to the interest of revenue". The orders granting increased benefit of 75% rebate or subsidy against additional tax liability to the Petitioner company were neither erroneous nor prejudicial to the interest of State in any manner. The benefit of increased subsidy cannot be said to be erroneous merely because withdrawal notification dtd.28.4.2006 came into existence nor prejudicial to the interest of State merely because the petitioner company shall be granted set off of increased subsidy against its additional tax liability which was allowed to it for almost 2 and 1/2 years out of 7 years until the clarification dtd.22.5.2008 was issued. If the withdrawal notification dtd.28.4.2006 itself was to be immediately applied though it uses the words "clause (vi) and (vii) of Clause 7 shall be deleted" and no other statutory notification was thereafter issued really deleting these Clause (vi) and

(vii), but even assuming for argument's sake that the words "shall be deleted" were to be considered to mean "are hereby deleted" also, the fact remains that increased benefit continued for 21/2 more years upto 22.5.2008, when under the purported clarification in all the six contingencies of exercise of option and consideration by SLSC, the Finance Department chose to deny such benefit of increased subsidy to only a single large scale manufacturing unit, that of the Petitioner - company in the State. this Court is at loss to understand why for adversely affecting the single large scale manufacturing cement unit, such withdrawal of Clauses (vi) and (vii) was even considered necessary by the State. No overriding public interest has been shown behind that much-less established. However, even though a prayer has been made in the writ petition for quashing of the said notification dtd. 28.4.2006, since it was not pressed during the course of arguments by the Learned Counsel appearing for the Petitioner company and only its retrospective application was challenged, this Court would not quash the said notification in the absence of any prayer to this effect being made.

45. Therefore, on an analysis of factual matrix and legal position, this Court is of the opinion that the present writ petition deserves to be allowed accepting the various contentions raised on behalf of the Petitioner which merit such acceptance and the same is hereby allowed and the impugned order of the Principal Secretary, Finance Department dtd.31.3.2009 is liable to be quashed and the same is hereby quashed and it is directed that the Petitioner company would continue to be given increased rebate/subsidy of 75% of the additional tax liability under the notification dtd.2.12.2005 for a period of 7 years in pursuance of Entitlement Certificates already issued in its favour for both the units at Ras, Pali and at Bhiwadi, Alwar and withdrawal notification dtd.28.4.2006 and clarification dtd.22.5.2008 would not come in way of the Petitioner company in getting such increased rebate/subsidy. The Respondents shall release the arrears of such subsidy and allow set off thereof of against additional tax liability within a period of one month from today failing which the petitioner company would be entitled to interest also thereon @9% per annum. Cost are however made easy.