

PROMISSORY ESTOPPEL HAS TO YIELD TO LARGER PUBLIC INTEREST

INTRODUCTION

In a recent pronouncement¹, the Apex Court upheld amendment notifications issued by the Central Government ("**Government**" / "**UOI**") limiting the extent of amount of benefit promised in the original notification. The genesis of the judgement is that doctrine of promissory estoppel cannot be invoked where invocation of the same against the Government is contrary to principal of equity or public interest.

FACTS OF THE CASE

In order to boost economic growth and employment opportunities in the district of Kutch (Gujarat), which was struck by a devastating earthquake on 26.01.2001, the Government issued a notification dated 31.07.2001² giving certain excise duty benefits to new industries new industrial units set up in the Kutch District prior to July 31, 2003 (which was subsequently extended to December 31, 2005). Such industrial units were entitled to refund of full duty paid by on finished goods, in cash/personal ledger account ("**PLA**") for a period of 5 years from the date of commencement of commercial production.

Various amendments were made to original notification dated July 31, 2001 between September 2001 to September 2004 to clarify certain matters including extending cut -off date of for setting up new industrial units from 31.07.2003 to 31.12.2003. One of the amendments made with effect from 06.08.2003³ provided that PLA payment could be made to discharge duty liabilities on the finished products only after exhausting the CENVAT credit balances.

Another amendment notification dated 27.03.2008⁴ issued by the Government provided that the benefit of refund of excise duty would be granted with reference to value addition done by the industrial units, which was notionally fixed on 34% for the commodity manufactured. This notification also empowered the Commissioner to decide special rate in a situation where the actual value addition was more than the deemed value addition, as notionally fixed. Resultantly there was a reduction in the amount of refund of excise duty to which the industrial units setup



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¹ Union of India & Another versus M/s V.V.F Limited & Another decided on 22.04.2020

Civil Appeal Nos. 2256-2263 OF 2020- In the article, only the facts pertaining to matters arising out of Kutch District are considered. Supreme Court disposed of similar matters arising out of decision of Gujarat High Court, Sikkim High Court and Guwahati High Court.

² Central Excise Exemption Notification No. 39/2001-CE dated 31.07.2001.

³ Notification No. 65/2003-CE dated 06.08.2003

⁴ Notification No. 16/2008-CE dated 27.03.2008

pursuant to original notification dated July 31, 2001 were entitled. The industrial unit owners challenged amendment notification dated 27.03.2008 before the Hon'ble Gujarat High Court ("**GHC**") contending that they had set up their industrial unit at district Kutch, as against Maharashtra by incurring additional substantial costs of approx. Rs.2200 PMT, only because of the incentive promised by the Government to refund excise duty paid in Kutch Area. Industrial unit owners (Petitioner before the GHC) challenged the notification dated 27.03.2008 on the ground that the said notification changed the entire basis of the incentive exemption and had the effect of substantially reducing the entitlement of refund from nearly 100% of the duty paid to only 34% of such duty amount. It was also contended that the amendment notification curtailing the promised incentive midway were in breach of the doctrine of principal estoppel.

During pendency of the writ before the GHC, Government issued another notification dated 10.06.2008⁵ leading the petitioners to amend their writ petition for challenging even the said notification dated 10.02.2008. It appears that by way of yet another amendment notification dated 03.10.2008⁶, the Government revised the deemed value addition at 75% in respect of the products manufactured by the eligible industries without giving them any option of applying for special rate.

Decision by GHC

GHC allowed the writ petitions vide judgement and order dated 10.03.2010 holding that the amendment notifications dated 27.03.2008 and 10.06.2008 were retrospective and not retroactive. It was further held that bar of promissory estoppel would operate against the Government. Accordingly, the GHC set aside the said amendment notifications; with direction for refund of differential amount by the Government to such owners.

Decision by the Hon'ble Supreme Court of India ("SC")

Union of India ("**UOI**") challenged the decision of the GHC before the SC raising following grounds:

- (i) Notification dated 27.03.2008 was only clarificatory in nature and did not amount to withdrawing exemption benefit provided by Notification dated 31.07.2003.
- (ii) Power to grant exemption from levy and collection of duty includes power to rescind, modify or withdraw such exemption, as per Section 5A of the Central Excise Act.
- (iii) The provisions granting refund of excise duty were being abused by unscrupulous manufacturers who indulge in different type of tax evasion tactics.
- (iv) Such rampant abuse being against the object and purpose of the original notification, the amendment notification were issued. As such there is no contravention of the doctrine of promissory estoppel.
- (v) Prevention of misuse of excise duty exemption was considered expedient in public interest and hence the Government modified the refund mechanism allowing refund only to the extent of duty payable on actual value addition made by the manufacturers undertaking manufacturing activities in these areas.
- (vi) The GHC failed to appreciate that amendment notification was issued by the Government in public interest and in the interest of revenue.

⁵ Notification No.33/2008 dated 10.06.2008

⁶ Notification No. 51/2008 dated 03.10.2008

- (vii) Doctrine of promissory estoppel cannot be invoked against exercise of powers under the statute/
- (viii) The bar of promissory estoppel is not applicable in fiscal matters.

On the other hand, the industrial unit owners supported the judgement passed by the GHC and contended that the amendment notification dated 23.03.2008 was violative of doctrine of promissory estoppel. The industrial unit owners made following submissions:

- (i) The amendment notification had the effect of reneging upon the promise made by the Government to grant incentive by way of refund of duty paid in cash for a period of 5 years starting from the date of commercial production.
- (ii) High Court correctly applied the doctrine of promissory estoppel. The incentive under the original notification was not dependent upon the extent of value addition, which concept was introduced only by way of amendment notification.
- (iii) The exemption was granted by way of refund of duty paid in cash or from Personal Ledger Account ("PLA"). It was contended that payment from PLA is not necessarily duty on value addition.
- (iv) Amendment notifications dated 27.03.2008, 10.06.2008 and 03.10.2008 demonstrate that Government only jettisoned the concept of value addition fixed arbitrarily at 75%, without option of special rate, irrespective of the supposed valuation. There are cases where the input used for final product are subject to Nil input stage duty.
- (v) Mere misuse of exemption notification by some manufacturers cannot justify the withdrawal of incentive since there is an adequate mechanism with the department concerned to curb, deduct, as well as punish the offenders for any such misuse. The notification dated 31.07.2001 itself provided for recovery of refunds along with interest if such refund were wrongly claimed/granted.

After examining the matter, the Hon'ble Supreme Court of India set aside the order passed by the GHC and upheld the amendment notifications dated 27.03.2008 and 10.06.2008. SC considered its earlier decisions on retrospectivity/ clarificatory/ applicability of promissory estoppel in the fiscal statute. The Hon'ble Court held that doctrine of promissory estoppel must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation. The Hon'ble Court further held that determination of applicability of doctrine of promissory estoppel against public authority/Government hinges upon balance of equity or public interest. In case there is a supervening public interest, the Government would be allowed to change its stand. The Court held that the amendment notification were only clarificatory in nature and are "to explain" the earlier notification, which did not take away any vested right conferred by the original notification and such a clarificatory amendment will have retrospective effect. The Apex Court was persuaded with the findings of the analysis carried out by the Excise Department showing some of the manufacturers indulging in various tax evasion tactics, to be a sufficient justification for the Government to issue the amendment notifications. Finding that the object of amendment notifications being prevention of tax evasion, SC held that the amendment notifications were issued in public interest and in the interest of Revenue and hence could not be said to be bad in law, arbitrary and/or hit by the doctrine of promissory estoppel. SC, however, clarified that refund granted/paid prior to amendment notification shall not be reopened.

CONCLUSION

This judgement summarises the law with respect to application of doctrine of promissory estoppel. It holds that the bar of promissory estoppel would not apply if in the facts of the given case it is inequitable or is against the public interest. It further held that bar of promissory estoppel would not apply against the Government so long as its impugned action rest on exercise of statutory powers. Undeniably, the enunciation of the SC in the present case is based on settled principle, however, question remains that can genuine and honest industrial units owners be made to suffer simply because a few entities had resorted to abuse of the exemption notification. The Apex Court did not deal with the contention of the industrial unit owners to the effect that in the original notification dated 31.07.2001 there was a mechanism in place to curb, detect and punish the defaulters/offenders and also for recover of refund wrongly claimed/allowed along with interest and in view of such provisions impugned amendments were not necessary.

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