**SUPREME COURT OF INDIA**

Pepsico India Holdings P.Ltd.

Vs.

State of Kerala

C.A.No. 3456 of 2009

(S.B. Sinha and Dr. Mukundakam Sharma JJ.)

11.05.2009

**JUDGEMENT**

**S.B. SINHA, J.**

Leave granted.

1. Interpretation of an exemption notification dated 3.11.1992 issued by the State of Kerala dated 3.11.1993 as modified by notifications dated 31.12.1999 and 31.3.2000 is in question herein.

2. The said question arises in the following factual matrix.

Appellant is a private limited company. It intended to set up a medium scale industrial unit at Kanjikode, Palakkad in the State of Kerala for manufacturing soft drinks under the brand name

`Pepsi'. Such a decision was taken purported to be relying on or on the basis of a policy decision taken by the State of Kerala to grant exemption from payment of sales tax with a view to attract more investment in the State. The said policy decision was issued by way of a Notification bearing SRO No.1729/1993 issued under Section 10 of the Kerala General Sales Tax Act, 1963 (hereinafter referred to for the sake of brevity as, "the said Act") providing for exemption to New Industrial Units set up in the State of Kerala, the relevant clauses whereof read as under :

"4. In the case of new Industrial Units under Medium and Large Scale Industries, there shall be an exemption for a period of seven years from the date of commencement of commercial production- (a) in respect of the tax payable by such units under the Kerala General Sales Tax Act, 1963- (i) On the turnover of sale of goods manufactured and sold by them within the state; and (ii) On the turnover of goods, taxable at the point of last purchase in the State, which are used by such units for manufacturing other goods for sale within the State or inter-state; and (b) in respect of the Surcharge payable under Section 3 of the Kerala Surcharge on Taxes Act, 1957 (Act 11 of 1957) in relation to the goods referred to in sub-clause (a) above."

3. The said notification provided for issuance of eligibility certificate in respect of medium and large scale industries assisted by the Kerala State Industrial Development Corporation ("KSIDC" for short) or the Kerala Financial Corporation inter alia by the Director of Industries and Commerce on application made by such units, and orders of exemption issued by the Secretary, Board of Revenue (Taxes), Thiruvananthapuram. It is stated that in stead and place of Secretary, Board of Revenue (Taxes), Thiruvananthapuram, the said jurisdiction of the Board was being exercised by Deputy Commissioner (General) Commercial Taxes.

4. Appellant is said to have written a letter to the Principal Secretary, Department of Industries, Government of Kerala on or about 11.5.1999 seeking confirmation of the benefits, such as incentive of sales tax exemption on the goods produced etc., available to the proposed new unit, stating:

"Proposal for Investments in Kerala State PepsiCo in India PepsiCo Inc. has set up a fully integrated operation in India - manufacturing, research and development marketing, distribution, exports and franchise - covering fruit/vegetable processing, snack foods and beverages. Presently, our activities provide direct/indirect employment to over 60,000 persons. We are also one of the large exporters in the country.

PepsiCo activities in Kerala PepsiCo India Holdings Ltd. revived the closed and sick manufacturing unit of Contract Bottling Company Ltd. at Angamaly, by entering into an arrangement for the manufacture of soft drinks.

We now propose to make substantial investments of over Rs.50 crores in the first two phases spread over three years in setting up a new unit in Kerala for the manufacture of soft drinks with the full range of Pepsi brands. We expect the project will generate substantial direct/indirect employment opportunities and also stimulate other related economic activities. The Greenfield unit will either be set up directly or, by assisting a local entrepreneur.

CONFIRMATION REQUESTED

1. Availability of Sales Tax exemption benefit As per the State Government's Industrial policy, new industrial Units under the medium and large scale sector are eligible for exemption from sales tax, purchase tax, surcharge and central sales tax for a period of seven years, upto aggregate financial limit of upto 100% of the value of fixed capital investments of the unit. Soft drinks has been notified as a thrust industry in the list of food processing industries notified by the Government.

We request your confirmation that the proposed green field unit, which will be set by the Company directly, or through a nominee entrepreneur, will be eligible for Sales Tax exemption.

2. Allotment of land for setting up new unit In our discussions with the Hon'ble Finance Minister and the State Industries Development Corporation, we were assured that the Government would speedily allocate land (approx. 25 to 30 acrs) with adequate water supply, power etc. in Kerala. The preferred location for us is Walayar or Kanjikode. Kindly confirm that we can get possession of land within 4 weeks, as we propose to put up the plant in 9 months from the date of land allocation."

5. A meeting took place by and between the representatives of the appellant and the authorities concerned. By a letter dated 12.5.1999, Kerala Industrial Infrastructure Development Corporation replied to the appellant's aforementioned letter dated 11.5.1999 in the following terms:

"This is with reference to your letter dated 11th May 1999 addressed to Mr. K. Mohandas, Principal Secretary (Industries). We are extremely delighted to find your proposal for investment in the State of Kerala.

As regards the two points which have asked in your letter, i.e. availability of sales tax exemption benefit and allotment of land for setting up of the unit, I wish to inform you the following:- 1. Availability of Sales Tax exemption benefit:

We are requesting the KSIDC to clarify the position. You may kindly discuss with the Managing Director, KSIDC.

2. Allotment of land for setting up the new unit:- Regarding this, as we discussed, we offer to give you the required land in the Districts of either Palakkad, Ernakulam or Kozhikkode, as per your choice. The land can be made available as per the time frame you have indicated in your letter."

6. Indisputably, KSIDC by its letter dated 13.5.1999 confirmed that the new industrial unit would be exempted from payment of sales tax for the first seven years subject to a ceiling of 100% of capital investment.

7. The Chairman of KSIDC by its letter dated 4.6.1999 informed the appellant that all promotional support and possible assistance under the State Government's industrial policy would be extended to the proposed new industrial unit, stating:

"As per your telephonic talk with me a few days ago, recently while I was in Thiruvananthapuram I briefly discussed with the Hon'ble Minster of Industry, Kerala Smt. Suseela Gopalan about your plans for investing in Kerala for setting up a bottling plant and allied facilities. The Principal Secretary, Dept. of Industry was also present during the discussion.

The Hon'ble Minister has assured that all promotional support and possible assistance under the State Govt.'s Industrial policy will be extended to the new venture you are planning to set up.

Please rest assured that our Co-operation, KINFRA, and the District Industries Centre, Palakkad will extend their co-operation to your executives concerned."

8. Pursuant or in furtherance of the said assurance given to the appellant, it entered into an agreement for lease in respect of 50 acres of land for setting up the new industrial unit at Kanjikode in the district of Palakkad on 28.12.1999. For the aforementioned purpose, a sum of Rs.2,77,64,000/- towards the amount of consideration for acquisition of the said land was paid on 24.12.1999 by a demand draft. It furthermore took steps for procurement of machinery, etc. being:

a) Filed IEM with SIA vide SIA ACK/2655/SIA/IMO/1999 dated 28.12.1999.

b) Obtained the necessary consent from the Kerala State Pollution Control Board on 20.12.1999 c) Placed firm orders for supply of large number of plant and machinery and in some cases made advance payments through cheques. The fact that in cases where advances payments were made, the payment was credited prior to January 1, 2000 was confirmed by Deutsche Bank by their letter dated September 29, 2000. This included the following, apart from several others:

- Pet conveyor systems on 28.12.1999 - Blow Moulder, including installation and commissioning thereof, on 20.12.1999 - Paramix Plant, Deaeration Plant, Mixing Plant, Beverage Chilling Plant, Carbonation Plant and Switch & Control Unit & Frame on 28.12.1999.

9. The aforementioned Notification dated 3.11.1993, however, was amended by a notification dated 31.12.1999, stating:

"Government have decided to withdraw the exemptions/ deferment in respect of tax under the Kerala General Sales Tax Act, granted to Industrial Unit as per Notification SRO No. 1729/93 in respect of Industrial Units which are set up on or after 1.1.2000, existing units which undertake diversification, expansion or modernization and also in respect of small scale industrial units which are registered as sick units on or after 1.1.2000.

But in the case of units which have already commenced commercial production, set up or taken effective steps to set up industrial units prior to 1.1.2000 or which have been registered as sick, units prior to 1.1.2000, will be allowed the benefit of exemption or deferment, as the case may be, granted as per notification SRO No. 1729/93.

This notification is intended to achieve the above object."

10. Yet again an amendment was effected by issuance of a notification dated 31.3.2000, which is in the following terms:

"S.R.O. NO. 295/2000:- In exercise of the powers conferred by Section 10 of the Kerala General Sales Tax Act, 1963 (15 of 1963) the Government of Kerala, having considered it necessary in the public interest so to do, hereby make the following amendments to notification issued in GO (P) No. 181/99/TD dated 31st December, 1999 and published as SRO No. 1092/99 in the Kerala Gazette Extraordinary No. 2433 dated 31st December, 1999, namely:- AMENDMENT In the said Notification, (i) in sub-clause (ii), for the words, figures and brackets, "(b) owned or acquired" or has been allotted land for establishing the industrial unit and (c) applied for financial support from

any regular financial institution/Government of acquired the necessary plant machinery provided that the unit "commences commercial production on or before 31st day of December, 2000", the following shall be substituted, namely:- "(b) owned or acquired or has been allotted land for establishing the industrial units and applied for financial support from any regular financial institution/government before 1.1.2000 or (c) in the case of self financed units acquired or placed firm orders for the purchase of the necessary plant and machinery, before 1.1.2000 provided that the unit commences commercial production on or before the 31st day of December, 2001".

(ii) in sub-clause (iii), for the words, figures "acquired necessary plant and machinery"

and equipments before the first day of January 2000, provided that such units "commences commercial products under such diversification, expansion or modernization or before the 31st day of December 2000", the following shall be substituted, namely:- "(a) or acquired necessary plant and machinery and/or equipments or (b) has owned or acquired or has been allotted land and has applied for loan from any regular financial institution and/or (c) has placed firm orders for the purchase of such plant and machinery and equipments before the 1st day of January 2000 provided that such unit commences commercial production of such diversification, expansion or modernization on or before the 31st day of December, 2001.

A unit shall be deemed to have placed firm orders for the purchase of plant, machinery and equipments if such unit had made any advance payments therefore by means of demand draft of Cheque which has been credited to the account of the seller prior to 1st January 2000. The onus of proving that an industrial unit had placed firm order for purchase of such plant, machinery and equipments prior to 1st January 2000 shall be on such industrial unit:

(iii) after sub-clause (iv), the following sub-clause shall be inserted, namely:- "(v) where on enquiry it is found that any industrial unit had secured exemption by furnishing false information or forged documents, the authority which issued the exemption order, shall, after affording such industrial unit a reasonable opportunity of being heard, cancel the exemption"."

(emphasis supplied)

11. Indisputably again, the new industrial unit of the appellant commenced commercial production on and from 6.3.2001. Appellant, however, was not granted the eligibility certificate.

Revenue recovery proceedings in connection with the provisional sales tax assessment for the month

of April 2000 were also started wherefor a notice of demand for a sum of Rs.47,83,769/- was issued to the appellant on 17.5.2001. Appellant replied thereto, stating that it was exempt from payment of any sales tax having fulfilled all the requirements in terms of the aforementioned exemption notification. It also applied for grant of sales tax exemption on 20.6.2001.

A writ petition marked as O.P. No. 20675 of 2001 was filed by it before the Kerala High Court in July 2001 questioning the aforementioned order of assessment dated 17.5.2001. By reason of an order dated 7.9.2001, the aforementioned writ petition was disposed of, directing:

"Petitioner submits that his Ext. P6 application for exemption from payment of sales tax is pending before the second respondent. In the meanwhile, steps have already been taken for assessment and completed as per Ext. P7 whereby huge amounts are to be paid. There is already a stay granted by this Court and the same is pending from 13.07.2001 onwards. The only grievance is regarding the delay in disposal of Ext. P6 application. In the above circumstances there is no purpose in keeping the original petition pending.

Therefore, the original petition is disposed of directing the second respondent to take up for consideration Ext. P6 application on merits and pass appropriate orders thereon, in accordance with law, within a period of two months from today. Petitioner will immediately produce a copy of this order along with a copy of this judgment before the second respondent. It is made clear that Ext. P. 7 order will be subject to the orders passed by the second respondent on Ext. P6 application.

Till such time orders are passed by the second respondent, interim order passed by this Court will continue."

12. Pursuant thereto or in furtherance thereof, the matter was placed before the Special Secretary (Taxes) who by reason of a letter dated 15.11.2001 addressed to the Commissioner of Commercial Taxes clarified that the appellant was eligible for grant of sales tax exemption.

13. The Principal Secretary (Industries) also wrote a letter to the Director of Industries & Commerce on or about 21.12.2001 reconfirming that it was eligible for sales tax exemption.

Yet again, the said authority by a letter dated 25.7.2002 informed the Director of Industries & Commerce stating that the term `necessary plant and machinery' need not be the entire plant and machinery and further that the appellant could be held to have taken effective steps as per the said notifications. The Director of Industries & Commerce, however, could not pass an appropriate order in terms of the direction of the learned single judge and sought for an extension which was allowed by an order dated 1.8.2002.

14. The Sales Tax Officer, Palakkad, however, issued Provisional Assessment Notice for the period April 2002 to December 2002 on or about 7.2.2003. Questioning the legality and/or validity of the said notice and the order of assessment, the appellant filed writ petition being O.P. No. 8563 of 2003 in the Kerala High Court.

15. During pendency of the said writ petition, the Director of Industries & Commerce by its order dated 8.6.2003 rejected the prayer for grant of eligibility certificate made by the appellant, stating:

"....In turn vide letter No. 29815/B2/02/ID dt.

23.12.2002 Government have clarified that there is no need to issue a general clarification for SRO No. 1092/99 and 295/2000 regarding STE. This position was reported to the State Level Committee held on 15.3.2003 for clarification.

Also the views in the matter contained in letter No. 23364/B3/2000/TD dt. 15.11.2001 of the Special Secretary to Government (Taxes) to the Commissioner of Commercial Taxes, Thiruvananthapuram and in Lr. No. 36693/B2/01/ID dated 21.12.2001 of the Principal Secretary to Government (Industries) were also presented before the State Level Committee for its consideration. As per SRO No. 29/99 dated 6.1.1999 the Government have authorized the State Level Committee, under Section 10 of the KGST Act, as the competent authority to issue clarifications, wherever necessary, regarding the scheme of tax exemption.

The State Level Committee examined the above issues and held that in the case of M/s Pepsicola India Marketing Company, the purchase orders and the other documents related to payment of advance to machinery suppliers do not show that the Company has fully satisfied the definition of "Effective steps" as required and as stipulated in SRO No. 1092/99 as modified by SRO No. 295/2000.

ORDER In the above circumstances and for the foregoing reasons, the claim of M/s Pepsicola India Marketing Company, Kanjikode, Palakkad for getting Eligibility Certificate for STE vide their application dated 30.5.2001 (Ext. P6 in OP No. 20675/2001) stands rejected."

16. A learned single judge of the High Court disposed of the writ petition filed by the appellant being O.P. No. 8563 of 2003.

In coming to its conclusion, the learned judge took into consideration the averments contained in paragraphs 6, 7, 8, 9, 12 and 13 of the counter affidavit filed on behalf of the State that the appellant had not complied with the essential conditions for grant of exemption from payment of sales tax as advance payment in the specified manner had not been made by it before 1.1.2000 having regard to the fact that the Notification required such payments in respect of `necessary plant and machinery and/or equipments' and not to any or `certain or a small portion of the plant and machinery necessary for the project', to hold:

"31. The latter part of Sub-clause (iii) which is applicable to Sub-clauses (ii) and (iii) alike is a deeming provision as per which if any advance payments are made by means of demand drafts or cheque for the purchase of plant, machinery and equipments which have been credited to the account of the seller prior to January 1, 2000, it shall be deemed that firm orders have been placed by the unit for the purchase of such plant, machinery and equipments. This deeming provision, if complied with, it must be noted, only dispenses with the requirement of establishing that firm orders have been placed by the unit for the purchase of plant, machinery and equipments which are required for setting up the unit and for commencing commercial production. This, however, does not mean that the above is the only means for establishing that "firm orders have been placed". The last sentence in Clause (iii) latter part states that "the onus of proving that an industrial unit had placed firm order for purchase of such plant, machinery and equipments prior to 1st January, 2000 shall be on such industrial unit".

This makes the position clear that it is open to the industrial unit to independently establish by producing other materials that firm orders for purchase of plant, machinery and equipments are placed before January 1, 2000."

It was furthermore held:

"33. In the case of small-scale industrial unit, if it has obtained provisional registration prior to January 1, 2000, it could be said that the said unit has taken effective steps. Similarly, an industrial unit can be considered to have taken effective steps, if it has owned or acquired or has been allotted land for establishing the industrial unit and also applied for loan from any regular financial institution/Government before January 1, 2000.

Similarly, in the case of self financed units acquired or placed firm orders for the purchase of necessary plant and machinery before January 1, 2000, it can be considered to have taken effective steps provided the unit commences commercial production on or before December 31, 2001.

Regarding the third situation, it is stated that a unit shall be deemed to have placed firm orders for the purchase of plant, machinery and equipments if such units had made any (emphasis supplied) advance payments therefor by means of demand draft or cheque which have been credited to the account of the seller prior to the first day of January, 2000. Here it must be noted that Sub- clauses (ii) and (iii) provide for the circumstances under which an industrial unit can be considered/deemed to have taken effective steps but it is not exhaustive. The burden is on the industrial unit to establish that the unit had placed firm orders for purchase of plant, machinery and equipments prior to January 1, 2000."

The learned judge furthermore opined that the doctrine of promissory estoppel shall be applicable in a case of this nature.

Respondents preferred a writ appeal thereagainst which was dismissed by the Division Bench of the said Court by an order dated 15.6.2004. A Special Leave Petition being SLP No. 17308 of 2004 filed thereagainst has also been dismissed.

The Director of Industries & Commerce thereafter granted an Eligibility Certificate to the appellant stating that it was also eligible for grant of sales tax exemption. Despite the same, however, the Deputy Commissioner (General) Commercial Taxes denied the grant of benefit of sales tax exemption on the premise that it had failed to take effective steps in terms of the relevant notifications by an order dated 5.1.2007.

Another writ petition being W.P. (C) No. 3115 of 2007 was filed by the appellant. By an order dated 30.11.2007, the said writ petition was dismissed. An intra court appeal preferred thereagainst has been dismissed by reason of the impugned judgment.

17. Before adverting to the rival contentions of the parties, we may place on record a disturbing fact. This case, on being mentioned by a Senior Counsel of this Court, this Court, by an order dated 5.01.2009 directed the matter to be placed at the top of the Board, subject to overnight part-heard.

It was taken up for hearing out of turn.

Mr. H.N. Salve, learned Senior Counsel, started his submissions on 3.3.2009. On the next day, i.e. on 4.3.2009, he made a statement that he had been instructed not to argue.

The proceeding sheet of this Court reads as under:

"Mr. Harish Salve, learned senior counsel appearing on behalf of the petitioner states today that he has been instructed not to appear in this case. Ms. Vibha Datta Makhija, Advocate-on- record also states that in that view of the matter she too would withdraw herself from this case. Thus, there is no representation on the part of the petitioner.

Mr. Purvez Bilimoria, Executive Director (Legal) appearing for the petitioner company seeks adjournment in this matter. Keeping in view the facts and circumstances of this case, we are of the opinion that this Court can not allow the same.

We called upon Mr. Bilimoria to argue the matter as a party in-person. He expresses his inability to do so. We refuse to adjourn the matter and call upon the learned senior counsel appearing on behalf of the State of Kerala to proceed with the arguments. However, any written submissions filed on behalf of the petitioner shall be entertained."

18. However, after the arguments of Mr. Dave were over, Mr. Bilimoria sought permission to appear in the case. We have, despite such a reprehensible conduct on the part of the appellant, allowed its representative to argue the case on behalf of the appellant-in-person.

19. Mr. Purvez Bilimoria would urge:

i. Eligibility certificate having been granted by the authorities of KSIDC and the Director of Industries and Commerce, the Secretary of State could not have sit in appeal over their decisions particularly when the High Court itself had gone into the issues.

ii. Grant of Eligibility Certificate could have been denied only when the conditions other than those noticed by the Kerala Finance Corporation were not satisfied.

iii. Having regard to the findings of the High Court in Writ Petition being O.P. No. 8563 of 2003, the writ appeal and the Special Leave Petition whereagainst were dismissed; the State could not have taken a contrary stand.

iv. The State having regard to the promises made to the appellant pursuant whereto it altered its position was bound thereby. v. The amended notifications and in particular the notification dated

31.3.2000 being benevolent ones, the same should have been construed liberally.

vi. Appellant, pursuant to or in furtherance of the promise, having not collected any tax from its consumers, a purposive interpretation to the said notification should have been rendered by the High Court.

20. Mr. Dushyant Dave, learned senior counsel appearing on behalf of the respondents, on the other hand, would contend:

(i) A finding of fact having been arrived at by the authorities that the appellant had not placed firm orders of necessary plant and machinery within the meaning of the provisions of exemption notification which having been affirmed by both the learned Single Judge as also the Division Bench of the High Court, no interference therewith is warranted.

(ii) The judgment and order dated 7.9.2001 in O.P. No. 20675 of 2001 cannot be held to be binding upon the Director of Industries as also the Deputy Commissioner (General) Commercial Taxes as by reason thereof the said authorities were merely asked to consider the matter relating to grant of eligibility certificate.

(iii) The Director of Industries having issued a certificate, subject to the concurrence of the Deputy Commissioner (General) Commercial Taxes, the same was not conclusive.

(iv) The exemption granted under the notifications being conditional, the said condition being imperative in character requires a strict interpretation.

21. The exemption notification was issued for the purpose of achieving the economic growth in the State. The letters exchanged by and between the appellant and the authorities of the State, which we have noticed heretobefore, in no uncertain terms, show that the appellant was intending to set up a plant in the State of Kerala pursuant to the provisions made by the State.

22. It is beyond any doubt or dispute that pursuant to or in furtherance of the said assurance, the appellant altered its position. It made a huge investment. It entered into an agreement of lease with the authorities of the State for which it had expended a sum of Rs. 2,77,64,000/-. The lease is for a period of 99 years with an option of renewal for another period of 99 22 years. Indisputably, again

in relation to a part of the plant and machinery, it had placed orders. The Deutsche Bank had issued a certificate on 29.9.2000 in that behalf, stating:

"This is to confirm that the following cheques issued by Pepsi Cola India Marketing Company, which were deposited by the parties in their respective accounts were duly honoured and credited to the party's respective accounts."

23. Indisputably, again the appellant had commenced commercial production much before the cut-off date fixed therefor, viz. 31.12.2001.

24. The grant of eligibility certificate is in two tiers. But, it is of some significance to note that the Director of Industries and Commerce is the appellate authority of the Deputy Commissioner (General) Commercial Taxes, as would appear from a notification dated 3.11.1993. On the one hand, in relation to the grant of exemption, the power of the Board of Revenue is being exercised by the Deputy Commissioner (General) Commercial Taxes, the Director of Industries and Commerce was the appellate authority; on the other, the latter's decision was made subject to the ultimate grant of exemption by the former.

The effect of such a dichotomy merits serious consideration.

25. It stands admitted that the contention raised by the respondents herein in the first round of litigation that the investment in the plant and machinery must be substantial was for all intent and purport rejected. Interpreting clauses (a), (b) and (c) of the notification, it was held that the conditions imposed thereby are not absolute. Clauses (b) and (c) of the notification were read together. It was furthermore held that the term "any" referring to advance payment is linked up with all the clauses.

The said writ application had to be filed by the appellant as the Director of Industries refused to grant the eligibility certificate in its favour.

The Deputy Commissioner (General) Commercial Taxes was a party thereto.

It has been stated before us that he had not filed any affidavit in the said proceedings. Only the Director of Commerce and Industries did. Even the special leave petition was filed by the Industries

Department and not by the Commercial Taxes Department.

The Director had granted a certificate in terms of the order of the High Court. The eligibility certificate was granted in the prescribed form. It was shown that a fixed capital investment of Rs. 30,46,94,552 has been made under the following heads:

"i) Land : Nil ii) Building : Rs. 1,56,02,600/- iii) Plant & Machinery : Rs. 26,71,62,774/- iv) Pollution Control Devices : Rs. 8,12,294/- v) Lab equipments : Nil vi) Diesel Generator : Rs. 99,73,589/- vii) Electrification : Rs. 1,11,43,295/- Total : Rs. 30,46,94,552/-"

26. To that extent, the appellant had been found to be eligible for grant of exemption. Conditions entailing the eligibility certificate specified therein read as under:

"This Eligibility Certificate is issued on the condition that the Deputy Commissioner (General), Commercial Taxes who is the sanctioning authority shall decide on the eligibility of the unit for ST Exemption under the relevant notification, vide general procedure in this regard clarified by the State Level Committee, in its meeting held on 15.3.2003"

An explanatory note had been appended thereto; Clauses 3 and 7 whereof read as under:

"3. Plant & Machinery: The claim of the unit under Plant & Machinery for eligibility certificate is Rs. 32,10,13,534/-. This claim includes investment in Plant & Machinery, Pollution control devices and lab equipments. Rs. 26,71,62,774/- and Rs. 8,12,294/- are found admissible under Plant & Machinery and Pollution Control devices respectively, based on admissible bills, invoices and receipts. Investments on Lab equipments are not admitted as the claim is not supported with a certificate of requirement issued by B/S or other similar organizations vide proviso (11) of the Manual of STE.

7. Purchase of Machinery The unit has not acquired its machinery prior to 1.1.2000. All the items were acquired after 31.12.1999."

27. The Director of Industries and Commerce, furthermore, noticed the advance payments made by the appellant to the supplier, stating:

"Of the above, item nos 3 & 4 are not any item/ constituent of necessary Plant & Machinery. They relate to expenditure in connection with either pre acquisition or post acquisition stages of Plant &

Machinery in the course of commissioning the unit. Deducting the above, the actual advance payment before 1.1.2000 towards identifiable constituents/ component of necessary Plant & Machinery is only Rs. 13.75 lakhs and this is advance paid prior to 1.1.2000 towards part of the Plant and Machinery costing 105.00 lakhs as against the total cost of Rs. 3210.13 lakhs involved in the necessary plant & machinery required for starting commercial production in the unit. It, therefore, shows that plant & machinery costing Rs. 3105.13 lakh were not paid of any advance to machinery suppliers prior to 1.1.2000 and they all were acquired on different dates after 1.1.2000.

During May 2000, amendments were made by the unit in the earlier placed purchase orders to accommodate in the purchase/ supply orders additional machineries as well as items varying in specifications/ with different capacities than the particular ones for which orders were placed prior to 1.1.2000. As per this amendment, the total value of the machinery for which the advance payment was made changes from Rs. 105.00 lakhs to Rs. 285.80 lakhs. It shows that final `firm orders' even for the items for which advances were paid prior to 1.1.2000 were placed (along with firm orders for certain new items) only on different dates in May 2000. This may be kept in mind while proceeding further, if found necessary."

28. The Deputy Commissioner (General) Commercial Taxes reopened the entire issue. He, despite the fact that the contention of the State raised in O.P. No. 8563 of 2003 had not been accepted by the learned Single Judge of the High Court, which was affirmed not only by the Division Bench of the High Court but also by this Court, proceeded to opine:

(i) Appellant did not fulfill the eligibility criteria.

(ii) It did not place orders for supply of machinery.

(iii) The conditions for grant of exemption had not been satisfied.

29. We may proceed on the premise that the said judgment does not operate res judicata as therein it was directed:

"45. For all these reasons, I set aside exhibit P26 order. I had given sufficient indications in this judgment in regard to the scope of the expression "have taken effective steps" for setting up the industrial unit prior to the first day of January, 2000 used in S.R.O. No. 1092 of 1999. I direct the second respondent to independently consider the petitioner's application for sales tax exemption (exhibit P8) in the light of the observations contained in this judgment and after considering the documents with regard to the placing of firm orders in respect of plant and machinery and equipments furnished by the petitioner untrammeled by the view taken by the State Level Committee in exhibit P19 proceedings as well as in exhibit P26. The Government in their communication dated December 23, 2002 has clearly stated that there is no need for issuing any general clarification regarding the scope of S.R.O. No. 1092 of 1999 and S.R.O. No. 295 of 2000.

Thus the second respondent is entitled to take a decision on the petitioner's application independently."

It was observed:

"...The principles regarding interpretation of an exemption provision in a taxing statute laid down by the Supreme Court as already noted in paragraph 29 supra where the Supreme Court has held that a provision granting incentive for promoting economic growth and development in a taxing statute should be liberally construed and restrictions placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the object of the provision. In this case, the Government when they took a decision to discontinue the incentive provided in Notification S.R.O. No. 1729 of 1993 with effect from January 1, 2000 by way of exception decided to extend the benefit of the said notification to the four categories mentioned in paragraph 21 supra. These exceptions, as already noted, are based on the principle of promissory estoppels as considered by the Supreme Court in Mahaveer Oil Industries' case [1999] 115 STC.

The circumstances under which a unit can be considered to have taken effective steps were incorporated in Notifications S.R.O. Nos. 1092 of 1999 and 295 of 2000 only as a measure to help the units which have taken effective steps for setting up the industrial unit based on Notification S.R.O. No. 1729 of 1993. I have also observed that the notification itself gives sufficient clues regarding the meaning to be given to the expression "have taken effective steps" in paragraph 33 supra. According to me Sub-clauses (ii) and (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 as amended by Notification S.R.O.

No. 295 of 2000 have to be considered and understood in the above background. If the latter part of Sub-clause (iii) of Clause 1 of Notification S.R.O. No. 1092 of 1999 inserted by Notification S.R.O. No. 295 of 2000 is understood in the above background, the use of the expression "any"

preceding the expression "advance payments"

would indicate that the quantum of advance payment is irrelevant and that it is sufficient to make advance payments even if it is negligible when compared to the value of the plant, machinery and equipments."

30. In the aforementioned context, we may notice the judgment of the learned Single Judge in the second round of litigation in W.P. (C) No. 3115 of 2007 wherein it was observed:

"34. The total cost of plant and machinery as claimed by the petitioner, in the application for sales tax exemption is Rs. 32,10,13,534/-. As noted in para 13 above (which is extracted from Ext. P13) apparently firm orders had been placed by the petitioner only for three items which would come under the category of necessary plant and machinery. Though three replies were given by the petitioner to Ext. P13, viz., Ext. P14 on 30.6.2005, Ext. P22 dated 29.9.2006 and thereafter Ext. P23 written submissions was made on 1.12.2006 after the personal hearing, it was not the case of the petitioner at any point of time that firm orders had been placed by them for other plant and machinery which will come under the category of necessary plant and machinery in terms of the notification...It is not the petitioner's case that any plant and machinery as such was acquired before the cut off date i.e. 1.1.2000. In the circumstances the finding in Ext. P24 that the petitioner had not acquired or placed firm orders for the purchase of necessary plant and machinery seems to be based on the materials on record and is otherwise tenable.

*** *** *** ...The items of plant and machinery for which firm orders were placed prior to the cut off date on 1.1.2000 even according to the petitioner are obviously only a small percentage of the plant and machinery..."

While, however, doing so, we may place on record that the following contentions had been raised :

"(1) The petitioner's eligibility for sales tax exemption was certified by the Director as per Ext.

R1(a) and consequently it was not open to the Deputy Commissioner of Commercial Taxes, the third respondent to again consider that question.

The third respondent had the jurisdiction only to quantify the exemption that the petitioner was entitled to, eligibility having been already certified.

(2) That at any rate, the petitioner had taken effective steps for setting up a new industrial unit prior to the first day of January, 2000, being a self financing unit it had placed firm orders for the purchase of necessary plant and machinery before 1.1.2000. It has commenced commercial production before 31st of December, 2001.

(3) The finding in Ext. P24 that the activity carried on by the petitioner does not tantamound to manufacture is fundamentally erroneous."

We are herein concerned with contention Nos. 1 and 2. So far as contention No. 1 is concerned, he determined the said question in paragraph Nos. 21 to 32, inter alia, stating :

"24...Should the certificate of eligibility issued by the competent authority necessarily be a certificate of exemption. Firstly, clause 10(d) states that the eligibility certificate referred to in clause (b) shall contain the date of commencement of commercial production and the monetary limit of exemption the unit is eligible for. In my view clause 10(d) indicates what should necessarily be contained in the eligibility certificate issued under clause 10(b).

This therefore could also be indicative of the parameters of the authority required to be exercised by the Director of Industries in terms of the notification. What is required to be certified in the eligibility certificate, is therefore the date of commencement of commercial production and the monetary limit of the exemption that the unit is eligible for. Can it be said that if these two factors are certified, the unit in question would be entitled to sales tax exemption? If these two factors are certified in the eligibility certificate issued by the Director, does it oblige the Deputy Commissioner of Commercial Taxes to necessarily consider the unit in question as entitled for tax exemption? Mr. Vellapally contends that once the unit is certified as eligible for tax exemption then the limited brief available to the Secretary, Board of Revenue or the Deputy Commissioner of Commercial Taxes (who is currently the competent authority) is only to quantify the monetary limits of the tax exemption that the unit is entitled to."

Contention No. 2 was dealt in paragraphs 33 to 36, concluding:

"(i) the activity carried on by the petitioner in its unit at Kanjikode, Palakkad, engaged in the production of soft drinks is a manufacturing activity within the meaning of SRO 1729/93.

(ii) In terms of the scheme for exemption from payment of tax as contained in SRO No. 1729/93, the certificate of eligibility to be issued by the Director is intended only to certify the actual commencement of commercial production of the 32 unit before the cut off date and the monetary limit of tax exemption that the unit would be eligible for. At the same time, the Director of Industries is not required to certify the entitlement of the unit for tax exemption.

(iii) The entitlement of the unit for exemption from payment of tax is to be certified by the Deputy Commissioner of sales tax, in SRO No. 1729/1993. Such certification of the entitlement is to be contained in the exemption certificate issued by the Deputy Commissioner.

(iv) Ext. P24 order passed by the Deputy Commissioner cannot be said to be without jurisdiction. It is with jurisdiction and the finding therein to the effect that the petitioner has not satisfied the conditions mentioned in SRO No. 1729/93 as amended by SRO 1092/99 and modified by SRO No. 295/2000 is correct and justified. The said finding does not require any interference.

(v) Ext. P24 is therefore upheld subject to the finding in para (i) above viz. the activity carried on by the petitioner in its unit for the production of soft drinks is a manufacturing activity within the meaning of SRO No. 1729/1993."

It was opined:

"...In my view Ext. P2 judgment obviously cannot be construed as conferring authority on the second respondent to decide the question of eligibility entitlement of the petitioner for sales tax exemption. If the direction issued in Ext. P2 judgment is construed in such a fashion, it will amount to altering the scheme for tax exemption as provided in the statutory application."

31. Although a contention has been raised before us that despite opportunities granted, the appellant had not adduced the additional evidence to establish compliance of the conditions precedent for grant of eligibility certificate, it has not been denied or disputed that even in the first round of litigation, the requisite documents formed part of the writ petition. The Deputy Commissioner (General) Commercial Taxes, therefore, in our opinion, even it be assumed that he was not totally bound by the observations made therein, should have taken into consideration the interpretation of the notification adverted to by the learned Single Judge.

32. This brings us to the question of interpretation of the notifications.

The notification dated 3.11.1993 was issued in terms of an industrial policy; pursuant whereto exemption was to be granted for a period of seven years. Appellant had placed orders for supply of plant and machinery both with advances and without advances.

What was necessary was to take effective steps for setting up of new industrial units. A deeming provision existed in terms whereof the effective steps would be considered to have been taken; if it has :

(a) obtained provisional registration (applicable only in the case of SSI units);

(b) owned or acquired or has been allotted land for establishing the industrial units and applied for financial support from any regular financial institution/ government before 1.1.2000; or (c) in the case of self financed units acquired or placed firm orders for the purchase of the necessary plant and machinery before 1.1.2000.

Although clause (a) has no application in the instant case but it becomes relevant for the purpose of construing the notification so as to measure the level of rigours imposed thereby. In case of SSI units, thus, merely a provisional registration would serve the purpose. Even no investment was necessary for obtaining the benefit. So far as clause (b) is concerned, mere application for financial support from any regular financial institution again would entitle the entrepreneur to obtain the benefit of the exemption notification.

It is in the aforementioned context, applications for grant of exemption by the self-financed units are required to be taken into consideration. They are either to acquire or place firm orders for the necessary plant and machinery. It is not that order for entire machinery and equipment were required to be placed for before the first day of January, 2000. Even in relation thereto, a legal fiction has been created stating that if such unit had made any advance payments therefor by means of demand draft or cheque, the requirements would stand satisfied.

33. The Director of Industries and Commerce, as noticed hereinbefore, opined that apart from a few items, firm orders have been placed in respect of some machineries by means of demand draft or cheques and the same has been credited to the account of the sellor prior to the first day of January, 2000.

It is also of some significance to notice that the exemption notification appears to have been drafted having regard to the decision of this Court in State of Rajasthan and Another v. Mahaveer Oil Industries and Others [(1999) 4 SCC 357].

A comparative chart placed before us by Mr. Billimoria may be noticed :

Mahaveer Oil This Court's Notification 1092/99 as observation amended The respondent - firm This is merely a Mere registration would got its provisional provisional registration be good enough for SSI registration certificate issued by the units.

on 15.2.1990. Directorate of Industries They applied for For this land, a very If you bought or were allotment of land and small amount was paid. allotted land and had land was allotted to merely applied for a them by RICO Limited, loan from a regular by its letter dated financial institution/ 19.2.1990. Possession government, before the of the land was handed relevant date it is good over on 7.3.1990 and enough. lease agreement was executed in March 1990.

A loan of Rs. 7.5 lakhs It is not stated how Mere application for was sanctioned by the much loan was actually loan is good enough for Rajasthan Financial availed of by the those who acquired Corporation in favour respondents on or land.

of the respondents on before 7.5.1990.

17.4.1990.

Mahaveer Oil claimed It is, however, not Show payment of any that they placed orders stated whether any advance towards plant for machinery on amount either as earnest and machinery and it 18.4.1990. or advance for the will be deemed that purchase of machinery necessary orders have was paid by the been placed.

respondents to anybody before 7.5.1990.

The aforementioned comparative chart throws a light on the legislative intent and deliberate dilutions of the rigours as to what effective steps would merit consideration of the application for grant of exemption by an entrepreneur.

34. It is also of some significance that the said notification was withdrawn by a notification dated 31.12.1999, subject of course to an exception curved out therein, viz., the industries which had been set up on or before 1.1.2000 and which have already commenced commercial production, set up or taken effective steps to establish industrial unit prior to 1.1.2000 were to be allowed the benefit of exemption.

That notification stood amended on 31.3.2000 in terms whereof some benefits had been given to an entrepreneur like the appellant, as noticed hereinbefore.

35. Appellant need not have questioned the validity thereof as the notification in question was issued by relaxing the conditions imposed in the notification dated 31.12.1999 which was one of withdrawing the grant of earlier benefits. Thus, by reason of the said notification, certain benefits had been confirmed on it.

36. There cannot be any doubt whatsoever that the burden of proof was on the appellant. According to the Director of Industries, he had discharged the burden. Only because the procedural sanction of grant of financial exemption was to be received from the Deputy Commissioner (General) Commercial Taxes, the same, in our opinion, would not mean that the conditions had not been satisfied. In any event, the certificate granted by the Director deserved serious consideration.

Both the learned Single Judge as also the Division Bench did not consider this aspect of the matter.

37. Although payment of advance in respect of some machinery and plant would subserve the requirements for the purpose of obtaining the eligibility certificate, the learned Single Judge read the word `any' to be synonymous to the word `all', whereas the Division Bench considered it to be "substantial". It is in that view of the matter the opinion of the learned Single Judge in O.P. No. 8563 of 2003 assumes importance wherein, as noticed hereinbefore, it was categorically held:

"...Regarding the third situation, it is stated that a unit shall be deemed to have placed firm orders for the purchase of plant, machinery and equipment if such units had made any (emphasis supplied) advance payments therefor by means of demand draft or cheque which have been credited to the account of the seller prior to the first day of January, 2000..."

The High Court although laid emphasis on the word "any" but proceeded on the basis as if, purchase of plant, machinery and equipment prior to 1st January, 2000 in their entirety, was imperative.

38. Appellant's bonafide is not in dispute. The fact that it had set up an industry and started commercial production nine months prior to the cut-off date, viz., 31.12.2001 is also not disputed.

39. Ordinarily, this Court would not have gone into the findings of the fact arrived at by the

statutory authorities but was only required to consider the correctness of judgment of the learned Single Judge as also the Division Bench of the High Court. However, even in a case of this nature, the authorities stuck to their own stand which is not expected from a statutory authority. See, however, K.I. Shephard and Others v. Union of India and Others (1987) 4 SCC 431 and Rajesh Kumar and Others v. Dy. CIT and Others (2007) 2 SCC 181]

40. Mr. Dave has placed strong reliance on a decision of this Court in Tata Iron & Steel Co. Ltd. v. State of Jharkhand and Others [(2005) 4 SCC 272] wherein it was held:

"42. Eligibility clause, it is well settled, in relation to exemption notification must be given a strict meaning.

43. In Collector of Customs v. Maestro Motors Ltd. this Court held: (SCC p. 418, para 9) "It is settled law that to avail the benefit of a notification a party must comply with all the conditions of the notification. Further, a notification has to be interpreted in terms of its language.""

The aforementioned observations were made having regard to the nature of exemption claimed by the appellant therein as also having regard to the industrial policy of the State of Jharkhand.

41. We may, however, notice that recently in Kusumam Hotels (P) Ltd. v. Kerala State Electricity Board & Ors. [2008 (9) SCALE 448], this Court held:

"17. It is now a well settled principle of law that the doctrine of promissory estoppel applies to the State."

The said principle was reiterated in M/s. Badri Kedar Paper Pvt. Ltd. v. U.P. Electricity Regulatory Commn. & Ors. [2009 (1) SCALE 137] in the following terms:

"...It is furthermore well known that even a right under a mandatory provision can be waived. [See Babulal Badriprasad Varma v. Surat Municipal Corporation and Ors.] If it had made a representation pursuant whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply. The doctrine of promissory estoppel, it is now well-settled, applies also in the realm of a statute."

42. An exemption notification and a notification withdrawing the benefit granted would, however, stand on different footings. For the said purpose, the industrial policy is required to be kept in mind. It must also be taken into consideration for the purpose of construing the exemption notification.

In A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala and Others [(2007) 2 SCC 725], this Court held:

"32. The general principles with regard to construction of exemption notification are not of much dispute. Generally, an exemption notification is to be construed strictly, but once it is found that the entrepreneur fulfils the conditions laid down therein, liberal construction would be made.

34. A question as to whether, in a given situation, an entrepreneur was entitled to the benefit under an exemption notification or not, thus, would depend upon the fact of each case. A bare perusal of the notification dated 6-2-1992 issued by the first respondent would show that the purport and object thereof was to grant benefit of a concessional power tariff which came into force on and from 1- 1-1992. The phraseology used in the said notification postulates that the benefit was to be granted in regard to the "enhanced power tariff".

Thus, where the new units had started production between 1-1-1992 and 31-12-1996, such exemption was available to the entrepreneurs.

35. Evidently, except in a situation as might have been existing in Hitech Electrothermics that any application filed by the entrepreneur had not been processed within a reasonable time, in which case benefit might not be denied on equitable ground; in cases where there has been a substantial failure on the part of the industrial unit to obtain such benefit owing to acts of omission and commission on its part, in our opinion, no such benefit can be given."

Yet again in U.P. Power Corporation Ltd. and Another v. Sant Steels & Alloys (P) Ltd. and Others [(2008) 2 SCC 777], it was opined:

"24. Learned Senior Counsel invited our attention to a decision of this Court in State of Punjab v. Nestle India Ltd. in which a representation was made by the Government in the manner dehors the rules but a statement was made by the Finance Minister in his Budget speech for 1996-1997 making representation to the effect that the State Government had abolished purchase tax on milk.

The manufacturers of milk products, therefore, were not paying the purchase tax on milk for Assessment Year 1996-1997 and mentioned this fact in their returns. The taxing authority entertained such returns. The manufacturers passed on the benefit of exemption to the dairy farmers and milk producers. However, after expiry of the said assessment year, the Government took a decision not to abolish purchase tax on milk and the taxing authority therefore raised a demand for Assessment Year 1996-1997. On these facts, the Court held that in absence of proof of any overriding public interest rendering the enforcement of estoppel against the Government was inequitable, notwithstanding that no exemption notification as required by the statute was issued. It was held that the State Government cannot resile from its decision to exempt milk and raise a demand for the aforesaid assessment year.

However, the same principle of estoppel was not invoked after Assessment Year 1996-1997. The Court enforced the principle of estoppel. All the earlier cases on the subject were reviewed by the Court and ultimately it was concluded as follows:

(SCC pp. 481-82, para 47) "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."

It was furthermore observed:

"35. In this 21st century, when there is global economy, the question of faith is very important.

The Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the short-sightedness of governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should

abide by their commitments. In this context, the action taken by the appellant Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in the governance.

Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith."

Furthermore, in this case, the appellant admittedly has even not realized any tax from its purchasers. Keeping in view the facts and circumstances of the case, we are of the opinion, that the respondents must, thus, be held to be bound by the doctrine of promissory estoppel.

43. For the reasons aforementioned, the impugned judgment is set aside.

The appeal is allowed. However, in view of the fact that the appellant had instructed the Senior Counsel not to appear in the matter despite the fact that the same was heard in part, we not only deny cost to it but also direct that the appellant must pay a sum of rupees one lakh to the Kerala State Legal Services Authority within four weeks from date.