
(2010) 04 UK CK 0105
In the Uttarakhand High Court

Vishvakarma Paper and Boards Ltd.

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Central Excises and Salt Act, 1944 — Section 14, 5A

Citation : (2010) 1 UD 382

Hon'ble Judges : J.S. Khehar, C.J.;B.C. Kandpal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

J.S. Khehar, C.J.—The controversy in the instant central excise appeal revolves around exemption claimed by the appellant under notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, both dated 10.06.2003. The aforesaid two notifications are similarly worded. Relevant extract thereof (for adjudication of the present controversy) is being extracted hereunder:

In exercise of the powers conferred by Sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), read with Sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and Sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the Schedule appended hereto, other than the goods specified in the Annexure appended hereto; and cleared from a unit located in the State of Uttaranchal or State of Himachal Pradesh, from the whole of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts.

2. The exemption contained in this notification shall apply only to the following kinds of units, namely:

(a) new industrial units which have commenced their commercial production on or after the 7th day of January, 2003;

(b) industrial units existing before the 7th day of January 2003, but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five percent, on or after the 7th day of January, 2003.

3. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production, whichever is later.

2. The appellant alleges, that its industrial unit manufacturing uncoated craft paper, is located at Kashipur in district Udham Singh Nagar in the State of Uttarakhand. It is also asserted, that the manufacture of uncoated craft paper falls under sub-head 4804.90 of the Schedule appended to the Central Excise Tariff Act.

3. According to the learned Counsel for the appellant, the impugned order (out of which the instant appeal has arisen) was passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"), on 18.08.2009. By the said impugned order, the solitary reason recorded for declining exemption to the appellant was, that it had undertaken the expansion of the existing installed capacity prior to 07.01.2003, and for no other reason whatsoever. Accordingly, it is submitted, that neither the Tribunal nor the other excise authorities, which adjudicated upon the controversy prior thereto, had found the appellant ineligible for exemption for any other reason whatsoever. It is, therefore, submitted by way of inference, that the nature of the unit, as also the nature of its produce, fall within the scope of the exemption envisaged by the notifications bearing Nos. 49/2003-Central Excise and 50/2003- Central Excise, dated 10.06.2003.

4. So far as the issue of expansion of the existing installed capacity is concerned, learned Counsel for the appellant invited the Court's attention to a communication dated 13.12.2002, addressed by the appellant to the Superintendent, Central Excise and Customs, Kashipur. Relevant extract of the aforesaid communication is being reproduced hereunder:

Sub: Intimation of shut down of plant

Dear Sir,

With reference to above subject, this is to bring your kind notice that our production is held up due to Major maintenance and Expansion of Plant from the Dt. 12.12.2002.

We will be further informing you, when our production starts in our plant.

This is for your information please.

Kindly acknowledge the receipt of the same and oblige us.

Thanking you,

Yours Faithfully

For Vishvakarma Paper & Boards Ltd.

Based on the aforesaid communication, it is submitted that the appellant stopped its production activity for purposes of maintenance and expansion with effect from 12.12.2002. It is also pointed out, that production in the appellant's industrial unit remained suspended on account of its maintenance and expansion programme upto 14.01.2003. The appellant's unit thereafter recommenced production on 15.01.2003. On the basis of the expansion programme carried out by the appellant, an application dated 16.07.2003 was filed by the appellant, seeking exemption under the notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, dated 10.06.2003. Relevant extract of the application for exemption dated 16.07.2003, is being reproduced hereunder:

Sub.: Application for Exemption under Notification No. 49/2003 and 50/2003 Dt. 10.06.2003.

Dear Sir,

In reference to your letter No. CNO:20- CE/KPRII/Exemption/03/209 Dt. 26.06.2003 for the Exemption under Notification No. 49/2003 and 50/2003 Dt. 10.06.2003, in this regards we inform your good self that our unit qualify for Excise Exemption under Notification No. 49/2003 and 50/2003 dt. 10.06.2003. We have completed the expansion as on 15.01.2003 and started the expended production from 15.01.2003.

We are enclosing here with application for Excise Exemption under the Notification No. 49/2003 and 50/2003 Dt. 10.06.2003.

As per above said Notification, presently our unit qualify for the Exemption of Excise duty. So, please allow us exemption from the Excise duty liability under said Notification.

Thanking you

Yours faithfully,

For Vishvakarma Paper & Boards Ltd.

5. The Assistant Commissioner, Central Excise Division, Haldwani, required the appellant to opt for provisional assessment under Rule 7 of the Central Excise Rules, 2002, subject to execution of B-2 Bond for Rs. 50 lacs, along with cash security of Rs. 12.5 lacs. In compliance with the order of the Assistant Commissioner, Central Excise Division, Haldwani, the appellant executed B-2 Bond for Rs. 50 lacs and furnished a bank guarantee of Rs. 2.5 lacs and a F.D.R. of Rs. 10 lacs from the Bank of Baroda, Kashipur, in compliance with the

requirement of cash security.

6. On examination of the records of the appellant, as also after the inspection of the factory premises of the appellant, the Deputy Commissioner, Central Excise Division, Haldwani, arrived at the conclusion, that the expansion programme of the appellant, insofar as the factory premises under reference is concerned, had commenced prior to 07.01.2003. As such, the Deputy Commissioner, Central Excise Division, Haldwani, arrived at the conclusion, that the appellant was not entitled to any exemption. The appellant was, accordingly, required to pay duty amounting to Rs. 1,85,35,232/- for the period from 25.07.2003 to 31.05.2004, along with interest at the rate of 15 % per annum. The Deputy Commissioner, Central Excise Division, Haldwani, also required the appellant to pay central excise duty on the craft paper at the rate of 16% advance on all future clearances forthwith.

7. Dissatisfied with the order passed by the Deputy Commissioner, Central Excise Division, Haldwani, dated 15.06.2004, the appellant preferred an appeal before the Commissioner of Central Excise (Appeals-II), Meerut. The appeal preferred by the appellant was allowed on 10.08.2004. The appellate authority arrived at the conclusion, that the expansion programme undertaken by the appellant, came to be completed after 07.01.2003, inasmuch as, on the completion of the expansion programme, the unit under reference became fully operational with the enhanced capacity only on 14.01.2003. As such, the Commissioner of Central Excise (Appeals- II), Meerut, held that the appellant was entitled to exemption under the notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, both dated 10.06.2003.

8. The custom authorities assailed the appellate order, rendered by the Commissioner of Central Excise (Appeals-II), Meerut on 10.08.2004, before the Tribunal. The Tribunal, by its order dated 18.08.2009, accepted the aforesaid appeal by upholding the order rendered by the Deputy Commissioner, Central Excise Division, Haldwani dated 15.06.2004.

9. Through the instant appeal, the appellant herein has assailed the order rendered by the Tribunal on 18.08.2009.

10. While adjudicating upon the controversy, only one issue was determined by the Tribunal. The Tribunal was of the view that the notifications bearing Nos. 49/2003-Central Excise and 50/2003- Central Excise, both dated 10.06.2003, would entitle an existing industrial unit to exemption, only if the programme for expansion (so as to increase the existing installed capacity), had commenced on or after 07.01.2003. Since, admittedly, the programme for expansion of the industrial unit of the appellant had commenced prior to 07.01.2003, the Tribunal arrived at the conclusion, that the appellant was not entitled to the exemption sought by it (through the application dated 16.07.2003).

11. Before dwelling upon the controversy in hand, it is necessary to notice some facts recorded by the various authorities, which had dealt with the controversy

prior to the passing of the impugned order, and which are not subject matter of challenge at the hands of the appellant, either in the grounds of appeal or during the course of hearing of the present case. First and foremost, it deserves to be noticed, that M/s Steamatic Resources, Faridabad, had undertaken the expansion activity of the appellant - M/s Vishvakarma Paper and Boards Ltd. Sri Anuragh Kalia, a partner in M/s Steamatic Resources, recorded a statement u/s 14 of the Central Excise Act, 1944 before the Superintendent (Preventive), Customs and Central Excise, Meerut on 29.12.2003. In his statement, he acknowledged, that M/s Vishvakarma Paper and Boards Ltd. had contacted M/s Steamatic Resources on 10.07.2002 for getting a 12 ton boiler installed and commissioned at their factory premises. The representative of M/s Steamatic Resources, accordingly, visited the premises of M/s Vishvakarma Paper and Boards Ltd. on 11.07.2002, whereupon, a contract was executed for the installation and commissioning of the required boiler for a total consideration of Rs. 4 lacs, out of which, an amount of Rs. 50,000/- was received by way of advance. M/s Steamatic Resources started installation of the boiler under reference in the first week of November, 2002. By 18.12.2002, erection of pressure parts and components supplied by M/s Thermax Ltd. were duly installed. On 14.01.2003, the balance work was completed, and the boiler was duly commissioned. It was then handed over to M/s Vishvakarma Paper and Boards Ltd. When Sri Anuragh Kalia (aforementioned) was required to elaborate the details of works executed from 18.12.2002 to 14.01.2003, he responded by asserting, that during the aforesaid period, hydraulic test was undertaken, all ducting and platforms were completed, slow firing of boiler was done and, then, final boiler commissioning with tank steam pressure was executed. In the order passed by the Deputy Commissioner, Central Excise Division, Haldwani dated 15.06.2004, it was noticed that M/s Vishvakarma Paper and Boards Ltd. conceived of an expansion plan of the unit under reference well before the issuance of notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, inasmuch as, they got prepared the layout plan for the expansion programme on 15.08.2002, whereupon they commenced the purchase of the required plant and machinery. It was also noticed, that although the erection work of the new boiler installed by M/s Steamatic Resources had commenced in the first week of November, 2002, yet all civil works connected with the aforesaid erection had already been completed by M/s Vishvakarma Paper and Boards Ltd. as per the norms of M/s Thermax Ltd., Pune, who had manufactured the boiler, which was to be installed prior to the commencement of the erection work. It was further noticed that slow firing was done in the boiler in the first week of January, 2003, which would lead to the inference that the boiler had been fully erected in the first week of January, 2003, as slow firing could commence only after conclusion of the erection of the boiler. The Deputy Commissioner, Central Excise Division, Haldwani, also noticed in his conclusions drawn from the inquiry conducted from M/s S.V. Engineering Company, Ghaziabad, that dismantling and reinstallation of the mechanical production line in M/s Vishvakarma Paper and Boards Ltd. was undertaken from 14.12.2002 to 14.01.2003. Reference was also made to the boiler

correspondence file by the Deputy Commissioner, Central Excise Division, Haldwani, wherein a communication was addressed on 13.12.2002 to the Director of the Boiler, Uttaranchal, Haldwani, that the boiler header and pipeline erection work had been completed and the boiler was ready for hydraulic testing. A request was accordingly made for the inspection of the boiler and issuance of a certificate for starting the boiler. The Assistant Director, Industries / Boiler, Uttaranchal, on 26.12.2002, conducted the necessary pressure checks and permitted the operation of the boiler. Suffice it to state, that none of the aforesaid facts are subject matter of challenge at the hands of the appellant in the instant appeal.

12. During the course of hearing, the first contention advanced by the learned Counsel for the appellant was, that the words "have undertaken" used in notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise (both dated 10.06.2003) have to be given their true and correct meaning. According to the learned Counsel for the appellant, the aforesaid words used in the notifications are relatable to the terms "begun" or "commenced". Insofar as the expression "have undertaken" is concerned, it is submitted that the requirement of the notifications for grant of exemption would be applicable to such undertakings / units, which may have begun or commenced expansion prior to 07.01.2003, but have concluded the same on or after 07.01.2003. It is, therefore, submitted that if the notifications bearing Nos. 49/2003-Central Excise and 50/2003- Central Excise, dated 10.06.2003 are read in their proper perspective contextually as well as holistically without losing the purpose and intent with which the notifications had been issued, it would emerge, that since the completion of the expansion, by way of increase in installed capacity, was attained by the appellant after 07.01.2003, the appellant was entitled to the exemption conceived of by the said notifications.

13. We have given our thoughtful consideration to the first submission advanced by the learned Counsel for the appellant. For the issue under reference, paragraph 2(b) of the notification dated 10.06.2003 (already extracted above) needs to be minutely examined, so as to determine the real intention expressed therein. Examined minutely, there can be no doubt, that the expansion conceived of under paragraph 2(b) pertains to a unit, which was in existence prior to 07.01.2003. Additionally, it envisages that the installed capacity in the said existing unit should have been increased by not less than 25%. The notification expressly envisages, that the industrial unit under reference should "...have undertaken substantial expansion..." so as to increase the installed capacity "...on or after the 7th day of January, 2003...". It is, therefore, apparent that the words "...have undertaken substantial expansion..." have been further classified by the words "...on or after the 7th day of January, 2003... ". We have, therefore, no hesitation in concluding, that the commencement of the increase in installed capacity should have commenced after 07.01.2003 so as to enable an industrial unit to claim exemption by way of increase in installed capacity under notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise,

both dated 10.06.2003. Insofar as the instant aspect of the matter is concerned, there is ample material on the record of this case to conclude, that the increase of expansion of installed capacity was conceived of and undertaken by M/s Vishvakarma Paper and Boards Ltd. well before 07.01.2003. The admitted factual position in this behalf has already been noticed in paragraph 11 herein above. As such, we find no merit in the first contention advanced by the learned Counsel for the appellant.

14. The first submission advanced by the learned Counsel for the appellant can also be examined from another angle. Insofar as paragraph 2(b) of the notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, dated 10.06.2003, is concerned, the exemption conceived of therein is applicable only to industrial units, which were in existence before 07.01.2003, but which had undertaken substantial expansion by way of increase in installed capacity by not less than 25% "...on or after the 7th day of January, 2003...". In other words, paragraph 2(b) notices the date 07.01.2003 twice over. In the first instance, with reference to the date on which an existing unit should have already been established, and in the second instance, with reference to the date when the expansion programme is undertaken. In case, the intention was not to further classify the words "...have undertaken substantial expansion..." with the words "...on or after the 7th day of January, 2003... ", it would not have been essential to again mention the date 07.01.2003, as in the absence thereof, the meaning sought to be projected by the learned Counsel for the appellant, would be deemed to have been fully and completely expressed. It is, therefore, not possible for us to accept that the words "...on or after the 7th day of January, 2003..." should be overlooked. The reiteration of the date, 07.01.2003, was to clearly express the intention of the authorities, that the exemption would be granted to an industrial unit only if it had commenced its expansion programme after 07.01.2003.

15. There is yet another reason for not accepting the first contention advanced by the learned Counsel for the appellant. We are of the view that the interpretation sought to be placed by the learned Counsel for the appellant, while advancing his first submission, would result in a great ambiguity. Firstly, the incentive, under reference, is with the aim and object of substantially expanding existing industrial units. The object sought to be achieved, would therefore be defeated, if expansion programmes had been undertaken before 07.01.2003. The incentive was aimed at luring the setting up of new industries in the State, as well as, persuading established industrial units in the State to go in for substantial expansion. There is material on the record of this case on the basis of which, it can legitimately be concluded that the expansion programme, under reference, was conceived of in July, 2002, when the negotiated contract of Rs. 4 lacs was entered into by making an advance payment of Rs. 50,000/-. If, in the present case, the commencement of the increase in installed capacity in July, 2002 is legitimized, on the same analogy, in an another industrial establishment, a programme for expansion initiated a year or two prior to the issuance of the

notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, would be entitled to avail of the stipulated exemption, if the expansion programme had culminated after 07.01.2003. Secondly, we are afraid that such classification may not be able to stand the test of constitutional validity, inasmuch as, if two different industrial units commence programmes of substantial expansion so as to increase installed capacity by not less than 25% on the same day (say hypothetically 01.01.2002), whilst one of them completes the expansion programme on 06.01.2003, the other completes it on or after 07.01.2003, would it be possible for the authorities to exempt one of the aforesaid two industrial undertakings from payment of central excise duty while denying the other (who had commenced expansion on the same day, but concluded it before 07.01.2003). So as to read the provision in a manner as would render its interpretation constitutionally valid, it is imperative that the words "...have undertaken substantial expansion..." are read together with the words "...on or after the 7th day of January, 2003...". Accordingly, we are satisfied, that it is not possible for an industrial unit, like the appellant herein, who has commenced its expansion programme prior to 07.01.2003, to seek exemption from payment of central excise duty.

16. The second contention advanced by the learned Counsel for the appellant was that the Tribunal had committed a manifest error in law in brushing aside the clarification given by the Board through para No. 2 of a circular dated 09.07.1999, interpreting an identically worded notification bearing No. 32/99-Central Excise dated 08.07.1999 to mean, that "...increase in capacity should have been effective on or after 24.12.1997...". Since the said clarification was in respect of an identically worded excise exemption notification, it is submitted that the same clarification should have been made applicable to the present notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, dated 10.06.2003 as well.

17. We may rephrase the second submission of the learned Counsel for the appellant. According to the learned Counsel for the appellant, the clarification envisages that the expansion programme conceived of by the notification should be substituted so as to be applicable with reference to the actual / physical increase in the installed capacity of the industrial unit, irrespective of the date when the expansion programme was commenced. Before dealing with the submission advanced by the learned Counsel for the appellant, it is necessary to notice that a clarification issued by a department cannot override the purport and intent of a notification specially of the kind under reference issued in exercise of powers conferred u/s 5A(1) of the Central Excise Act, 1944. Secondly, no such clarification has been issued insofar as the present notifications bearing Nos. 49/2003- Central Excise and 50/2003-Central Excise, both dated 10.06.2003, are concerned. Thirdly, for the same three set of reasons, as have been considered by us while rejecting the first contention advanced by the learned Counsel for the appellant, we are satisfied that the second submission made by the learned Counsel for the appellant, based upon a similar clarificatory note, would not

render the appellant eligible for exemption under the notifications bearing Nos. 49/2003-Central Excise and 50/2003-Central Excise, dated 10.06.2003.

18. The third submission advanced by the learned Counsel for the appellant was, that the Tribunal was not justified in narrowly construing the phrase "have undertaken" occurring in paragraph 2(b) of the notifications bearing Nos. 49/2003-Central Excise and 50/2003- Central Excise, dated 10.06.2003, to mean "beginning" of substantial expansion by way of increase in installed capacity on or after 07.01.2003. Insofar as the instant issue is concerned, learned Counsel for the appellant has placed reliance on *Belapur Sugar and Allied Industries Ltd Vs. Collector of Central Excise, Aurangabad*, . Our pointed attention was invited to the following observations recorded in the aforesaid judgment:

10. Before we proceed to scrutinise the Notifications, the law to interpret is settled. Unless there is anything to the contrary in the Act, Rules or Notification, if there be two possible interpretations, it is that interpretation which subserve the object and purpose should be accepted. The objective of this Notification is by conferring rebate in excise duty, an incentive is given to a factory for increasing the sugar production during the lean period. It is with this in mind now we proceed to scrutinize the two Notifications. The only question is, whether benefit under Notification 192 dated 11.6.1982 is to be understood only from the date on which this Notification came into force or for the entire period preceding that date which is conferred under Notification No. 132. We find significantly the language used in the second Notification is "For para 4, following paragraph shall be substituted". It is significant while substituting this paragraph 4 on the 11th June, 1982, it admits to confer rebate for the period preceding the date of this Notification viz. from May. So this Notification clearly indicates to confer benefit which is covered by the first Notification No. 132. If the interpretation as sought by the Revenue is to be accepted the preceding period has to be excluded. Substituted para 4 has two parts, first where production during three preceding years was nil and second part, the entire production during May to September, 1982 will be exempted. Appellant case is covered under both parts. Its production in the last three preceding years was nil and in terms of Notification 132 read with this substituted para 4, in terms of 2nd part the entire sugar produced during May to September, 1982 would exempt. Thus the interpretation for revenue cannot be accepted as it defeats the very object of the Notification.

19. We have considered the third submission advanced by the learned Counsel for the appellant. In our considered view, the judgment relied upon by the learned Counsel for the appellant squarely demolishes the contention advanced on behalf of the appellant. The object for granting exemptions is for alluring industrialization within the territory of the State of Uttarakhand. The incentives under reference are for establishing new industrial units and for substantial expansion of existing industrial units. If the object was to allure industrialization or substantial expansion of the existing industrial units, then the interpretation sought to be placed on paragraph 2(b) of the notifications bearing Nos. 49/2003-

Central Excise and 50/2003- Central Excise, dated 10.06.2003, would be impermissible. It is not possible for us to accept that paragraph 2(b) of the notifications under reference has been narrowly construed. We are of the view, that the Tribunal gave meaning and effect to each of the words expressed in paragraph 2(b) of the aforesaid notifications, and was justified. In our considered view, the exemption under the aforesaid notifications was permissible only for such industrial units, which had undertaken substantial expansion after 07.01.2003. In the present case, on the factual matrix, there is no dispute whatsoever, that the expansion programme at the hands of the appellant, of its existing industrial unit commenced prior to 07.01.2003. As such, it is not possible for us to accept even the instant contention advanced by the learned Counsel for the appellant.

20. The last contention advanced by the learned Counsel for the appellant was, that excise exemptions granted under a particular industrial policy for a specified State, had to be read along with the industrial policy under which the exemption had been granted for purpose of understanding the true effect of the applicability of the exemptions. Insofar as the instant issue is concerned, learned Counsel for the appellant has placed reliance on the judgment rendered by the Supreme Court in *State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others*, . Relying on the aforesaid judgment, learned Counsel for the appellant, in order to point out the similarity of the controversy in the present case with that in *Suprabhat Steel Ltd.* 's case (supra), read out to us paragraph 2 of the aforesaid judgment, which is being extracted hereunder:

2. In these appeals, the Judgment of the Division Bench of Patna High Court in Civil Writ Jurisdiction Case Nos. 7063, 7068 and 7467 of 1994 and the other judgments following the same are under challenge. The short question for consideration is whether the Industrial Units which have started production prior to 1.4.93 and whose investment on plant and machinery do not exceed Rs. 15 Crores on 1.4.93 would be entitled to the facilities of sales tax exemption on the purchase of raw material for a period of seven years from 1.4.93 in accordance with Clause 10.4(i)(b) of the Industrial Incentive Policy, 1993 (hereinafter referred to as "the Industrial Policy") and whether the notification issued by the Government of Bihar dated 2nd of April, 1994 in exercise of power u/s 7 of the Bihar Finance Act to the extent it indicates "who has not availed of any facility or benefit under any Industrial Promotion Policy" is invalid as being contrary to the Policy Resolution of 1993. The High Court by the impugned Judgment came to the conclusion that the old industrial units whose investment on plant and machinery did not exceed Rs. 15 Crores on 1.4.93 would be entitled to the sales tax exemption on the purchase of raw material for a period of seven years from 1.4.93. Examining the notification dated 2nd of April, 1994, issued by the Government of Bihar in exercise of power conferred by Clause (b) of Sub-section (3) of Section 7 of the Bihar Finance Act, 1981, the High Court further came to the conclusion that the notification so far as it imposes a condition that the facility of sales tax exemption on purchase of raw material will be available only

to those industrial units who have not availed of any facility/benefit on the earlier incentive policy is bad and struck down that part of the notification.

Learned Counsel for the appellant then invited our attention to the conclusions drawn in paragraph 7 of the aforesaid judgment, which are being extracted hereunder:

7. Coming to the second question, namely the issuance of notification by the State Government in exercise of power u/s 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the Incentive Policy itself. The Industrial Incentive policy is issued by the State Government after such Policy is approved by the Cabinet itself. The issuance of the notification u/s 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the Industrial Policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power u/s 7 of the Bihar Finance Act, if is found to be repugnant to the Industrial Policy declared in a government resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4th of April, 1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly the Policy engrafted in Clause 10.4(i) (b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to Sub-clause (b) of Clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power u/s 7 of the Bihar Finance Act, which may over-ride the incentive policy itself. In our considered opinion the expression "such conditions and restrictions as it may impose" in Sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4th April, 1994.

Based on the authoritative determined rendered by the Supreme Court in the aforesaid judgment, it is the submission of the learned Counsel for the appellant, that the policy decision, depicted in the industrial policy framed by the State Government on the basis whereof the notifications under reference were issued, cannot be whittled down, so as to deprive individuals, who relying on the industrial policy, had taken steps and altered their positions pointedly to entitle themselves to certain concessions envisaged by the industrial policy.

21. Insofar as the industrial policy under reference is concerned, learned Counsel

for the appellant invited our attention to the Office Memorandum dated 07.01.2003, issued by the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India, and referred to paragraphs 1, 2, 3 & 3.1 thereof, which are being extracted hereunder:

Subject: New Industrial Policy and other concessions for the state of Uttaranchal and the state of Himachal Pradesh.

The Hon''ble Prime Minister, during the visit to Uttaranchal from 29th to 31st March, 2002, had, inter-alia made an announcement that "Tax and Central Excise concessions to attract investments in the industrial sector will be worked out for the Special Category States including Uttaranchal. The industries eligible for such incentives will be environment friendly with potential for local employment generation and use of local resources.

2. In pursuance of the above announcement, discussion on Strategy and Action Plan for Development of Industries and generation of employment in the states of Uttaranchal and Himachal Pradesh were held with the various related Ministries / agencies on the issue, inter-alia, infrastructure, development, financial concessions and to provide easy market access. The new initiatives would provide the required incentives as well as an enabling environment for industrial development, improve availability of capital and increase market access to provide a fillip to the private investment in the state.

3. Accordingly, it has been decided to provide the following package of incentives for the states of Uttaranchal and Himachal Pradesh.

3.1 Fiscal Incentives to new Industrial Units and to existing units on their substantial expansion:

(I) New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Centres, Industrial Infrastructure Development Centres (IIDCs), Industrial Estates, Export Processing Zones, Theme Parks (Food Processing Parks, Software Technology Parks, etc.) as stated in Annexure-I and other areas as notified from time to time by the Central Government, are entitled to:

(a) 100% (hundred percent) outright excise duty exemption for a period of 10 years from the date of commencement of commercial production.

(b) 100% income tax exemption, for initial period of five years and thereafter 30% for companies and 25% for other than companies for a further period of five years for the entire states of Uttaranchal and Himachal Pradesh from the date of commencement of commercial production.

(II) All New industries in the notified location would be eligible for capital investment subsidy @ 15% of their investment in plant & machinery, subject to a ceiling of Rs. 30 lakh. The existing units will also be entitled to this subsidy on their substantial expansion, as defined.

(III) Thrust Sector Industries as mentioned in Annexure-II are entitled to similar concessions as mentioned in para 3(I) & (II) above in the entire state of Uttaranchal and Himachal Pradesh without any area restrictions.

Referring to paragraph 1 thereof, it is submitted, that the aforesaid policy decision had been taken as far back as in March, 2002. Inviting our attention to paragraph 2 thereof, it was submitted that the aforesaid policy decision was to be applicable to two States, including the State of Uttarakhand. Referring to paragraphs 3 & 3.1 of the aforesaid Office Memorandum, it was submitted, that incentives were to be available for new industrial units and existing industrial units on their substantial expansion. Learned Counsel for the appellant, then, referred to the notification dated 08.01.2003 issued by the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) Government of India, wherein various terms, relevant to the industrial policy, were defined. The definitions incorporated in the notification dated 08.01.2003 are being reproduced hereunder:

5. Definitions:

- a. "Industrial Unit" means any industrial unit where a manufacturing programme is carried on or suitable servicing unit as defined in M/o SSI letter No. 2(3)/91-SSI.Bd dated 30.9.1991, other than that run Departmentally by Government.
- b. "New Industrial Unit" means an industrial unit for the setting up of which effective steps were not taken prior to 7th January, 2003.
- c. "Existing Industrial Unit" means an industrial unit existing as on 7th January, 2003.
- d. "Substantial Expansion" means increase by not less than 25% in the value of fixed capital investment in plant and machinery of an industrial unit for the purpose of expansion of capacity / modernization and diversification.
- e. "Effective steps" means one or more of the following steps:
 - i. that 10% or more of the capital issued for the industrial unit has been paid up.
 - ii. that any part of the factory building required for manufacturing activity has been constructed.
 - iii. that a firm order has been placed for any plant and machinery required for the industrial unit.
- f. "Fixed Capital Investment" means investment in plant and machinery for the purpose of this scheme.

Referring to the definition of the term "substantial expansion", it is submitted that no date was stipulated in the notification dated 08.01.2003, with reference to which, the expansion ought to have been made. It is, therefore, the submission of the learned Counsel for the appellant, based on the Office Memorandum dated 07.01.2003 and the notification dated 08.01.2003, that the

appellant, relying on the aforesaid, had commenced its programme of expansion so as to claim eligibility for the incentives proposed therein. Relying on the judgment rendered in Suprabhat Steel Ltd.'s case (supra), it is submitted, that having given the impression to existing industrial establishments, that incentives will be available on substantial expansion, and having defined the term "substantial expansion", the authorities were precluded from incorporating further conditions therein, so as to deprive the appellant the right to avail of the incentives incorporated therein.

22. We have given our thoughtful consideration to the last submission advanced by the learned Counsel for the appellant as has been noticed in the foregoing paragraph. It is not possible for us to accept that the Office Memorandum dated 07.01.2003 resulted in the creation of any impression in the mind of the appellant, on the basis of which, it commenced the expansion programme of their existing industrial unit. In the Office Memorandum dated 07.01.2003, the words "as defined" appearing in conjunction with the term "substantial expansion" (in sub-paragraph (1) of paragraph 3.1), make it clear, that the term "substantial expansion" was yet to be defined. Although the term "substantial expansion" was defined in Clause (d) of paragraph 5 of the notification dated 08.01.2003, the same must necessarily be read in conjunction with the definition of the term "existing industrial unit" defined in Clause (c) thereof. An "existing industrial unit", as per Clause (c) of paragraph 5 is an industrial unit which existed as on 07.01.2003. "Substantial expansion" thereof would necessarily entail expansion carried out after 07.01.2003. But then, at best, learned Counsel for the appellant could place reliance on the Office Memorandum dated 07.01.2003 and the notification dated 08.01.2003 to support his present submission. If these two are the basis of his instant contention, that, relying on the impression given in the industrial / incentive policy, the appellant had gone in for "substantial expansion" to reap the benefit of the declared incentives, then the said impression came to be entertained on 07.01.2003 / 08.01.2003 and not before that. Then the process of expansion, as per the appellant's own showing, should have commenced after 07.01.2003 / 08.01.2003, as according to the instant submission, the appellant was persuaded to enhance its existing capacity on the basis of the said industrial / incentive policy. From the factual position noticed in paragraph 11 of the instant order, it is clear that the appellant had contacted M/s Steamatic Resources on 10.07.2002 for the proposed expansion. Whereupon a contract was executed for the installation and commissioning of the expansion for a total consideration of Rs. 4 lacs, out of which a sum of Rs. 50,000/- was paid by the appellant to M/s Steamatic Resources by way of advance. M/s Steamatic Resources commenced the expansion work in the first week of November, 2002. By 18.12.2002, the components supplied by M/s Thermax Ltd. had been duly installed. Based on the aforesaid facts, it is clear that the appellant had commenced its expansion before the industrial / incentive policy was made public through the Office Memorandum dated 07.01.2003 and the notification dated 08.01.2003. Thus viewed, even the Office Memorandum

dated 07.01.2003 and the notification dated 08.01.2003, relied upon by the learned Counsel for the appellant, cannot lead to the conclusion, that any impression could have been gathered by the appellant, that "substantial expansion" envisaged by the policy would be relevant to any expansion carried out prior to 07.01.2003. In view of the above, we have no hesitation to conclude, that the appellant cannot claim any benefit under the industrial policy issued by the Government.

23. For the reasons recorded herein above, we find no merit in this appeal and the same is accordingly dismissed.