

(2005) 06 GAU CK 0041

In the Gauhati High Court

Case No : Writ Appeal No(s).55 to 107,110, 111 to 127,129,131,133 to 172 of 2005

Union of India

APPELLANT

Vs

Assam Brook Ltd.(And other Appeals)

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Finance Act, 2003 — Section 157, 157

Citation : (2011) 5 GLR 51

Hon'ble Judges : B.K.Roy, C.J. and D.Biswas, J

Bench : Division Bench

Advocate : Mr.B.Sarma for the appellant., Mr.K.N.Choudhury and Mr.S.K.Kejriwal for the respondent., Advocates appearing for Parties

Judgement

D. Biswas, J.—These writ appeals are directed against the common judgment and order dated 29th November, 2004 passed by the learned Single Judge in a batch of writ petitions filed by the companies engaged in producing and manufacturing tea within the territorial limits of this court for declaration that they are not liable to pay the additional duty of excise imposed by the Finance Act, 2003 and for consequential reliefs including refund of excise duty paid.

2. The Government of India in the Ministry of Industries, Department of Industrial Policy and Promotion, by the Office Memorandum dated 24th December, 1997 announced the New Industrial Policy for development of industries in the North Eastern Region and introduced a new and synergetic intensive package to stimulate development of industries. The Policy, amongst various other incentives and concessions also include exemption from payment of Central Excise in respect of industrial activities relating to manufacture of tea in the North Eastern States for a period often years. The petitioners in all the writ petitions are manufactures of tea classifiable under Chapter 9 heading 09.02 subheading 9.2.2000 of the Central Excise Tariff Act, 1985. No central excise was leviable on tea and tea waste falling under the heading and subheading as

above. With effect from midnight of 27th/28th February, 1999, provisions for payment of excise duty at the rate of Rs.2 per kilogram on bulk tea was introduced without any exemption to the manufacturers of tea in the North Eastern Region.

3. Being aggrieved, a series of writ petitions were filed before this court by the manufacturers of tea. Notification No.33 of 1999 was issued on 8.7.1999 under the relevant provisions of the statute in question during the pendency of those petitions. By this notification, amongst other items, tea cleared from a unit in the North Eastern States was exempted from payment of excise duty leviable under the Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the Additional Duties of Excise (Textile and Textile Articles) Act, 1978. The exemption contained in this notification has been given effect to in the following manner:

"(a) The manufacturers shall submit a statement of the duty paid from the said account current to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid from the account current.

(b) The Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid from the account current during the month under consideration to the manufacturer by the 15th of the next month.

(c) If there is likely to be any delay in the verification, the Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer."

4. Accordingly, the manufacturers of tea located in the North East were granted refund of excise duty paid in terms of the above conditions specified in the notification. By the Finance Act of 2002, the duty leviable on tea and tea waste was brought down to Re. 1 per kilogram from Rs.2. Exemption Notification being No.6/2003 was also issued exempting tea and tea waste from the purview of payment of excise duty leviable, but an additional duty of excise, by way of surcharge, at the rate of Re. 1 per kilogram was levied under the provisions of section 157 of the Finance Act, 2003 and the additional duty imposed was included in the First Schedule of the Tariff Act, 1985. The respondent authority refused to make refund of the additional duty of excise paid by way of surcharge in terms of the Notification No. 33/1999 on the ground that the additional duty paid by way of surcharge was not covered by the Notification No.33/1999 and that the levy of additional duty is for the purpose of raising a special fund for development of tea industries. It is on this background, the writ petitions at hand have been filed for appropriate directions by this court for refund of the

additional duty of excise in terms of the Notification No.33/1999.

5. The learned Single Judge formulated two core questions to be answered in the writ petitions. The first question is whether the additional duty of excise levied by way of surcharge by the Finance Act of 2003 with the avowed objective for creating a special fund for development of tea industries is covered by the Notification No.33/1999. The second one is whether the writ petitioners would be entitled to exemption from the additional duty imposed and entitled to refund of the duty paid on the basis of the promises of exemption in terms of the policy resolution of the Government dated 24th December, 1997.

6. The learned Single Judge, relying upon the decision of the Apex Court in the case of Union of India and Others v. Modi Rubber Ltd. and Others, 1986 (25) ELT 849 held that the Notification No.33/1999 does not operate to exempt the additional duty of excise imposed by the Finance Act of 2003. The learned Single Judge also held that the additional duty of excise imposed by the Finance Act of 2003 was not a prevailing duty on the date of issue of the notification No. 33 of 1999 and, therefore, it cannot be construed to have provided exemption of duty which was not in force when the said Notification was issued. With regard to second question, relatable to doctrine of promissory estoppel, the learned Single Judge observed that nothing has been pleaded by the Union to enable the court to come to the conclusion that the Union should be allowed to recall its promise and resile from the same on the ground of equity or superior public interest. Relying upon the Industrial Policy Resolution of the Central Government embodied in the Office Memorandum dated 24.12.1997 which provided for exemption of Central Excise duty for a period of ten years to all industrial activities; and having noticed that the petitioners have, indeed, altered their position relying upon the promises made by the Central Government, the learned Single Judge held that a promise to grant exemption in such a situation can be enforced under law under the doctrine of promissory estoppel even in the absence of an exemption notification.

7. Mr. B. Sarma, learned Central Government Standing Counsel argued that the additional duty imposed by way of surcharge by the Finance Act of 2003 is distinguishable from the basic duty (CENVAT) leviable under section 3 of the Central Excise Act of 1994. According to Shri Sarma, the additional duty is a surcharge levied for creation of a special fund for development of the industry and the exemption made by the Notification No.33 of 1999 with regard to basic duty cannot be construed to have contemplated exemption of this additional duty. Elaborating the stand taken by the Union, Mr. Sarma, learned CGSC argued that the additional duty of excise in the form of cess will not impose any additional burden as because by the Notification No.6/2003 CE dated 1.3.2003 (Annexure E), excise duty on tea and tea wastes was brought down to nil and the consequential effect thereof is that the tea and tea wastes will be excisable only to additional duty of excise leviable by way of surcharge at the rate of Re. 1 per kilogram. The additional duty has been introduced by the provisions of

section 157 of the Finance Act of 2003 without any promise to grant exemption. The Finance Act, 2003 also does not authorize the Central Government to issue any notification exempting payment of additional duty. Relying upon the decision of the Apex Court in *Union of India v. Modi Rubber*, (1986) 4 SCC 66, Mr. Sarma argued that the writ petitioners (respondents herein) are not entitled to refund of the additional duty of excise paid as it is not the basic excise duty exempted in terms of the Industrial Policy Resolution and the Notification No. 33/1999. In support of the aforesaid contentions, the appellants relied upon the decisions of the Apex Court in *Sales Tax Officer and Other v. Shri Durga Oil Mills and Another*, (1998) 1 SCC 572; *Union of India and Others v. Modi Rubber Ltd.*, 1986 (25) ELT849 and *State of Punjab v. Nestle India Ltd. and Another*, (2004) 136 STC 35. Mr. K.N. Choudhury, learned senior counsel for the respondents relied upon the judgments in *Mis. Bisra Lime Stone Company Ltd. v. Orissa Electricity Board*, (1976) 2 SCC 167; *Sarojini Tea Co. (P.) Ltd. v. Collector of Dibrugarh, Assam*, (1992) 2 SCC 156; *Commissioner of Central Excise v. Chetta Sugar Co. Ltd.*, (2004) 3 SCC 466; *State of Orissa v. Sudhangshu Shekar Mishra*, AIR 1968 SC 647; *State of Bihar v. Suprabhat Steel Ltd.*, (1999) 1 SCC 31; *Dharampal Satyapal v. Union of India* 2002 (3) GLT 676; *Pournami Oil Mills v. State of Kerala*, (1986) Supp. SCC 728; *Union of India v. Godfrey Philips India Ltd.*, (1985) 4 SCC 369; *M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*, (1979) 2 SCC 409; *Sales Tax Officer v. Sri Durga Oil Mills*, (1998) 1 SCC 572; *Chottabhai Jethabhai Patel v. Union of India*, AIR 1962 SC 1006 and in *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107.

8. Mr. K.N. Choudhury, learned senior counsel argued at length on the Principles of Promissory Estoppel relying upon the Industrial Policy Decision of 1997 which expressly provide exemption from payment of central excise duty to industries located in the North Eastern Region for a period of 10 years to bring home the point that the tea manufacturers of the North Eastern States in view of the industrial policy and the exemption of the basic excise duty allowed in pursuance of the said policy also stand exempted from payment of additional duty under the provisions of section 157 of the Finance Act of 2003. Mr. Choudhury further argued that the additional duty of excise includes a special duty as well in addition to the duty of excise specified in clause (a) of section 3 of the Central Excise Act, 1944 and, as such, it would be permissible to read the additional duty in the Notification No.33 of 1999 dated 8.7.1999 to bring it at tune with the promise contained in the Industrial Policy Resolution of 1997 to allow complete tax holiday for a period of ten years. According to Mr. Choudhury, the levy of additional duty of excise imposed by the Finance Act, 2003 by way of surcharge does not cease to become excise duty or special duty within the meaning of article 366(28) of the Constitution. The word "surcharge", according to Mr. Choudhury, as defined by the Apex Court in *M/s. Bisra Lime Stone Company Ltd.* (supra) and in *Sarojini Tea Co. (P.) Ltd.* (supra) is a duty of excise over and above the duty of excise as defined in section 3(a) of the Central Excise Act, 1944.

9. Before the above questions are addressed, it would be pertinent to mention here that the decision of the learned Single Judge that the Notification No.33/1999 does not operate in respect of the additional duty of excise levied by way of surcharge has not been challenged by the writ petitioners by filing any crossappeal. The appellant, Union of India, has challenged the decision of the learned Single judge relating to the application of doctrine of promissory estoppel entitling or rendering the writ petitioners eligible for exemption from payment of additional excise duty in terms of the Industrial Policy Resolution of 1997.

10. We would now like to refer to the reasons recorded by the learned Single Judge in answering the first question in favour of the appellant. The learned Single Judge, as already stated, held that the Notification No.33/1999 does not cover the additional duty of excise imposed. The decision of the learned Single Judge is founded upon the ratio available in the Apex Court's judgment in *Modi Rubber* (supra) wherein the Apex Court while dealing with a similar situation was of the view "it would be absurd to suggest that by issuing the Notification dated 1st August, 1974 the Central Government intended to grant exemption not only in respect of excise duty then prevailing but also in respect of all future duties of excise which may be levied from time to time". The learned Single Judge was also of the view that the Central Government while issuing Notification No.33/1999 exempting prevailing excise duty did not contemplate exemption of any duty of excise to be imposed in future, particularly, the additional duty of excise imposed under the provisions of section 157 of the Finance Act, 2003. The learned Single Judge noticed that the Notification No.33/1999 issued under section 5A of the Central Excise Act, 1944 does not have any reference to the provisions of subsection (3) of section 157 of the Finance Act, 2003 and that duty not in force could not have been exempted when the Notification No.33/1999 was issued. Obviously, the learned Single Judge relied upon the ratio in *Modi Rubber* (supra) to come to the above conclusion. The observation of the Apex Court in para 10 of the aforesaid judgment, excerpts thereof quoted above, in our opinion take due care of the aforesaid two situations. We are, therefore, in full agreement with the decision of the learned Single Judge with regard to first question.

11. The other issue relates to the applicability of the Doctrine of Promissory Estoppel emanating, if any, from the Industrial Policy Resolution published vide Memorandum dated 24.12.1997. The writ petitioners pleaded that they are otherwise exempted from payment of additional duty of excise imposed by the Finance Act of 2003 as they have altered their position in pursuance of the promise made by the Central Government. The learned Single Judge answered the issue in favour of the writ petitioners on the following grounds:

(i) There was an unequivocal and unambiguous promise conveyed by the Central Government by the Memorandum dated 24.12.1997;

(ii) The tea manufacturers in the North Eastern States altered their position in pursuance of the aforesaid promise of exemption from payment of central excise duty for a period of ten years;

(iii) The Central Government did not plead that the Union be allowed to recall its promise and resile from the same on the ground of better equity or superior public interest; and

(iv) A legal right is established in the petitioners to claim benefit of exemption in view of the judicial pronouncements of the Apex Court in various cases, particularly, in *Nestle India Ltd. (supra)*, since the exceptions to the Principles of Promissory Estoppel as pointed out in this judgment is not present in the instant case.

12. There is, however, no dispute with regard to the conclusion of the learned Single Judge insofar it relates to the unequivocal and unambiguous promise by the Central Government and alteration of position by the tea manufacturers of the North Eastern Region in pursuance of the said promise. However, the observation that the Central Government did not plead that it should be allowed to recall its promise on the ground of better equity or superior public interest is not wholly borne out of records. In the affidavit dated 17th September, 2004 filed on behalf of the Union of India and sworn in by Shri Sujan Kumar Das, Deputy Commissioner in the Department of Central Excise, the Central Government spelt out and clarified the necessity for creating a special fund to be raised from the additional excise duty imposed by way of surcharge. This affidavit was filed in pursuance of the direction given by the court on 1.9.2004 while hearing the cases. The purposes and the necessities for creating a special fund has been clarified in this affidavit. It would be better to read the affidavit in its own language, as quoted below

"3. That in view of the above order the deponent begs to submit that the Ministry of Commerce has informed that Special fund has been created for the development, modernization and rehabilitation of the tea plantation sector through budetory grants equivalent to the collections of Additional Excise Duty on tea and it was further stated that by virtue of the Note dated 25.9.2003 Department of Commerce has submitted proposal to the Cabinet Committee on Economic Affairs (CCEA) and sought approval to the following proposals:

(a) Crediting of the amount of Rs. 250 crore generated by way of additional excise duty (AED) of Re. 1 per kg. on tea to a nonlapsable account to be kept in public account and utilization of the same including annual interest accrued thereon over a period of four years of 10th Plan. This fund earmarked for the tea sector will be in addition to the plan outlay of the Department for the 10th Plan period.

(b) Implementation of five broad categories of schemes covering revival and rehabilitation packages for the closed/abandoned tea gardens, inventives to the manufacturers for production of orthodox type of tea for catering to the international markets, generic promotion of tea in India, financial assistance to the two major F and D Institutions in tea sector in Assam and Tamil Nadu, partial reimbursement of the social sector costs borne by the organized tea Industry,

from out of the Fund being created with the Additional Duty of Excise of Re. 1 per kg. by way of surcharge on tea. These broad categories of schemes would form one single scheme to be approved by the Expenditure Finance Committee chaired by the Secretary (Expenditure) and to be cleared by Cabinet Committee on Economic Affairs.

(c) Setting up an implementation and Monitoring Committee under the Chairmanship of the Commerce Secretary, for monitoring, implementation of the Schemes after approval from Expenditure Finance Committee chaired by the Secretary (Expenditure) and Cabinet Committee on Economic Affairs.

(d) Authorising the implementation and Monitoring Committee to consider any specific new Schemes with overall objectives of the Fund with the prior concurrence of the Planning Commission and the Department of Expenditure.

4. That your deponent begs to submit that the aforesaid proposal has been approved by the Cabinet Committee on Economic Affairs in a meeting held on 13.10.2003 with the modification. The modifications are:

(i) The assistance for Research and Development be restricted to 80% of the cost for a period of 5 years, and

(ii) The proposal for financing the social sector cost in tea plantation in the fund are to be settled between the Ministry of Commerce and Industry and the Ministry of Finance.

5. That the deponent further begs to submit that in terms of the aforesaid decision of the Committee on Economic Affairs, the issue relating Financing the social sector cost in tea plantation and provision of interest to the deposits in the fund are to be settled between the Ministry of Commerce and Industry and the Ministry of Finance.

6. That the deponent further begs to submit that Tea Board is in process of formulating a suitable Scheme for financing social sector cost and thereafter the matter will be discussed by the Ministry of Commerce and Industry with the Ministry of Finance. Pending a final decision of financing of the social costs from the special fund, an amount of Rs. 60 crores has already been earmarked for this purpose.

7. That the deponent further begs to submit that in terms of the decision of the Cabinet Committee in Economic Affairs, various schemes to be funded out of the Special fund are being finalized for approval of

Expenditure Finance Committee. The Expenditure Finance Committee memo seeking approval for implementation of the following four schemes with a total financial out lay of Rs. 190 crores during the 10th Plan period.

Si.

No. Scheme Financial out Lay (Rs. in crore)

1 Interest subsidy on the revival and rehabilitation packages for the closed/ abandoned tea gardens. 40.00

2 Incentives to the manufacturers for production of orthodox type of tea. 110.00

3 Generic promotion of tea in India 20.00

4 Assistance to the two Research & Development Institutions viz. Tea Research Association (TRA) and United Planters' Association of Southern India Tea Research Foundation (UPASITRF) 20.00

Total 190.00

14. That the deponent further begs to submit that in addition, it is also clarified that exemption from Basic Excise duty, Additional Excise Duty (GSI) and Additional Excise Duty (T and TA) only was extended to specified goods, manufactured to a new unit or an existing unit on its substantial expansion. As such exemption from any other duty including Additional Excise Duty on tea was/ is not available under the North East Exemption (Exemption). Notification Nos.32/99CE and 33/99CE, both dated 8.7.1999, Further Additional Excise Duty on tea has been imposed as a surcharge for the development, modernization and rehabilitation of the tea plantation sector out of the revenue earning of Additional Excise Duty of Re. 1 per kg. from tea Industry during the Tenth Plan period. For this reason also exemption from Additional Excise Duty on tea has not been extended under the North East Exemption Scheme.

16. Be it to be mentioned that section 157 of the Finance Act, 2003 has levied Re. 1 as Additional Excise Duty which is credited to the aforesaid fund for the purpose of Special Fund as proposed above. It will continue from 200304 to 200607. Hence, the question of refund of Additional Excise Duty to the writ petitioner in the present state of affairs of ongoing development of the schemes as decided by the Cabinet Committee on Economic Affairs and Expenditure Finance Committee, Government of India does not arise at all. Additional Excise Duty has been levied by way of surcharge to create the aforesaid Special Fund which is expected to be around Rs.250 crore."

13. The affidavit submitted as per direction of the court unambiguously clarify the purpose behind levy of the additional excise duty by way of surcharge. The purpose is undoubtedly laudable and it is in the interest of the tea industry as a whole and, more particularly, the closed/abandoned tea gardens. That apart, the incentives announced to the manufacturers for production of orthodox type of tea, the scheme for generic promotion of tea and the proposed assistance to the two research and development institutions indicate that the object behind the levy of additional excise duty was for the purpose of development of tea industries in the country. There is also provision for expenditure on the social

sector. In the budget speech, the Finance Minister stated "In addition. I propose to abolish the excise duty of Re. 1 per kg. on tea and replace it by a cess of Re.1 per kg. for creating a separate fund for development, modernization and rehabilitation of the tea plantation sector. This measure, Mr. Speaker, will not impose any additional burden on the tea industry, but it will redesign the duty to help the industry. Further, coffee plantations will henceforth be eligible for income tax deduction of sums deposited in a development account, as in the case of tea.". The statement of the Finance Minister shows that the existing excise duty of Re.1 per kg. on tea has been replaced by cess for Re. 1 for creating a separate fund for development, modernization and rehabilitation of the tea plantation sector. It was clarified by the Finance Minister that this measure will not impose any additional burden on the tea industry, but will redesign the duty to help the industry. The various facets highlighted by the Central Government in the above affidavit read with the budget speech of the Finance Minister clearly indicate that the abolition of the existing excise duty (payable at the rate of Re.1 per kg. on tea) is followed by imposition of cess of Re.1 per kg. is for the purpose of development of tea industry. The purpose behind creating this special fund of Rs.250 crores suggest that the measures undertaken in exercise of the legislative power of the Central Government was in the interest of the tea industry as a whole. The blanket exemption given earlier to the tea manufacturers of the North East without any direction as to how the benefit arising out of the exemption would be utilized was evidently not in public interest. There was no direction for utilization of the additional resources for the benefit of the people associated with the tea industry. The purpose behind the levy of the additional duty and the measures undertaken by the Central Government is aimed to develop the tea industry including all categories of people associated with it. We are, therefore, unable to agree with Shri Choudhury, learned counsel that the Union failed to plead better equity or superior public interest.

14. In *Nestle India Ltd.* (supra) the Apex Court held that the doctrine of promissory estoppel comes into play only when equity so requires.

The promisor cannot be allowed to go back on the promise when it is clear and unequivocal and the promisee has altered his position in pursuance of the said promise. It is further held that the doctrine of promissory estoppel would operate as an equitable doctrine. Deviation therefrom, however, is permissible when the Court is satisfied on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to go unfettered. The question of promissory estoppel and withdrawal of concessions/exemptions from payment of tax has been subjectmatter of discussion before the Apex Court in a series of litigation. In *Nestle India Ltd.* (supra), the Apex Court in para 44 of the Judgment categorically observed that a citizen may and can compel the Government to act on a promise if all factors founding the plea of promissory estoppel are established, and such a proposition would not be beyond the "constitutional scheme and public interest". In that case, the Chief Minister, Council of Ministers

and the Finance Department had decided to abolish the purchase tax on milk with effect from 1st April, 1996. The Sales Tax authorities issued consequential circulars giving exemption. The decision was reviewed and altered by the Council of Ministers in a meeting held on 4th June, 1997. The Excise and Taxation authority issued notices to the respondents requiring them to pay purchase tax. The Punjab and Haryana High Court having found that the factors essential for establishing the plea of promissory estoppel decided that the Government was bound by the promise. The Apex Court noticed that the overall benefit to the State's economy and the public would be greater if the exemption were allowed as because the respondents undisputedly passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. The element of public interest in that case led the court to direct the State Government to continue with the exemption. This ratio is not a oneway traffic and would also be available to the State when it wants to withdraw exemption in public interest. In the case at hand, there is nothing on record to show that the benefit arising out of the exemption from payment of excise duty was being utilized by the tea growers of the North East for benefit of the industry and the common men associated with it. Therefore, the decision of the Central Government to abolish excise duty altogether and to levy additional duty by way of surcharge (cess) for development of the industry has overriding public interest ingrained in it.

25. There cannot be promissory estoppel against public interest and the law. The doctrine of legitimate expectation or estoppel cannot be invoked by the citizen against State authorities contrary to public interest. In *Sharma Transport v. Government of Andhra Pradesh*, (2002) 2 SCC 188, the law has been summarized by the threeJudges Bench of the Apex Court. The Apex Court observed that even though a concession is extended for a fixed period, the same can be withdrawn in public interest at any point of time. In *Shri Durga Oil Mills (supra)*, it has been held that there cannot be estoppel against statute. Where it is in public interest, the court will not interfere because public interest must be over any consideration of private loss or gain. In *Kanishka Trading v. Union of India*, (1995) 1 SCC 274, it has been observed that where there is supervening public interest, the Government is free to change its stand and withdraw the exemption already granted. The decisions in *Mis. Motilal Padampat Sugar Mills Co. Ltd. (supra)*, *Godfrey Philips India Ltd. (supra)* and *Nestle India Limited (supra)* have been relied upon by the writ petitioners pleading that in view of the legal right available to the petitioners, they are eligible to claim the benefit of exemption. The case in *Nestle India Ltd. (supra)* has been dealt with in hereinbefore. The exceptions that can be culled out from *Nestle India Ltd. (supra)*, *M/s. Motilal Padampat Sugar Mills Co. Ltd. (supra)* and *Godfrey Philips India Ltd. (supra)* are that the doctrine of promissory estoppel will not operate in case of overriding public interest and where the representation is prohibited by any law, in the sense that person or authority making the representation or promise must have the power to carry out the promise. In the instant case, the

overriding public interest is evident from the purpose for which the additional duty has been levied. On the other hand, the Finance Act, 2003 does not provide for any power of exemption of additional duty of excise. Going by the decision in *Modi Rubber* (supra), it can be construed that the Central Government while imposing the duty of additional excise must have applied its mind as to whether exemption should be granted to the manufacturing units located in the North Eastern Region, and omission to incorporate any provision empowering the authority to grant exemption of payment of additional duty reveal the intention of the Central Government. Refusal to entertain the claim of refund is also an indication of the intention.

26. It has been argued that rule 2(e) of the Excise Rules defines duty payable under section 3 of the Central Excise Act, 1944 which provides that duty includes a duty of excise to be called Central Value Added Tax (CENVAT) on all excisable goods as well as special duty of excise in addition to the duty of excise specified in clause (a) of section 3 and, therefore, the additional duty of excise levied by way of surcharge (cess) being part of the basic excise duty stand exempted in pursuance of the Notification No.33/1999. This argument of the learned counsel can be well taken care of by referring to the observation of the Apex Court in para 10 of the Judgment in *Modi Rubber* (supra)

"10. Moreover, at the date when the first Notification was issued, namely, 1st August, 1974, there was no special duty of excise leviable on tyres. It came to be levied on tyres with effect from the financial year 1978 under various Finance Acts enacted from year to year. It is, therefore, difficult to understand how the expression "duty of excise" in the Notification dated 1st August, 1984 could possibly be read as comprehending special duty of excise which did not exist at the date of this Notification and came to be levied almost four years later. When special duty of excise was not in existence at the date of this Notification, how could the Central Government, in issuing this Notification, have intended to grant exemption from payment of special duty? The presumption is that when a Notification granting exemption from payment of excise duty is issued by the Central Government under rule 8(1), the Central Government would have applied its mind to the question whether exemption should be granted and if so to what extent. And obviously that can only be with reference to the duty of excise which is then leviable. The Central Government could but be presumed to have projected its mind into the future and granted exemption in respect of excise duty which may be levied in the future, without considering the nature and extent of such duty and the object and purpose for which such levy may be made and without taking into account the situation which may be prevailing then. It is only when a new duty of excise is levied, whether special duty of excise or auxiliary duty of excise or any other kind of duty of excise, that a question could arise whether any particular article should be exempted from payment of such duty of excise and the Central Government would then have to apply its mind to this question and having regard to the nature and extent of such duty of excise and the object and purpose for which it is levied and the

economic situation including supply and demand position then prevailing, decide whether exemption from payment of such excise duty should be granted and if so, to what extent. It would be absurd to suggest that by issuing the Notification dated 1st August, 1974 the Central Government intended to grant exemption not only in respect of excise duty then prevailing but also in respect of all future duties of excise which may be levied from timetotime."

The decision of the Apex Court, quoted above, meets the contention raised by Shri Choudhury, learned counsel for the respondents. We are unable to endorse the view that the Notification No. 33/1999 also contemplated exemption of additional duty levied subsequently by a legislative action of the Union Parliament for raising a special fund for the benefits of the Industry as a whole. We have taken into consideration the decision in Chottabhai Jethabhai Patel (supra), Liberty Cinema (supra), Chatta Sugar Co. Ltd. (supra), M/s. Bisra Lime Stone Company Ltd. (supra) and in Sarojini Tea Co. (P.) Ltd. (supra). Even if the additional duty is within the meaning of basic duty, yet going by the decision in Modi Rubber (supra), the additional duty of excise has to be comprehended as a special duty levied for a specific purpose without intending exemption of payment thereof.

27. It may be mentioned here that an affidavit in reply and additional affidavit has been filed by the writ petitioners on 4.8.2004 pleading that the provisions of section 157 of the Finance Act, 2003 are ultra vires of the Constitution. The learned Single Judge did not discuss the plea of ultra vires. Shri Choudhury, learned Single Judge also did not raise the question of vires during the course of argument before this court. There being no cross appeal, we are of the opinion that the matter requires no consideration at the appellate stage. However, it may be placed on record that the provisions of section 157 of the Finance Act, 2003 are within the legislative competence of the Union Parliament and is covered by Entry 84 of List I of the Seventh Schedule to the Constitution. The argument that the levy of the additional duty by way of surcharge (cess) is nothing short of a tax/special tax within the meaning of article 366(28) of the Constitution and, therefore, the impugned levy is a duty of excise over and above the duty of excise within the meaning of section 3(a) of the Central Excise Act, 1944 does not appeal to us. It is firstly because the basic excise duty has been abolished by the Finance Act, 2003. No excise duty is required to be paid on coming into force of the Finance Act, 2003. Consequent upon such abolition, additional duty of excise by way of surcharge, as cess, as described by the Finance Minister was introduced to raise a special fund with a definite objective. On abolition of the basic excise duty by this Act, the Notification No.33/1999 issued under subsection (1) of section 5 of the Central Excise Act, 1944 read with subsection (3) of section 3 of the Additional Duty of Excise (Goods of Special Importance) Act, 1957 and subsection (3) of section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 ceased to operate. The abolition of the basic excise duty for all concerned including the manufacturing units of the North East in a way is in furtherance of the promise held through the Industrial Policy

Resolution of 1997. There was no promise or representation in the Industrial Policy Resolution of 1997 to give any exemption to any other tax that may be imposed in future. It would, therefore, be impermissible to revive this notification to extend the benefit arising therefrom to cover an additional duty levied by the Finance Act of 2003. There cannot be any mandamus against Legislature. The doctrine of promissory estoppel cannot be invoked against any legislative act of the Legislature unless the Act is declared ultra vires of the provisions of the Constitution. The levy of additional excise duty by way of surcharge (cess) under the Act of the Parliament is within the parameter of the provisions of article 265 of the Constitution and relatable to Entry 84 of List I of the Seventh Schedule. Situated, thus, we are unable to reconcile our views with the contention of Shri. Choudhury that the manufacturers of tea and tea wastes in the North Eastern States are eligible to get refund of the additional duty of excise paid in terms of the Notification No.337 1999.

28. We may recapitulate hereinbelow the features appearing in the instant case from the discussions above:

(i) The Finance Act of 2003 is within the legislative competence of the Union Parliament and there cannot be mandamus against Legislature;

(ii) The challenge to the vires of the Finance Act, 2003 was not pressed before the learned Single Judge or before this court;

(iii) No promise have been made by the Central Government to exempt the tea manufacturers of the North East from payment of additional duty either in the Industrial Policy Resolution of 1997 or in the Finance Act, 2003;

(iv) The Notification No.33/1999 restricted to the basic excise duty prevailing at the time of issuance of the notification lost its" force on abolition of basic excise duty and cannot be stretched to exempt duties imposed later;

(v) The decision of the learned Single Judge that the additional duty of excise is not covered by the Notification No. 33/1999 attained finality for want of cross appeal;

(vi) Legal right cannot enforced against supervening public interest established on record; and

(vii) The levy of additional excise duty by way of surcharge (cess) has been in overriding public interest in the sense that the monies to be ploughed back would be evenly supplemented by the Union Government to raise a fund for development of the Industry.

29. For reasons and discussions above, we are of the opinion that the common judgment and order dated 29th November, 2004 passed by the leaned Single Judge warrants reversal. Accordingly, we allow the appeals, set aside the judgment under appeal and dismiss all the writ petitions.

No order as to costs.