

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : 11.05.2012

CORAM**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PERMOD KOHLI****Writ Petition (C) No. 22 of 2007**

M/s. Unicorn Industries,
A Partnership Firm,
Through it's Managing Partner
Shri Vedprakash Wadhvani
Khasra No. 786/1064,
Mahjigaon, Jorethang Housing Road,
Jorethang,
South Sikkim 737 121.

... **Petitioner.**

- versus -

1. The Union of India,
Its Notice to be served through:
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.
2. The Commissioner of Central Excise,
Siliguri Commissionerate,
C.R. Buildings,
Hakimpura, Haren Mukherjee Road,
Siliguri (West Bengal).



3. The Deputy Commissioner of
Central Excise,
Gangtok Division,
Notice to be served through:
The Superintendent of Central Excise,
Rangpo Range, C. R. Buildings,
Hakimpura, Haren Mukherjee Road,
Siliguri (West Bengal).
4. State of Sikkim
Notice to be served through:
The Secretary,
Ministry of Industry,
Department of Commerce & Industries,
Government of Sikkim,
Annexe I Building,
Near Power Department,
Gangtok, Sikkim.

... **Respondents.**

For Petitioner : Mr. Paresh M. Dave, Mr. Chetan
Pandya, Ms. Mukul R. Parajuli,
Advocates.

For Respondent : Mr. B. K. Gupta, Advocate for
respondents No.1, 2 and 3.

Mr. S. K. Chettri, Asstt. Govt.
Advocate for respondent No.4.

J U D G M E N T

Kohli, CJ


Legality, propriety and validity of Notification
No.21/2007- Central Excise dated 25.04.2007 (Annexure-1 to
the Writ Petition) as it inserts Clause-1A under Annexure-1 to
the Notification, whereby Pan Masala has been included in the



list of excluded articles from the Notification No.71/2003-Central Excise dated 09.09.2003, has been called in question in the present Writ Petition along with certain ancillary and consequential reliefs.

2. Petitioner claims to be a partnership firm engaged in the business of manufacturing of branded "Indian Mouth Freshner" popularly known as Pan Masala with its principal place of business in the State of Gujarat to which all the partners of the petitioner belong. The petitioner manufactures Indian Mouth Freshner with the brand name of "123".

3. The Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India formulated its industrial policy for the North-Eastern Region to give impetus to industrial growth and development in all the hilly regions of the country, particularly the North-Eastern Region. The policy for North-Eastern Region was notified by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India vide its Office Memorandum dated 24.12.1997, *inter alia*, providing for various incentives for establishment of Industries in North-Eastern Region. Since the State of Sikkim was not specifically included in this policy, Government of India vide subsequent




Notification/Memorandum dated 23.12.2002 extended the policy to the State of Sikkim, namely, "Special package of incentives for development of Industries in the State of Sikkim, 2002". Consequent upon the Government of India's industrial policy, the State of Sikkim issued Notification No. G.O./2/DI/2002-2003/901 dated 17.02.2003, whereunder various Fiscal Incentives to new Industrial Units and existing Units with substantial expansion were notified. The Fiscal Incentives, *inter alia*, include 100% income tax and excise duty exemption for a period of 10 (ten) years besides various other subsidies etc. The controversy in the present petition, however, is confined to the exemption from the Central Excise Duty. Since the excise duty is leviable under the Central Excise Act, 1944, with the view to implement the industrial policies referred to above the Central Government in exercise of its power under sub-section (1) of Section 5A of the Central Excise Act, 1944 and other related provisions whereunder additional duties of excise were imposed from time to time, issued a statutory Notification No.71/2003 - Central Excise dated 09.09.2003 for exemption of excise duty in the State of Sikkim in respect to the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 other than goods specified in Annexure-I to the Notification. The Notification contains various stipulations and conditions



for availing the exemption envisaged under the Notification on clearance of goods from the Units located in the specified Industrial Centres/Areas. The excluded Industries specified in the Annexure-I to the aforesaid Notification were: -

1. Tobacco and Tobacco products including Cigarettes/Cigars/Gutkha,
2. Branded Aerated beverages, and
3. Pollution causing paper and paper products.

4. It is alleged that the respondent no.4, i.e. the State of Sikkim through its officers, executives and agencies gave wide publicity to Industrial Policy Resolution (IPR) Notification dated 17.02.2003 all over the Country so as to invite various industrialists and entrepreneurs to set up new industrial units in growth centre within the State of Sikkim. It is further averred that the petitioner was prompted and persuaded by the promise, assurance and invitation extended by the respondent no.4 and the Government of India through its IPR as notified vide abovementioned Notifications to set up manufacturing Units for Indian Mouth Freshner, a product not containing any tobacco in the State of Sikkim. The petitioner, accordingly, applied for registration of its small scale industrial unit to the Directorate of Industries, Government of Sikkim. A Certificate dated 10.05.2006 (Annexure-P3) was granted to the petitioner. The petitioner also applied for registration as a



manufacturer under the Central Excise Law on 15.5.2006 in respect to its proposed unit in the State of Sikkim and a Certificate dated 16.05.2006 (Annexure-P4) was issued in its favour. The petitioner also applied for registration as a dealer under Sales Tax Act and a Sales Tax Registration Certificate dated 15.05.2006 (Annexure-P5) was also issued to it. It is stated that the petitioner set up a full-fledged manufacturing unit for its product Indian Mouth Freshner "123" brand by investing Rs.2,93,56,461/-. This investment was made on capital and preliminary expenditures, raw-materials, direct and indirect costs and various other expenses. A statement detailing the investment made in the unit up to April, 2007 is placed with the petition as Annexure-P6. The petitioner also claims to have employed about 18 workers as per the details given in Annexure-P7. The petitioner's unit commenced its commercial production from June, 2006. In accordance with the exemption Notification, the petitioner was required to deposit the excise duty as leviable under the Central Excise Act, 1944 and was entitled to refund of the same on clearances of the goods in accordance with the prescribed procedure under the exemption Notification No.71/2003-Central Excise dated 09.09.2003. The petitioner filed its returns in prescribed Form E.R.1 and on clearances of




the goods he was allowed to refund of the excise duty paid by it up to the month of April, 2007.

5. While the petitioner was availing the exemption from payment of excise duty on the goods manufactured by it in the State of Sikkim, the Ministry of Finance, Department of Revenue, Government of India issued the impugned Notification No.21/2007-Central Excise dated 25.04.2007, whereby various notifications specified therein were amended including Notification No.71/2003-Central Excise dated 09.09.2003 wherein exemption from the payment of excise duty was granted to the Industries set up in the State of Sikkim. Annexure-I to the Notification No.71/2003-Central Excise was substituted and "Pan Masala" falling under Chapter 21 of the First Schedule of the Central Excise Tariff Act, 1985 was included in the Annexure-I, meaning thereby the excise duty exemption earlier allowed on manufacturing of Pan Masala came to be withdrawn. Consequent to the issuance of the aforesaid Notification dated 25.04.2007, the respondent no.3 vide its communication dated 01.05.2007 (Annexure-P10) informed the petitioner that the benefits as envisaged under Notification No.71/2003-Central Excise dated 09.09.2003 stand withdrawn in respect to the petitioner's unit manufacturing Pan Masala falling under Chapter 21 of the First



Schedule of the Central Excise Tariff Act, 1985 and duty payable with effect from the month of April, 2007 on the goods manufactured by the petitioner was demanded. It was followed by another letter dated 19.06.2007 asking the petitioner to reverse the re-credited amount in PLA in May, 2007 and to revise their returns on account of impugned Notification dated 25.04.2007. Aggrieved of the impugned Notification and the demand made by the respondents from the petitioner in respect to the excise duty, the present petition has been filed.

6. The petitioner has invoked the principle of promissory estoppel. In sum and substance, the contention raised on behalf of the petitioner is that the Government of India by virtue of its IPR for promotion and development of industries in the North-Eastern Region including Sikkim, extended various Fiscal Incentives including exemption from income tax and excise duty to the industrialists and entrepreneurs for establishment of industries in hilly areas. The petitioner being persuaded and allured by such promises, assurances and incentives extended by the Union of India and the State of Sikkim established an industrial unit for manufacturing of Indian Mouth Freshner (Pan Masala) with a brand name "123" in the State of Sikkim by investing Rs.2.93



crores and thus altered its position to its detriment. It is stated that the respondents after having extended such promises and assurances to continue to grant exemption from excise duty for a period of 10 (ten) years from the date of publication of the Notification in Govt. Gazette or from the date of commercial production whichever is later, were not entitled to withdraw the exemption on the principle of promissory estoppel. The petitioner has also pleaded that the action of the respondents besides being in breach of its promises is arbitrary and *ultra vires* to Article 14 and Article 265 of the Constitution of India.

7. The Government of India has filed its counter affidavit on behalf of the respondents no.1, 2 and 3 through the Superintendent, Central Excise, Rangpo Range opposing the petition. All factual averments in respect to the issuance of IPR by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India in respect to the North-Eastern Region and Sikkim vide Notification No.71/2003-Central Excise dated 09.09.2003 and establishment of industry by the petitioner in the State of Sikkim, its investment and commencement of commercial production with effect from 27.06.2006 have been admitted. Payment of excise duty and grant of exemption, refund of the



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duties paid by the petitioner on the goods manufactured by its Sikkim unit up to the month of April, 2007 are also not disputed. Respondents have justified the withdrawal of benefit of excise duty exemption on manufacturing of Pan Masala only on the ground that the action is in public interest since the Pan Masala falls within the category of demerit goods as it is found hazardous to health. It is further stated that it was felt necessary so as not to encourage production and consumption of such goods through tax incentives. Further submission to oppose the relief/claim of the petitioner is that petitioner seeks to challenge the policy decision of the Government which is not permissible in law. The State of Sikkim chose not to file any reply to the petition. Petitioner has filed a rejoinder to the counter affidavit filed by the respondents. To controvert the contentions raised by the respondents, Union of India in the counter affidavit, the petitioner has placed on record a copy of Office Memorandum dated 01.04.2007 issued by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India whereby industrial units established in the State of Sikkim on or before 31.03.2007 were allowed to continue to get benefits/incentives under the 'New Industrial Policy' and other concessions for the State of Sikkim vide Office Memorandum dated 23.12.2002. The petitioner has also placed on record a Report dated




03.02.2007 from the Gujarat Laboratory to establish that there was no health hazardous substance in the Pan Masala and the sample conformed with the prescribed standard of quality under the Prevention of Food Adulteration Rules, 1985. It is specifically pleaded that only Pan Masala containing tobacco can be termed as hazardous to health and not the product manufactured by the petitioner. The petitioner has also placed on record an additional affidavit dated 17.04.2008 in response to additional affidavit filed by the respondents containing allegations of mis-declaration, wrong classification etc. Along with additional affidavit dated 01.09.2011, some reports of the Laboratory have also been placed to indicate that the product manufactured by petitioner does contain component of lime. These test reports are not germane to the controversy as during the hearing of the petition no arguments were raised on behalf of the respondents in respect to the allegations contained in the additional affidavit filed by the respondents. Otherwise also if the petitioner has committed any mischief or fraud, the respondents were/are at liberty to initiate any action in accordance with the Prevention of Food Adulteration Act or any other law against it. However, it has no relevance in so far the question of grant or withdrawal of exemption from payment of excise duty is concerned.

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8. Before the issues involved in the petition are examined and delved upon, it is relevant to notice that the question in the Writ Petition relates to the validity of the policy decision of the Government of India, but unfortunately the counter affidavit has not been filed by any Secretary level officer either from the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India or the Ministry of Finance, Department of Revenue, Government of India. To the contrary the counter affidavit has been filed by an officer in the rank of Superintendent of Central Excise posted at Rangpo in the State of Sikkim. Even in this affidavit, no reference is made to any access to the records of the Government of India nor the statements made in the affidavit are relatable/referable to any record of the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India or of the Ministry of Finance, Department of Revenue, Government of India.


9. I have heard Mr. P. M. Dave, learned counsel appearing for the petitioner and Mr. B. K. Gupta, learned counsel for the respondents no. 1, 2 and 3 at length. The sole question that comes up for judicial scrutiny is the validity of impugned Notification No.21/2007-Central Excise dated




25.04.2007 on the touch stone of doctrine of promissory estoppel. It is now a settled law that doctrine of promissory estoppel is a rule of equity and for the enforcement of this rule apart from equitable considerations, the public interest, public policy, sovereign and statutory exercise of authority by the State and its functionaries are other relevant factors. The law as evolved over a period of time recognise the enforceability of promissory estoppel where the promise or assurance is extended unequivocally and the promisee has altered his/its position to its detriment acting on such representation or promise. It is equally settled law that the extended promise becomes unenforceable in law if revocation of promise or withdrawal is found to be in public interest or its basis is exercise of sovereign or statutory powers or on account of any valid public policy. Thus the validity of the impugned Notification needs to be examined on the basis of the afore-noticed broader principles.

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10. I have noticed above the factual averments on record. Since the factual averments made in the petition have not been disputed on any material question, the principles of law are to be applied to the admitted factual position. Promise extended by the respondents to the petitioner and similarly situated industries through its IPR Notification dated



24.12.1997 followed by the Office Memorandum dated 17.02.2003 and the Notification No.71/2003-Central Excise dated 09.09.2003 is indubitably established. The respondents have also not disputed such offer, promise and assurance to the prospective industrialists/entrepreneurs for establishment of industrial units in the State of Sikkim or for that matter in North-Eastern Region. Grant of Fiscal Incentives, benefits for establishment of industries in the State of Sikkim is not a determinable question having been specifically admitted in the counter affidavit. Thus to consider the relief claimed by the petitioner what is required to be established by it is that it has altered its position to its detriment acting on or in response to the representation, promise and assurance of the respondents. The Government of India issued the first IPR vide its Notification No.14(2)/2002-SPS dated 23.12.2002 offering special package of incentives for development of industries in the State of Sikkim followed by the Notification dated 17.02.2003 issued by the Department of Commerce and Industries, Government of Sikkim, though prior to the aforesaid Notification, the Government of India had issued its 'New Industrial Policy' for concessions in the North-Eastern Region vide its Office Memorandum dated 24.12.1997. This policy decision has been formally implemented by issuing statutory Notification No.71/2003-Central Excise dated



09.09.2003 by granting exemption from payment of Central Excise Duty on goods manufactured as specified in the First and Second Schedule of the Central Excise Tariff Act, 1985 except those notified in Annexure-I thereto in the State of Sikkim. Admittedly manufacturing of Pan Masala was not one of the products incorporated in Annexure-I which is in fact a negative list. It is admitted case of the parties that the petitioner was entitled to exemption from payment of the excise duty in accordance with the procedure prescribed in terms of the exemption Notifications dated 17.02.2003 and 09.09.2003. Through the impugned Notification No.21/2007-Central Excise dated 25.04.2007, Pan Masala has been introduced in Annexure-I so as to withdraw exemption granted in respect to manufacture of this item under Notification No. 71/2003-Central Excise dated 09.09.2003. It is equally admitted position that the exemption from payment of Central Excise Duty was available to the petitioner for a period of 10 (ten) years from the date of publication of the Notification in the official gazette or from the date of commencement of commercial production whichever is later. The petitioner commenced its commercial production in June, 2006 as per the averments made in the Writ Petition, and, in reply the respondents have specified the exact date of commercial production as 26.06.2006. Under the exemption Notification,




referred to above, the petitioner was entitled to exemption from payment of Central Excise Duty for a period of 10 (ten) years which is to expire on 25.06.2016. However, with the intervention of the impugned Notification No.21/2007-Central Excise dated 25.04.2007, the petitioner's entitlement to avail the excise duty exemption up to June, 2016 stands curtailed by withdrawing the exemption with effect from the date of issuance of the exemption Notification, i.e. 25.04.2007. It has to be presumed that whenever the State grants exemption from payment of any chargeable duty or tax for promotion of industry, in general or in any specified area or in respect to specified goods, it has a public purpose and is in public interest. The purpose could be to promote industry in a particular area/State in respect to specified goods, to generate employment in an area or host of other public purposes. Once such a benefit is conferred upon any individual or juristical person for a specified period, its premature withdrawal has to be for justifiable and valid reasons and purposes. The State has to justify withdrawal once a promise/assurance is extended and the action of the State is justiciable and judicial review of such action is permissible in law. Conferment of benefit to the petitioner from payment of Central Excise Duty for a period of 10 (ten) years on the goods manufactured by it in the State of Sikkim pursuant to the promise extended by



the respondents is all admitted. The State has to, therefore, justify its actions in accordance with law. In the counter affidavit filed by the State, the only ground for withdrawal of benefit is mentioned in paragraph 4(i), which reads as under:-

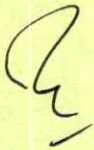
“(i) It is submitted that such action was in public interest since Pan Masala fell within the category of “demerit goods” as it was found hazardous to health. This was felt necessary so as not to encourage production and consumption of such goods through tax incentives. It was on these grounds that NEIIPP (North Eastern Industrial & Investment Promotion Policy), 2007 was framed, in larger public interest, that no excise duty exemption/concessions be provided to ‘pan masala’, for units located in the NER and Sikkim. In this background, it would have been iniquitous to continue to extend the benefit of Central Excise exemption to manufacturers of pan masala under notification no. 71/2003-CE dated 09.09.2003. A copy of the North Eastern Industrial & Investment Promotion Policy, 2007 is enclosed herewith and marked as Annexure R-1.”


11. As observed above, this affidavit has not been filed by any competent official of the Government of India from the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion or even from the Ministry of Finance, Department of Revenue who is associated or acquainted with the Policy making/decision of Government or is custodian of such record or has access to it. The impugned Notification is a



Government of India's policy decision. The reasons for issuance of impugned Notification could only be disclosed by the Government of India at the level of concerned Ministry, the policy framers.

12. I must place on record my displeasure on the manner the petition has been defended by the Union of India. The counter affidavit has not been filed by any of the respondents to the petition or competent Government official as observed above but by an officer of the rank of Superintendent of Central Excise posted in Sikkim who could not have any access to the record of the policy decision of the Ministry nor he has stated anything about his knowledge based upon the record of the concerned Ministries in this regard. The affidavit thus sans requisite information in respect to formulation of new policy and/or withdrawal of the earlier policy. The only ground for withdrawal of benefit granted to the petitioner's industry is that the Pan Masala falls in the category of demerit goods and is health hazardous. What is the definition of demerit goods or the health hazardous is not disclosed anywhere in the counter affidavit. Petitioner has specifically averred that they manufacture mouth freshner Pan Masala which does not contain tobacco. The petitioner has also placed on record certificate of the certified Laboratory





which does not indicate any hazardous substance or component in the product of the petitioner. This certificate has not been rebutted by the respondents even in their additional affidavit filed though the respondents alleged some mis-classification on the part of the petitioner. Pan Masala is admittedly one of the specified goods under Chapter 21 of the First Schedule of the Central Excise Tariff Act, 1985. Even though it is stated in the counter affidavit that the withdrawal of the excise duty is in larger public interest, however, so called public interest has not been disclosed in the counter affidavit.

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13. To justify the action of the respondents, Mr. B. K. Gupta, learned counsel appearing for the respondents, only pleaded that Pan Masala is a hazardous substance. His further contention is that premature withdrawal of benefit is in public interest but without referring to any material on record to demonstrate the nature and extent of such public interest. To support his contention he has referred to case of **Kasinka Trading & Anr. v. Union of India & Anr.** reported in **(1995) 1 SCC 274**. In this case, exemption granted on import duty under the Customs Act on the import of PVC resins for the period from 15.03.1979 to 31.03.1981 was prematurely withdrawn vide withdrawal notification dated



16.10.1980. Validity of this withdrawal notification came to be examined by the Hon'ble Supreme Court. The plea of the Government of India has been noticed by the Hon'ble Supreme Court, the relevant extract from paragraph 19 is noticed hereunder: -

" 19.
 It was stated that it was with a view to equalizing sale prices of the indigenous and the imported material and to make the commodity available to the consumer at a uniform price, keeping in view the trends in the supply of the material, that the Cabinet had decided to issue the exemption Notification No.66 of 1979 under Section 25(1) of the Act. Subsequently, when it was found and realized that the international prices of the product were falling and consequently the import prices had become lower than the ex-factory prices of the indigenous material, the matter was examined by the Government of India and it was decided in "public interest" to withdraw the exemption notification. Thus, the Union of India has disclosed the circumstances under which the exemption was initially granted as well as the change of circumstances which warranted the withdrawal of the exemption notification. The reasons given by the Union of India justifying withdrawal of the exemption notification, in our opinion, are not irrelevant to the exercise of the power in "public interest", nor are the same shown to be insufficient to support the exercise of that power. "

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 Considering the above circumstances, which, in opinion of the Hon'ble Supreme Court, is a justified public purpose on account of the change in the circumstances, Hon'ble Supreme Court declined the relief to the petitioners therein.

14. Another decision relied upon by the learned counsel on behalf of the respondents is the case of **Shree Sidhbali**



Steels Ltd. & Ors. v. State of Uttar Pradesh & Ors.

reported in **(2011) 3 SCC 193**. In this case, the State of Uttar Pradesh under its industrial policy with the consent of U.P. State Electricity Board granted incentives, i.e. the rebate of 33.33% on the total quantity of electricity bills to industrial units to be established in the hilly areas of U.P. This benefit was subsequently altered to 17% vide subsequent tariff notifications issued in the years 1998 and 1999 and vide the impugned Notification dated 07.08.2000, the rebate was totally recalled. The exemption granted somewhere in the year 1986 was by a notification issued under Section 49 of the Electricity (Supply) Act, 1948. The Notification withdrawing the rebate was, however, issued after the enactments of the U.P. Electricity Regulatory Commission Act and the U.P. Electricity Reforms Act, 1999. While considering the question of validity of the withdrawal Notification, Hon'ble Supreme Court noticed that in the subsequent enactments, i.e. the U.P. Electricity Regulatory Commission Act and the U.P. Electricity Reforms Act, 1999, there is no provision for grant of rebate/exemption and the respondent-State was justified in withdrawing the rebate granted under the Electricity (Supply) Act, 1948 in the public interest. Hon'ble Court also noticed that under the agreement executed between the Electricity Board and the industrial units as a consumer, the supplier



could revise the tariff rate from time to time and the revised tariff shall be applicable to the consumer. The supplier was also entitled to levy sales tax, excise duty, electricity duty or any other charges by virtue of whatsoever name called by the Central or the State Government on the electricity supplied to the consumer. Considering these facts, Hon'ble Supreme Court held that there is no breach of Article 14 of the Constitution or the promise/assurance extended by the State to the industries established in the hilly areas. Hon'ble Supreme Court also relied upon an earlier judgment of the Apex Court in **U.P. Power Corporation Ltd. v. Sant Steels and Alloys (P) Ltd. : (2008) 2 SCC 777**. In this case, Hon'ble Supreme Court while upholding the doctrine of promissory estoppel against the State action, held that theft of electricity is no ground to withdraw the benefit granted to the industries of the hilly areas and the same does not constitute public interest. However, it has also been held that statutory notification issued by the Government in exercise of delegated legislation cannot be pressed into service to deny the benefits granted under the earlier statutory notification and the principle that there can be no estoppel against the statute is not applicable in so far the delegated legislation is concerned except where it is found to be in public interest. Hon'ble Supreme Court, though ruled that the principle of estoppel



cannot be applied in so far the primary legislation is concerned. In the above case, the exemption notification granted rebate was issued in the year 1986 under Section 49 of the Electricity (Supply) Act, 1948, wherein power to exempt was vested with the Government. Subsequently, the said notification was withdrawn again in exercise of the power under Section 49 of the Electricity Act, but on account of subsequent legislation, i.e. the U.P. Electricity Regulatory Commission Act and the U.P. Electricity Reforms Act, 1999 which did not contain any provision for grant of exemption. Hon'ble Supreme Court, accordingly, granted the benefit of exemption notification up to the date of new legislations enacted by the State Legislature in the year, 1999.

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15. In both the above judgments, the State specifically pleaded public interest with details. In **Kasinka Trading (Supra)** change in circumstances was found to be justifiable public interest to enable the State to withdraw the incentives granted to the industries, whereas in **Sant Steels (Supra)** even theft of electricity was held not to be an overwhelming public interest.

16. The respondents have placed on record an Office Memorandum dated 01.04.2007 said to be the New Industrial



Policy for the North-Eastern Region including the State of Sikkim, namely, the "North East Industrial and Investment Promotion Policy (NEIIPP), 2007". Clause (x) of this policy contains a Negative List, which, *inter alia*, includes Pan Masala as covered under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985. It is pertinent to note that this policy was issued under File No. 10(3)/2007-DBA-II/NER of the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India. Simultaneously, another Office Memorandum of even date (01.04.2007) on the basis of the same File has been issued by the same Ministry. A copy of this Memorandum has been placed on record by the petitioner as Annexure-P13 along with their rejoinder. This Office Memorandum reads as under: -

" File No.10(3)/2007-DBA-II/NER

**Government of India
Ministry of Commerce and Industry
Department of Industrial Policy and Promotion**

New Delhi dated the 1st April, 2007.

OFFICE MEMORANDUM

Subject : Discontinuation of 'New Industrial Policy and other concessions for the State of Sikkim' dated 23.12.2002.

With the announcement of the North East Industrial and Investment Promotion Policy (NEIIPP), 2007 which covers the State of Sikkim also, the 'New Industrial Policy and other concessions for the State of Sikkim' issued vide O.M. No. 14(2)/2002-SPS dated 23.12.2002 and the various subsidy Schemes thereunder viz. Central Capital Investment Subsidy Scheme, 2002, Central Interest

Subsidy Scheme, 2002 and the Central Comprehensive Insurance Scheme, 2002 all notified vide Notification No.14(2)/2002-SPS dated 24.12.2002, will cease to exist with effect from 1st April, 2007.

2. However, industrial units which have commenced commercial production on or before 31.3.2007 will continue to get benefits/incentives under the 'New Industrial Policy and other concessions for the State of Sikkim' dated 23.12.2002.

Sd/-

(N. N. Prasad)


Joint Secretary to the Government of India"

17. In paragraph 1 of the aforesaid Memorandum, reference is made to North East Industrial and Investment Promotion Policy (NEIIPP), 2007, whereunder various subsidy Schemes under various office memorandums/policies have been revoked with effect from 01.04.2007. However, paragraph 2 of the Memorandum provides that where industrial units which have commenced commercial production on or before 31.0.2007 are allowed benefits/incentives under the "New Industrial Policy and other concessions for the State of Sikkim" dated 23.12.2002. Reference to this document is made in paragraph 2 of the rejoinder. The existence and validity of this Memorandum has not been disputed even in the additional affidavit filed by the respondents after the filing of the rejoinder. Mr. B. K. Gupta, learned counsel appearing on behalf of the respondents when confronted with this document, has not been able to either deny the issuance of this Memorandum or its continuation till date. The clause 2 of



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this Memorandum clearly provides for continuation of benefits/incentives granted under original IPR issued by the Government of India in respect to the State of Sikkim vide their policy decision dated 23.12.2002, which forms the basis for issuance of Office Memorandum dated 17.02.2003 and statutory Notification dated 09.09.2003. There is another interesting aspect that while the industrial policies dated 23.12.2002 and 24.12.1997 have been modified allowing the industries established in the State of Sikkim, who commenced commercial production on or before 31.03.2007 to get benefits thereunder, the impugned Notification dated 25.04.2007 issued under Section 5A of the Central Excise Act, 1944 does not even refer to the Office Memorandum dated 01.04.2007 (Annexure-P13) with the rejoinder. From the conjoined reading of the Office Memorandum dated 01.04.2007 (Annexure-R1), Notification No.21/2007-Central Excise dated 25.04.2007 and Office Memorandum dated 01.04.2007 (Annexure-P13), it appears that even while the Central Government decided to revoke incentives, particularly, the Central Excise Duty in respect to the Pan Masala, the product manufactured by the petitioner, as also units availing exemption which went to commence commercial production on or before 31.03.2007, have been allowed to avail benefits of earlier Government policy. Learned counsel appearing for the



respondents has failed to either explain this factual position or rebutt the same on the basis of any document or plea. It thus emerges that the petitioner's entitlement for the excise duty exemption on Pan Masala being produced by its units established in Sikkim having commenced commercial production with effect from 27.06.2006 i.e. before 31.03.2007, has been protected for the specified period of 10 (ten) years. Mr. B. K. Gupta, learned counsel, however, insisted that by virtue of the impugned Notification, the writ petitioner ceases to be the beneficiary as the intention of the respondents is to withdraw and discontinue the benefit of excise duty exemption with effect from the date of issuance of Notification dated 25.04.2007. In view of the stand of the respondents, it becomes necessary to examine the question of application of doctrine of promissory estoppels in case of petitioner.

18. Other relevant decisions on the issue including those referred to and relied upon by petitioner may be noticed: -

18.1 In **Union of India & Ors. V. Godfrey Philips India Ltd. & Ors. : 1985 (22) E.L.T. 306 (S.C.) : (1985) 4 SCC 369**, Hon'ble Supreme Court reiterating its earlier decision in **Motilal Padampat Sugar Mills Co. Ltd. V. State of U.P. : (1979) 2 SCR 641: (1979) 2 SCC 409**, held that



the Government is bound by its promise held to the manufacturer.

18.2 In Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board & Ors. : (1997) 7 SCC 251,


Hon'ble Supreme Court, upholding the enforceability of doctrine of promissory estoppel and the action of its withdrawal without any public interest, observed as under: -

“ 34. Consequently it must be held that relying upon the representations held out by the Board in these earlier notifications assuring grant of incentive rebate of 10% on the total bill of electricity consumption charges these new industries being assured that for three years this concession will be available had burnt their boats and spent large amounts and had established their industries in the area falling in the operative jurisdiction of the Board in the State of U.P.

35. Under these circumstances when no public interest was sought to be pressed into service by the Board for withdrawal of this incentive rebate, as seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promises high and dry before the requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted. This takes us to the consideration of the second aspect of the matter. ”

18.3 In State of Bihar & ors. V. Suprabhat Steel Ltd.

& Ors. : (1999) 1 SCC 31, while considering a similar question of application of doctrine of promissory estoppel, Hon'ble Supreme Court held as under: -



“ 7. Coming to the second question, namely, the issuance of notification by the State Government in exercise of power under Section 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 under Section 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 government order in exercise of power under Section 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 4-4-1994 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 under Section 7 of the Bihar Finance Act, which may override 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 authorize 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 4-4-1994. ”

“Emphasis Supplied”



18.4 In **Mahavir Vegetable Oil (P) Ltd. & Ano. v. State of Haryana & ors. : (2006) 3 SCC 620**, it has been held that the promissory estoppel operates even in the legislative field and accrued right on the basis of statutory notification in exercise of the subordinate legislation cannot be taken away even by amendment of such notification with retrospective effect. It has been held that even any delegated legislation cannot operate retrospectively.

18.5 In **Dai-Ichi Karkaria Ltd. v. Union of India & Ors. : (2000) 4 SCC 57 : 2000 (119) E.L.T. 516 (S.C.)**, it has been held that doctrine of promissory estoppel becomes unenforceable if change in the stand of the Government is made on account of public policy. It has further been held that burden to establish public policy is upon the Government.

18.6 In **State of Punjab v. Nestle India Ltd. & Ano. : (2004) 6 SCC 465**, relying upon various previous judgments of the Apex Court, particularly, in cases of **Union of India v. Anglo Afghan Agencies : AIR 1968 SC 718** and **Motilal Padampat Sugar Mills Co. Ltd. (supra)**, Hon'ble Supreme Court while laying down principles governing the doctrine of promissory estoppel, held as hereunder: -



“ 30. So much for the strengths. Then come the limitations. These are:

(1) Since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. But it is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. (SCC p. 443, para 24)

(2) No representation can be enforced which is prohibited by law in the sense that the person or authority making the representation or promise must have the power to carry out the promise. If the power is there, then subject to the preconditions and limitations noted earlier, it must be exercised. Thus, if the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute. But if the statute confers power on the Government to grant the exemption, the Government can legitimately be held bound by its promise to exempt the promisee from payment of sales tax. (SCC p. 453) ”

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“ 47. The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event readjust the

expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet. "

18.7 In **Gillette India Ltd. v. Union of India : 2009**

(235) E.L.T. 5 (H.P.) while considering a similar controversy, the withdrawal of exemption was held to be impermissible in view of applicability of doctrine of promissory estoppel.

18.8 In **Bannari Amman Sugars Ltd. v. Commercial**

Tax Officer : (2005) 1 SCC 625, Hon'ble Supreme Court considered the principle of legitimate expectation and observed as under: -

" 38.

A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient *locus standi* for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. The doctrine does not give scope to

claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision maker should justify the denial of such expectation by showing some overriding public interest. (See *Union of India and Ors. v. Hindustan Development Corporation and Ors.* (AIR 1994 SC 988). "


18.9 In **MRF Ltd. v. Assistant Commissioner (Assessment) Sales Tax : (2006) 8 SCC 702 : 2006 (206) E.L.T. 6 (S.C.)**, apart from applying principle of legitimate expectation as held in **Bannari Amman Sugars Ltd. (supra)**, it has also been held that doctrine of promissory estoppels applies to statutory notifications where the State does not plead any overriding public interest/equity.

19. In the present case, the State has failed to disclose any material to indicate the public interest. The plea that the Pan Masala falls under the category of demerit goods and that the same is health hazardous is not supported by any scientific analysis or material to justify the plea. What is public interest has to be established on the basis of a specific plea based on material or record to enable the Court to examine the foundation of the plea and to find out whether it is an abstract and real public interest or only a device to justify the action.



The law evolved on the doctrine of principle of promissory estoppel and legitimate expectation from time to time postulates that the doctrine of promissory estoppel and equitable estoppel represents plea of equity to avoid injustice. The very foundation of the doctrine is whether a party by his representation, conduct, promise or assurance unequivocally extended to another party to create a legal relationship knowing or intending that such representation, assurance or promise would be acted upon by the other party to whom it is made and such other party acts upon such promise, assurance or representation and alters his position to his detriment, such promise, assurance and representation bind the promissor. It is equally settled that the doctrine of promissory estoppel could only be enforced if a definite foundation is laid for the same. However, this doctrine must yield to the larger public interest, the sovereign act or the statutory requirements and sound government policy formulated to achieve the supervening public interest.

20. Undisputedly, the petitioner acted on the assurance, promise and representation of the Government of India through its IPR and exemption Notification dated 09.09.2003 and the State of Sikkim by virtue of its Notification dated 17.02.2003 and invested huge amount of about Rs.3.00



crores by altering its position. The respondents are bound to honour their promises, commitments and assurances and are not entitled to breach the same on mere conjectures, whims and absolute discretions. The respondents are, however, entitled to recall benefits of such promise on the basis of valid, justifiable policy and supervening public interest or in exercise of its sovereign authority or if any statute authorises them. Contentions raised by the respondents in support of their action to withdraw the exemption are – (i) statutory exercise of authority and (ii) public interest. In so far the statutory action of the respondents is concerned, suffice it to say that exemption Notification dated 09.09.2003 issued by the respondents in exercise of power under sub-section (1) of Section 5A of the Central Excise Act, 1944 was its statutory action and is deemed to be in public interest acknowledged in the notification itself. Even though the withdrawal notification is also a statutory action, it may be noticed that both the actions are on account of delegated legislative authority vested with the respondents, (Central Government). In various judgments of the Apex Court noticed hereinabove, particularly, **Sant Steels (supra)**, Hon'ble Supreme Court on an unequivocal terms held that it is only the principle legislation which protects the State against enforceability of an equitable promise as there can be no estoppel against statute.



However, this principle is inapplicable to the delegated legislation where existence of justifiable public interest is must. In **Mahavir Vegetable Oil (P) Ltd. (supra)**, Hon'ble Supreme Court held that doctrine of promissory estoppel operates even in legislative field and accrued rights cannot be taken away by amendment of statutory notification. Since both, i.e. the exemption and withdrawal notifications, are issued in exercise of delegated legislation, the first contention of the respondents deserves to be rejected.

21. Coming to the real and basic question of public interest, the only public interest indicated in the reply is about the nature of the product being manufactured by the petitioner, i.e. Pan Masala, which has been termed to be falling in the category of "demerit goods" and health hazardous. Both the contentions deserve to be rejected in view of the observations made hereinabove. At the cost of prolixity, it may be noticed that the demerit goods have not been defined anywhere. Pan Masala has not been declared as a health hazardous by any notification or order of the Government of India or the State Government. Even no material or scientific reports have been placed on record to demonstrate that the Pan Masala containing no tobacco is health hazardous. Mere *ipse dixit* terming the goods manufactured by the petitioner as



health hazardous or under the category of demerit goods does not in any manner constitute justifiable public interest. The doctrine of promissory estoppel thus becomes enforceable in the present case.

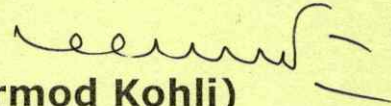
22. There is another aspect which though not specifically pleaded by the petitioner but deserve consideration. Vide the impugned notification dated 25.04.2007, earlier notification dated 09.09.2003 issued under sub-section (1) of Section 5A of the Central Excise Act, 1944 has been amended and Pan Masala has been inserted in Annexure-I as one of the excluded goods. This amendment has not been applied retrospectively and is deemed to be prospective in nature as per the settled law that every legislation is prospective unless made retrospective. The only meaningful interpretation which can be put to the notification is that any industry established after the amendment of notification dated 09.09.2003 in the State of Sikkim manufacturing any of the excluded items including the Pan Masala inserted in Annexure-I (excluded goods) will not be entitled to exemption w.e.f. the date of the impugned notification. It cannot be construed to take away the exemption already granted under the un-amended notification for the assured period as the impugned notification has no retrospective application. This position is in tune and



consonance with the notification dated 01.04.2007 (Annexure-P13) placed on record and Annexure-P13 discussed in detail hereinabove and the law laid down in **Mahavir Vegetable Oil (P) Ltd. (supra)**.

22. In the light of the factual and settled legal position discussed hereinabove, this petition succeeds. The petitioner is entitled to exemption from payment of excise duty on the manufacture of Pan Masala from its unit situated in the State of Sikkim for a period of 10 (ten) years from the date of commencement of commercial production, i.e. 27.06.2006. No order as to costs.

Approved for Reporting: Yes/ No
Internet: Yes/ No


(Permod Kohli)
Chief Justice
11.05.2012