* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 14.01.2020
Judgment delivered on: 02.03.2020

\+ **W.P.(C) 505/2020 & CM APPL. 1328/2020**

M/S. HERO MOTOCORP LTD ..... Petitioner

Through: Mr. S. Ganesh, Senior Advocate with Ms.Priyanka Rathi, Ms. Ashwini Chandrasekaran and Mr. Rohit Arora, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Amit Bansal, Mr. Aman Rewaria, Ms. Vipasha Mishra and Mr. Akhil Kulshrestha, Advocates for respondents No.2 and 5.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

Brief Facts

1. The Petitioner is engaged in the business of manufacturing of two wheelers in the State of Uttarakhand. It was operating and registered under the Central Excise Act, 1944. With the introduction of Goods and Services

Tax ("GST") w.e.f. 01.07.2017, it now has registration under the said Central and State GST Acts.

2. In the year 2002, special packages of incentives were announced to promote industrial development in the State of Uttarakhand. In pursuance thereto, the 1st Respondent- Union of India through the 4th Respondent- Ministry of Commerce & Industry issued an Office Memorandum dated 07.01.2003, detailing the package of incentives. The fiscal incentive provided under the memorandum included 100% *ab inito* Central Excise Duty Exemption to new industrial units for a period of 10 years from the date of commencement of commercial production. The relevant extract of Office Memorandum/Policy read as under:

> *"3.1 Fiscal Incentives to new Industrial Units and to existing units on their substantial expansion:*
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> *(1) New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Centres, Industrial Infrastructure Development Centres (IIDCs), Industrial Estates, Export Processing Zones, Theme Parks (Food Processing Parks, Software Technology Parks, etc.) as stated in Annexure-I and other areas as notified from time to time by the Central Government, are entitled to:*
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> *(a) 100% (hundred percent) outright excise duty exemption for a period of 10 years from the date of commencement of commercial production.*
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> *(b) 100% income tax exemption for initial period of five years and thereafter 30% for companies and 25% for other than companies for a further period of five years for the entire states of Uttaranchal and Himachal Pradesh from the date of commencement of commercial production.*

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

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

3. In line with the objective of the above noted memorandum and in order to implement the incentive scheme, the Central government, on being satisfied that it is necessary in the public interest, issued Notification No. 50/2003- C.E, dated 10.06.2003 (hereinafter referred to as ***"exemption notification"***) in exercise of powers conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978). This notification exempted certain goods from whole of the duty of excise, or additional duty of excise, as the case may be, leviable thereon under any of the said Acts, in respect of certain industrial units located in the State of Uttarakhand (earlier Uttaranchal) and Himachal Pradesh. The notification also provided that the exemption shall apply to industrial units for a period not exceeding 10 years from the date of publication of notification in the Official Gazette or from the date of commencement of commercial production, whichever is later.

4. Since the Petitioner's unit qualified for exemption under the

aforementioned notification, it established a new industrial unit for manufacture of motor vehicles at Haridwar, Uttarakhand and commenced commercial production in its industrial unit from 07.04.2008 and continued to avail the benefits of the exemption notification till 01.07.2017.

5. Then, the Constitution 101st Amendment Act, 2016 was enacted by the Parliament to introduce the Goods and Services Tax. The said Act conferred concurrent taxing powers on the Union as well as the States including the Union Territories. In this regard, Article 246A was inserted, making a special provision with respect to levy of GST, by both the Union as well as the States. Article 269A was inserted to provide for levy of IGST on inter-state transactions exclusively by the Union. Post the aforesaid constitutional amendments, the GST and the IGST Act were enacted by the Parliament and the SGST Acts were enacted by various State legislatures for their respective States for the levy of the GST.

6. Petitioner migrated under the new GST regime and is now required to pay CGST and IGST under the provisions of the Goods and Services Tax (GST) regime in respect of intra-state, and also inter-state supplies made from the Uttarakhand unit. Immediately thereafter, CGST rules came into force on 18.07.2017 and Notification No. 21/2017-CE was issued by Respondent No.1 rescinding the various area-based exemption notifications, including the exemption notification no. 50/2003-CE with effect from 01.07.2017. Due to the rescission of the exemption notification, the beneficial incentives granted to the petitioner, ceased to continue w.e.f. 01.07.2017.

7. Since the withdrawal of the exemption notifications caused financial hardships, the negative impact thereof was discussed in the second GST Council meeting held on 30.09.2016, and Respondent No.1- Union of India in recognition of the hardships faced by the industries and conforming to the recommendations of the GST Council, decided that it would provide budgetary support to the eligible units for the residual exemption period by way of part reimbursement of GST, paid by the unit, limited to the Central Government's share of CGST and/or IGST retained after devolution of a part of these taxes to the States. Accordingly, in consonance with the recommendations of the GST Council, on 05.10.2017, the Central Government notified the Budgetary Support Scheme providing reimbursements of Central Government's share of the cash component of CGST and IGST i.e. 58% of CGST and 29% of IGST, in lieu of exemption provided under the exemption notification.

8. In these circumstances, the Petitioner has preferred the present writ petition before us under Article 226 of the Constitution of India to seek a direction to Respondent No. 1 to grant ***"complete exemption by way of reimbursement of the amount of Central Goods and Services Tax (CGST) and Integrated Goods and Services Tax (IGST) for the residual period of exemption notification"*** dated 10.06.2003, that granted 100% exemption on excise duty and adherence of Industrial Policy.

Submissions on behalf of the Petitioner

9. We have heard the learned counsels for the parties at length at the admission stage itself. Mr. S. Ganesh, learned senior counsel for the

Petitioner argues that the action taken pursuant to the promise made by the Government, manifested vide the policy contained in the notification dated 07.01.2003, followed by the exemptions provided by the exemption notification, confers a vested right in favour of the Petitioner. He elucidated that the object of the afore-noted policy decision and exemption notification was to grant incentive for promoting investment and industrial development in the State of Uttarakhand by granting complete exemption from excise duty for a period of 10 years from the date of commencement of commercial production. This is evident from the Office Memorandum No. 1(10)/2001-NER dated 07.01.2003 issued by Respondent No. 1 which provides that the new industrial units and existing industrial units on their substantial expansion, as defined, are entitled to 100% outright excise duty exemption *"**for a period of 10 years** from the date of commencement of commercial production"*. He argues that, even though the said exemption notification uses the words "***for a period not exceeding 10 years***", the period of exemption has to be understood in line with the office memorandum/ policy statement. He submits even though the GST enactments have taken the place of, *inter alia*, Central Excise laws with effect from 01.07.2017, the burden of GST should have been relieved for the residual balance of the period of 10 years, i.e, the benefit of the exemption notification should have been available to the petitioner till 06.04.2018. Mr. Ganesh has placed reliance on the decision of the Supreme Court in ***State of Bihar and Ors. Vs. Supraphat Steel and Ors.***, (1999) 1 SCC 31, to advance his submission that the exemption notification was issued by the Government to carry out the objectives of the policy decisions taken in the industrial policy itself, and in

case the notification 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, meaning thereby, that the declared policy decision would take precedence over the statutory exemption notification.

10. Mr. Ganesh also placed strong reliance upon the judgment of the Supreme Court in ***Manuelsons Hotels Private limited Vs. State of Kerala and Ors.***, (2016) 6 SCC 766, to advance his submission on the principle of promissory estoppel. He argued that where the Government holds out a promise which has been acted upon, subject to certain restrictions, such as overriding public interest, the government cannot resile from such promise and it will have to adhere to the doctrine of 'Promissory Estoppel'. In this perspective, he also relied upon the recent judgment of the High Court of Bombay in the case of ***K.M Refineries and Infraspace (P) Ltd. Vs. State of Maharashtra***, 2019 SCC OnLine Bom 1485, wherein the Court held that the reduction under the Incentive Scheme – in the name of new policy of GST, was clearly not permissible and the Incentive Scheme that was in operation on the date of issuance of Eligibility Certificate would have to be enforced against the State. It was held that the State should modify the Incentive Scheme in such a way that it is consistent with the new tax structure and does not result in reducing or restricting the benefits which have been conferred upon an industrial unit, like that of the Petitioner, under the Incentive Scheme.

11. Mr. Ganesh also argued that in the previous tax regime, the exempted taxes were in respect of Central Indirect Taxes. Therefore, the first

Respondent should have either granted total exemption from CGST and IGST in exercise of its statutory powers under the respective charging Acts or, alternatively, grant full budgetary support instead of limiting it to 58% of the cash payments of CGST and 29% of IGST paid to industrial Units. He argued that the rationale behind the aforesaid limited budgetary support being the devolution of taxes on goods and services to the States as per the recommendation of the 14th Finance Commission, is totally irrelevant and an immaterial consideration. This aspect is of no consequence or relevance to the assesee, who pays the entire amount of tax to the Central Government. The first Respondent has an obligation to issue the exemption notification under the relevant provisions of the Acts.

Submissions on behalf of the Respondent

12. Mr. Amit Bansal, learned counsel on behalf of the Respondent has countered these submissions and defended the withdrawal of the exemption notification and introduction of the limited budgetary support. He argued that the first contention of the petitioner that the policy will override the exemption notification is not correct, as the words of the notification are clear in providing that the said exemption will be granted **"*for a period not exceeding 10 years*"**, and therefore, the exemption could be provided for a maximum period of 10 years i.e. it could be lesser than 10 years. In view of the above, there is no bar in suspending the exemption before a period of 10 years has expired in respect of a particular beneficiary. He further submits that the Office Memorandum dated 07.01.2003 relied on by the petitioner was meant for internal communication, and was not released in the public

domain.

13. According to Mr. Bansal, the decision of the Court in the case of ***K.M Refineries*** (supra) cannot be applied to the facts of the present case as the said decision was qua an executive order, whereas, in the present case, Petitioner is espousing the principle of promissory estoppel qua a legislative Act. In support of this submission, Mr. Bansal has further drawn the attention of the Court to the proviso to section 174 (2) (c) of the CGST Act. He contends that the Notification No. 21/2017-CE dated 18.07.2017- whereby the said exemption notification was rescinded, has not been challenged by the Petitioner, and therefore, in view of these circumstances, the concession grated by the exemption notification cannot be claimed as a vested right in the light of proviso to Section 174(2) (c) of the CGST Act.

Discussion and Decision

14. We have heard the submissions of the learned counsels and given our due consideration to the matter. The Petitioner had acted upon the assurance given by the Respondent and incurred liability by mobilizing resources and making substantial investments which, in turn, led to economic growth and development in the State of Uttarakhand. Now, with the change in the indirect tax laws, Petitioner's submission is that State could not resile from the promise or alter its position, and withdraw the exemptions which would negatively impact the financial position of the Petitioner. Petitioner wants this court to hold the first Respondent to the promise it had demonstrably made by way of the exemption notification. The central question that arises for our consideration in the present petition is as to whether the Respondents

can be compelled to grant exemption from payment of GST and IGST to the petitioner w.e.f from 1.07.2017 for the balance residual period of 10 years.

15. The mainstay of Petitioner's claim is the exemption notification dated 10.06.2003 whereby the Central Government granted exemptions from the payment of Central Excise Duty for a period of 10 years to the units in the State of Uttarakhand. Indisputably, the said exemption notification was under the Central Excise Act, 1944. With the coming in force of the GST regime, the Central Excise Act, 1944 itself has been repealed. For that matter, the entire indirect tax structure has been overhauled. Thus, the right to exemption, pitched by the Petitioner as a "vested right" can be meaningfully appreciated only if we understand the changes introduced with the advent of the GST laws. This would also help us understand if the Petitioner has indeed suffered a setback, as it has presented before us.

16. Having regard to the Constitutional Scheme with regard to the tax structure that existed in the country prior to the promulgation of the CGST and the IGST Acts, the same did not provide for any concurrent taxing powers to the Union as well as the States. The powers of both the governments under the Union list and State list were clearly delineated. Therefore, in order to introduce goods and services tax, the amendments to the Constitution of India were inevitably required, with the aim of conferring simultaneous powers on the Parliament as well as the State Legislature, including every Union Territory, to make laws for levying Goods and Services Tax on transaction of supply of goods, and services, or both. Thus, the genesis of the GST is the 101st Constitution Amendment,

through which several amendments were introduced in the Constitution of India. In this regard, the 2014 Amendment Bill proposed insertion of new provisions i.e. Article 246A in the Constitution. The statement of objectives and reasons laid down the rationale behind the introduction of said provision in the following words:

> *"The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax."*

17. Article 246A empowered both Centre and State to legislate and introduce the goods and services tax. Another crucial amendment is the insertion of Article 269A which fundamentally alters the scheme of "Finance" provided in Chapter –I of part –XXII of the Constitution. This is in fact, linked to Clause (2) of 246A and provides for levy and collection of tax in the course of inter-state trade and its appropriation between the Union and States. After the amendment of the Constitution, and along the lines of the recommendation of the GST Council, the Parliament in exercise of the powers conferred under the newly introduced articles, enacted the Central Goods and Services Goods Act, 2017, Union Territories Goods and Service Tax, Act, 2017 and Integrated Goods and Services Act, 2017. Likewise,

exercising powers under Clause (1) of Article 246A of the Constitution, the State Legislatures also enacted their respective State Goods and Service Tax Legislations. Thus, Article 246A can be termed as the most significant amendment carried out by the Constitutional Amendment Act, as a result whereof, now both Parliament and State legislatures are competent to concurrently legislate with respect to Goods and Services Tax. The dual GST structure which empowers the Centre and the States to levy and collect taxes through appropriate legislations is in conformity with the constitutional schemes.

18. Under the new taxing scheme, various central indirect taxes including the Central Excise Duty and several State indirect taxes have been subsumed in GST. It is a destination-based tax, - i.e. Goods and Services are taxed at the point where they are consumed, and not at the point of origin. Under GST law, the place of supply of goods and services assumes significance. There are several noticeable differences between the GST regime and the previous one pertaining to levies, taxes, exemptions etc. Once such area is the "exemptions". The Legislature has sought to prune the exemptions that were provided by the Government in the previous regime. The GST predicates on the fact that there would be minimum exemptions. This was necessary in order to ensure that cascading of taxes is minimized and there is seamless transfer of the Input Tax Credit, which is one of the main cornerstones of the GST law. In this changed scenario, the Parliament being conscious of the exemptions that were granted as incentives against investments through a notification, while repealing the earlier legislations, specifically provided that such incentives shall not continue as privileges, if

the notifications are rescinded on or after the appointed date provided under the Act. This objective has been embedded in Section 174 (2) (c) of the CGSCT Act, which reads as under:

*"**174. Repeal and saving**.—*

*(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, **the Central Excise Act, 1944** (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) **are hereby repealed**.*

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or Section 173 shall not—

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day ; or..." (emphasis supplied)

19. Consistent with the objective envisioned at the time of bringing in the new law, the Respondents vide notification No. 21/2017-CE dated 18.07.2017 rescinded various area-based exemption notifications including the Notification No. 50/2003-CE which forms the foundation of the Petitioner's claim in the present petition. As a result, vide Notification dated 18.07.2017 read with Section 174 (2) (c) of the CGST Act, the Petitioner lost all the privileges which it had in the erstwhile regime.

20. However, the stakeholders viz. Central and State Governments were conscious of the fact that in the previous regime, they had announced industrial and investment policies for promoting industrial growth and employment in industrially backward states. One of the prominent features of the framework of the policies was to provide exemption from excise duty on goods produced in the specified states. Similarly, some of the States had also granted exemptions from VAT or deferment of VAT, *inter alia*, as part of their industrial promotion policies to specific areas within the States or to specific industry. Insofar as the Central Government is concerned, the area based Central Excise Duty exemptions were applicable to certain states including the State of Uttarakhand, with which we are the presently concerned. Thus**,** an agenda item was taken up in the second GST Council Meeting held on 30.09.2016, regarding the treatment of existing tax incentives scheme of the Central and State Governments. The said agenda was taken up and the inputs of the States were evaluated. The extract of minutes of meeting of GST Council and conclusion with respect to above noted agenda item reads as under:

"Agenda Item 3: Treatment of the existing tax incentive schemes of the Central and State Governments

25. The Secretary to the Council explained that the Central and State governments had given various incentives of Central Excise and Value Added Tax (VAT) and Central Sales Tax (CST). He pointed out that in the GST regime, such incentives could not be continued as supplies would need to be made on payment of tax in order to permit flow of tax to the destination state. Therefore, a decision would need to be arrived at regarding the treatment of such tax incentive schemes under the GST regime. He observed that one option could be to 'grandfather' such schemes and provide for a budgetary apportionment in the State and the Central budgets for reimbursing the tax paid to those units which enjoyed tax exemption up to a specified period. However, while 'grandfathering' any such scheme, it would need to be kept in mind that unlike VAT and the CST which were origin-based taxes, GST was a destination-based tax and an unconditional reimbursement scheme could lead to double outf1ow for the origin-state - one by way of transfer of tax to the destination State and the other by way of reimbursement to the supplier. Therefore, the States would need to be careful while devising any reimbursement scheme and care could be taken that such reimbursement was limited for supplies made within the State.

26. The Hon'ble Deputy Chief Minister of Gujarat alluded to examine possible legal complications. The Secretary to the Council pointed out that the agenda note contained certain judgements of the Hon'ble Supreme Court as per which the principle of promissory estoppel would not apply in a case where there was a supervening public equity.

27. The Hon'ble Minister from Tamil Nadu stated that the Centre should not give budgetary support to only few States that were classified as Special Category States for the tax incentive schemes maintained by them. The Hon'ble Minister from Assam strongly objected to the line of argument presented by the Hon'ble Minister from Tamil Nadu and stated that small states should get help from the Centre. He pointed out that for the last 70 years, oil and natural gas were being taken out of Assam which was used for the benefit of all States. He pointed out that for small States to exist, the Centre

should help them; otherwise smaller States might wither away. The Chairperson stated that no compensation was to be paid by the Centre to any State for reimbursements relating to tax incentive schemes and that States would need to make their own budgetary provisions for the same.

28. The Hon'ble Minister from Uttarakhand stated that the Government of lndia had given an area-based exemption for 10 years and that such exemptions were to continue up to 2020. She observed that the Centre must reimburse such units for the Central taxes as jobs of more than one lakh workers were at stake. The Hon'ble Minister from Jammu and Kashmir stated that his State was in a similar situation as Uttarakhand. The Chairperson observed that once incentive schemes were withdrawn, the taxes paid would be accounted for in the Consolidated Fund of India and 42% of the amount would be devolved to the States. The Centre, therefore, could be expected to only reimburse the units out of the remaining 58% of the fund which was not part of the devolution and the States would also need to correspondingly reimburse such units out of the share of revenue received through devolution.

29. The Council approved the following-

(i) All entities exempted from payment of indirect tax under any existing tax incentive scheme shall pay tax in the GST regime.

(ii) The decision to continue with any incentive given to specific industries in existing industrial policies of States or through any schemes of the Central Government, shall be with the concerned State or Central Government.

(iii) In case the State or Central Government decides to continue any existing exemption/incentive/deferral scheme, then it shall be administered by way of a reimbursement mechanism through the budgetary route, the modalities for which shall be worked out by the concerned State/Centre.

30. In conclusion, after discussing with the members, the Chairperson stated that the next meeting of the Council would be held on 18th , 19th and 20th October 2016. The main agenda for

that meeting would be the rate structure under GST along with other residual agenda items from the previous meeting.

31. The meeting ended with a vote of thanks to the Chair."

21. The above extract indicates that the Council reiterated and maintained that under GST regime, exemptions cannot continue. However, in the spirit of helping the affected units to tide over the troubled times, it was *inter-alia* resolved that in case, the State or Central Government decides to continue any existing exemptions/incentives/deferral schemes, it would be administrated by way of re-imbursement mechanism through the budgetary route. In line with the recommendations of the GST Council, Respondent No.1 then framed the Budgetary Support Scheme for the eligible manufacturing units located in the States like Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North Eastern States including Sikkim. The relevant portion of Budgetary Support Scheme reads as under:

"F. No. 10(1)/2017-DBA-II/NER.- In pursuance of the decision of the Government of India to provide budgetary support to the existing eligible manufacturing units operating in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North Eastern States including Sikkim under different Industrial Promotion Schemes of the Government of India, for a residual period for which each of the units is eligible, a new scheme is being introduced. The new scheme is offered, as a measure of goodwill, only to the units which were eligible for drawing benefits under the earlier excise duty exemption/refund schemes but has otherwise no relation to the erstwhile schemes.

1. 2 Units which were eligible under the erstwhile Schemes and were in operation through exemption notifications issued by the Department of Revenue in the Ministry of Finance, as listed under para 2 below would be considered eligible under this scheme. All such notifications have ceased to apply w.e.f 01.07.2017 and stands

rescinded on 18.07.2017 vide notification no. 21/2017 dated 18.07.2017. The scheme shall be limited to the tax which accrues to the Central Government under Central Goods and Service Act, 2017 and Integrated Goods and Services Act, 2017, after devolution of the Central tax or the Integrated tax to the States, in terms of Article 270 of the Constitution.

3. SHORT TITLE AND COMMENCEMENT

3.1 The scheme shall be called Scheme of Budgetary Support under Goods and Services Tax (GST) Regime to the units located in State of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North Eastern States including Sikkim. The said Scheme shall come into operation w.e.f.01.07.2017 for an eligible unit (as defined in para 4.1) and shall remain in operation for residual period (as defined in para 4. 3) for each of the eligible unit in respect of specified goods (as defined in para 4.2). The overall scheme shall be valid upto 30.06.2027.

3.2 OBJECTIVE:

The GST Council in its meeting held on 30.09.2016 had noted that exemption from payment of indirect tax under any existing tax incentive scheme of Central or State Governments shall not continue under the GST regime and the concerned units shall be required to pay tax in the GST regime. The Council left it to the discretion of Central and State Governments to notify schemes of budgetary support to such units. Accordingly, the Central Government in recognition of the hardships arising due to withdrawal of above exemption notifications has decided that it would provide budgetary support to the eligible units for the residual period by way of part reimbursement of the Goods and Services Tax, paid by the unit limited to the Central Government's share of CGST and/or IGST retained after devolution of a part of these taxes to the States.

x x x

5. 2 The above 58% has been fixed taking into consideration that at present Central Government devolves 42% of the taxes on goods

and services to the States as per the recommendation of the 14th Finance Commission" (emphasis supplied)

22. Under the aforesaid Scheme, for the remaining period, the units can only claim refund of taxes pertaining to just the Union Government's share of CGST (58%) and IGST (29%). Petitioner is peeved that the units that were eligible in various exemption notifications under the erstwhile regime have been granted only partial benefit as against 100% benefit. It contends that the policy decision arrived at vide Office Memorandum dated 07.01.2003, entitles them to grant complete benefit under the Budgetary Support Scheme. In our view there is fundamental fallacy in the contention. We do not perceive that the Petitioner has any vested right to be entitled to budgetary support of entire CGST and IGST. The industrial policy of Respondent No.1 to grant area-based exemption has undergone complete change. Consequently, the exemption granted under the Central Excise Exemption Notification giving effect to the said policy has also lost its relevance and is no longer in force. We cannot now selectively concentrate on the benefits under the policies that are no longer in vogue. The comprehensive picture can be grasped only if an exercise is undertaken of the evaluation of the taxes post the GST. The new law entitles the Petitioner the input tax credit of all the taxes and cross utilization thereof which was not the position back in the day.

23. In India, where taxation has been subject to both State and Central legislations, the exemptions were also granted under one or several taxation laws, both by the State and the Central Government. Exemption in simple terms is an act of providing immunity from liability to pay tax. Anything

that is "exempt under tax law" means that the entity is not to be subject to tax by the Government authorities. The purpose for granting these exemptions was often to achieve the objective of attracting investments, or promoting trade and industry. In the instant case, we are concerned with area-based exemptions which were extended to the industries under the scheme of the Central Governments. Para 3.1 of the Office Memorandum/policy, extracted above, does indeed indicate the intention to grant benefit to new industrial units such as that of the petitioner. This was implemented through the exemption notification issued by the Central Government allowing 100% excise duty exemption. This position continued till the introduction of the Constitution 101st Amendment Act, 2016 which sought to fundamentally and radically change the indirect tax regime in India. In fact, it was way back in 2009 when the Task Force on GST deliberated on the future of area-based exemptions under GST and recommended that area based exemptions should not continue under GST. The relevant extract of the Report of the Task Force on GST dated 15th December 2009 is reproduced herein below:

> *"q. Area- Based Exemptions*
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> *2.68. Under the CENVAT, industries set up in the North East, Jammu & Kashmir, Sikkim, Uttaranchal and Himachal Pradesh (hereinafter referred to as 'specified areas') enjoy exemption from payment of CENVAT. This area based exemption creates economic distortions and affect economic viability of units located in non-exempt areas. They are difficult to administer and prone to misuse. Moreover, durability of investment attracted by such measures beyond the exemption period is also doubtful.*
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> *2.69. The Prime Minister's Economic Advisory Council, which had*

recently examined the issue of area based exemption in the context of its impact on pharmaceutical industry, has observed that:-

"The policy of granting area based exemptions was ill advised. It created a host of distortions. We have to design and introduce subterfuges to neutralize those distortions. But such subterfuges make the tax administration needlessly clumsy and complex and run counter to our declared policy of simplifying the tax system. There is clearly a case for revisiting the whole issue of area based tax exemptions. If their premature withdrawal is not possible for political and business reasons, at the minimum such incentives should not be extended to fresh areas and the ones already in force should be extinguished when their applicability ends."

2.70. Further, the existing exemption for Uttranchal and Himachal has been objected to by many States. In particular, Chief Ministers of Haryana, Uttar Pradesh and Punjab have often expressed their opposition to such exemptions as these had the effect of diverting industries to Himachal Pradesh and Uttranchal.

2.71. Para 3.3.2.(viii) of the draft of "An Approach to the 11th Five Year Plan" has also commented on the undesirability of the area based exemptions. To quote :-

"The existing incentive programmes such as those available for the North East, J&K, Himachal Pradesh and Uttranchal need to be reviewed with a view to assessing their impact on industrialization in these regions. The extension of excise duty exemption to Himachal and Uttranchal has had an adverse impact on industrial investments in both the North Eastern region and the adjacent States. Consideration would need to be given to restricting these incentives to only hilly areas or to replacing these incentives by a special programme for roadways and railway development in these States."

2.72. The area based exemptions erode the tax base. The revenue foregone on account of area-based exemptions is estimated to be Rs. 8,073 crores in 2007-08.

2.73 Further, the case for providing area based exemption is

extremely weakened in the face of our recommendation for a sharp reduction in the combined rates of CGST and SGST and the ease of compliance through a combined transaction reporting and payment Form No. GST-I.

2.74. In view of the above, we recommend that the area based exemption in respect of CENVAT should not be continued under the GST framework. In case it is considered necessary to provide support to industry for balanced regional development, it would be appropriate to provide direct investment linked cash subsidy."

(emphasis supplied)

24. GST has now enabled seamless flow of input tax credits across the chain. The Central Excise Duty exemptions did not envisage exemption from VAT, which is now available as input tax credit on account of being subsumed in GST and the credit thereof is now available for payment of duty. Similarly, VAT exemptions did not envisage exemption from service tax and excise duty, which is now available as input credit on account of being subsumed in GST. In this changed scenario, the Government has decided to grandfather the incentives that were given to specific industry under the existing industrial policy of States, or through a scheme of the Government. The new tax structure and merging of indirect taxes and the mechanism provided for input tax credit of state taxes that were earlier part of the State and Central Legislations has now resulted in a completely new tax which is known as GST. Therefore, the Petitioner's argument that the policy decision of 2003 still holds the field and can be enforced against the Government as a promise, to our understanding is not correct. The 100% tax exemption under the industrial policy was envisaged under the previous regime. The policy can no longer be invoked and therefore, the exemption

notifications issued implementing the said policy also have lost the mandate. Merely because the Government has acknowledged the difficulties faced by the industrial units and introduced Budgetary Support Scheme, it cannot be said that the Petitioners as a matter of right, are entitled to insist that the support should be on the entire fiscal benefits that were originally envisaged under the 2003 policy. The Budgetary Support Scheme under the GST, is not in lieu of exemptions that were granted under the previous fiscal incentives schemes for providing exemptions under the Central Excise Act, 1944 and other such legislations. Just because, the Respondents have acknowledged that the units located in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim should be granted Budgetary Support Scheme as a measure of goodwill for a residual period for which each of the units was earlier eligible, it cannot be held that that the support is in lieu of exemptions. Recognizing hardships arising out to withdrawal of exemptions notifications cannot be understood or categorized as an admission of any such right in favour of the Petitioner.

25. Even otherwise, the Respondents acknowledgment cannot vest a right in favour of the Petitioner, if they did not have such right in law. We also do not perceive that the Petitioners have acquired vested right in terms of the policy. The fiscal benefits promised in return for making investments in the State of Uttarakhand were privileges which were granted under law that no longer holds the field. The rights and the obligations that were flowing under the tax regime originated from the tax structure that existed when the policy was framed. Such obligations cannot stay alive, if the legislation itself has undergone a complete overhaul by advent of introduction of GST

legislations. Therefore, the Budgetary Support Scheme cannot said to be in contravention of the fiscal incentive policies or promise made by Respondent No.1 at the time of introducing area-based exemptions. In the previous tax regime, taxes were being levied on different incidents, such as 'manufacturing' in the case of the levy of excise duty. This is no longer a relevant consideration. GST is a destination based tax, the area based exemptions, under the GST regime have entirely different dimensions and therefore, for this reason, there are no area-based exemptions envisaged under the GST regime. Government has, instead, provided the necessary support to the industry for its economic development and has grandfathered the incentive Scheme.

26. Now let us also examine as to whether the Budgetary Support Scheme reveals the half hearted approach of Respondent No.1, as has been sought to be projected by the Petitioner. The Respondent No.1 is giving Budgetary Support Scheme to the extent of 58% on the premise that, to that extent, the share is devolved upon the Central Government and the remaining 42% is apportioned to the State Government and, likewise, in the case of IGST, the Budgetary Support Scheme is restricted to the Central Government's share of 29%. The aforesaid figures are the recommendations of the 14th Finance Commission. We do not find anything irrational or arbitrary with respect to partial tax budgetary support. Firstly, the Budgetary Support is not an exemption under the Act. The rationale of providing support to the extent of Central Government's share of CGST and the IGST is also based on the reasoning which cannot be questioned by the Petitioner. Article 279A of the Constitution provides that the GST Council shall make recommendations to

the Union and States, *inter alia,* on issues relating to special provision with respect to the States of Arunachal Pradesh, Assam, Jammu & Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand. The GST Council in its meeting held on 30.09.2016, left it to the discretion of the Central Government and State Government to notify schemes of Budgetary Support to units where the erstwhile schemes were in operation on 18.07.2017. Accordingly, the Central Government provided the Budgetary Support to eligible units for the residual period by way of part re-imbursement of goods and service tax paid by the unit, limited to Central Government's share of CGST and IGST retained after devolution of part of these taxes to the States. The apportionment of the tax between Central and States has also undergone complete reorganisation. In this regard, we may specifically mention that under Clause (1) of Article 269A of the Constitution of India, the Goods and Services Tax on supplies in course of inter-state trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and States in the manner as may be provided by the Parliament by law on recommendations of GST Council. This has been operationalized by the levy of tax under IGST Act. Since the entire gamut of taxation has been completely restructured, we fail to understand as to how the Petitioner is claiming, as a matter of right, that the Central Government should bear the burden and also give Budgetary support to the extent of the entire tax, irrespective of the fact that a portion thereof is passed on to the States. If the submissions of the Petitioner were to be accepted, it would mean that the Central Government would not only not

pocket any tax from the Petitioner, it would also be out of pocket to the extent the collected tax devolves upon the States. The States are not bound to take a cut on the tax collected from the Petitioner under any statute or any equitable principle such as promissory estoppel.

27. The Finance Commission's Reports, which are recommendations in terms of Article 280 (3) (a) of the Constitution, are recommendations of the Finance Commission regarding, *inter alia,* the sharing of the Union Tax Revenue. The said 14th Finance Commission's Report is valid for a period of five years from 1st April 2015 till 31st March 2020. The Finance Commission Report does provide for tax devolution of 42% to the State. Mr. Ganesh has argued that the sharing of Revenue existed even in the erstwhile regime and, therefore, that cannot be the rationale behind the restriction of the budgetary support to the extent of the Central Government share therein. We however, do not agree with this contention of Mr. Ganesh. Firstly, for the reason, that it is not for the Petitioner to question the sharing of Revenues that have been recommended by the Finance Commission. Secondly, the rationale for fixing 58% has a reasonable nexus to the support extended under the Scheme of Budgetary Support and the same to our mind does not call for any judicial intervention.

28. Mr. Ganesh, while advancing his arguments, had also reasoned that all the erstwhile duties such as central excise duty, service tax etc. which were levied by the Central Government before the enactment of GST legislations, have been subsequently replaced by CGST under the existing GST law and likewise, all the duties levied by the State Government in the

erstwhile tax regime have been replaced by SGST in the present tax regime. This is a completely wrong proposition as under the dual GST model, both the Centre and the States concurrently levy and collect the tax on supply of goods and services. This leads to consolidation of tax base and better administration. We fail to comprehend in what way the Petitioner has equated erstwhile excise duty and other duties levied by the Central Government in the erstwhile regime with existing CGST, as the two tax regimes are completely different. It is not the case that erstwhile duties levied by the Centre have been replaced by CGST.

29. Now let us also examine the case law that has been relied upon by the Petitioner in support of his submissions. Reliance placed on the decision of the Court in ***K.M Refineries*** (supra) is misplaced. We agree with the submissions of Mr. Bansal in this regard that in ***K.M Refineries*** (supra), the Court was dealing with only an executive order. As opposed to it, in the present case, the exemption from excise duty has been taken away by a legislative fiat of the Parliament.

30. The decision of the Court in ***Mannuelsons Hotels*** (supra), also, is not relevant to the present case. To better appreciate the findings of the Supreme Court, it is necessary to understand the factual matrix giving rise to this case. In this case, on 11.07.1986, a G.O. was issued which accepted the recommendations of the Government of India, suggesting that tourism be declared as an "industry". Pursuant to the aforesaid G.O, the appellants began constructing a hotel building which was completed in the year 1991. In line with the said G.O, Kerala Building Tax Amendment Act, 1990 was

passed w.e.f. from 06.11.1990 and Section 3-A was added, which granted the Government power by notification in the gazette to make exemption from the payment of building tax under the Act. However, no notification under Section 3-A was issued. Notice for fling returns under the Kerala Building Tax Act was issued to the appellants and this was contested by the Appellants on the ground that they were under no obligation to furnish any return under the said Act as they were exempt from the payment of building tax as per the G.O and Section 3-A. By letter dated 06.02.1997, the exemption promised by the G.O of 1986 was denied to the appellants stating that as Section 3-A had been omitted w.e.f. 01.03.1993, the power to grant exemption had itself gone and, therefore, no such exemption could be given to the appellants. Thus, the issue for consideration before the Court was that whether the appellant was entitled to claim exemption from payment of property tax under the Kerala Building Tax Act, 1975, as amended, as per Section 3-A, on ground of promissory estoppel. The said Section 3-A came in force from 06.11.1990 and had been later omitted w.e.f. 01.03.1993. The Court in this case noted in paragraph 36 as follows:

> *"36 ….This would make it clear that from 06.011.1990 to 01.03.1993, the power to grant exemption from building tax was statutorily conferred by Section 3-A on the Government. And we have seen that the Statement of Objects and Reasons for introducing Section 3-A expressly states that the said section was introduced in order to fulfil one of the promises contained in the G.O. dated 11-7-1986. We find that the appellants, having relied on the said G.O. dated 11-7-1986, had, in fact, constructed a hotel building by 1991. It is clear, therefore, that the non-issuance of a notification under Section 3-A was an arbitrary act of the Government which must be remedied by application of the doctrine of promissory estoppel, as has been held by us hereinabove. The*

> *ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise. It is also an admitted fact that no other consideration of overwhelming public interest exists in order that the Government be justified in resiling from its promise. The relief that must, therefore, be moulded on the facts of the present case is that for the period that Section 3-A was in force, no building tax is payable by the appellants.* ***However, for the period post-1-3-1993, no statutory provision for the grant of exemption being available, it is clear that no relief can be given to the appellants as the doctrine of promissory estoppel must yield when it is found that it would be contrary to statute to grant such relief…"*** (emphasis supplied)

31. Thus, ***Mannuelson's*** case (supra) is clearly distinguishable on facts from the present case before us. Noticeably, in ***Mannuelson's*** case (supra), the decision was rendered on the issue of promissory estoppel against the action of the Government, i.e, an executive action, but, more importantly, this case also goes against the Petitioner in as much as, the Supreme Court while granting the relief of promissory estoppel was also mindful of the fact that in case where there is no statutory provision for the grant of exemption, no relief can be given. In Paragraph 36 of the judgment, the Court notes that no mandamus could be issued to the legislature to amend the Kerala Building Tax Act, 1975, for that would necessarily involve the judiciary in transgressing into a forbidden field under the constitutional scheme of separation of power.

32. Ergo, in view of the proviso to Section 174 (2) (c) of the CGST Act, the issue that arises for our consideration is whether the doctrine of promissory estoppel can be invoked against a legislative act, because in the

present case, the government has clearly acted in accordance with the law laid down by the Parliament. When the law itself has undergone a complete revision, can the doctrine of promissory estoppel still be invoked, in light of Section 174(2) (c) of the CGST Act? The issue that arises in the present petition has been firmly established in a string of judgments and is no longer a point which is untouched by dictum.

33. We may in this connection refer to the decision of the Supreme Court in the case of ***Shree Sidhbali Steels Ltd. And Ors. Vs. State of U.P and Ors.***, (2011) 3 SCC 193. The facts of this case were that a new Industrial Policy dated 30.4.1990 was declared by the State Government assuring the grant of 33.33% hill development rebate on the total amount of electricity bills to new entrepreneurs for a period of 5 years. This period was extended by another period of 5 years to be made available to new industrial units set up till 31.3.1997. Vide Notifications dated 18.6.1998 and 25.1.1999, uniform tariffs of electricity were introduced whereby the rebate so given was reduced to 17%. Post 2000, vide a Notification dated 7.8.2000, a new tariff was announced which completely withdrew the hill development rebate. A challenge to the aforesaid notifications was turned down by the two judge bench of the Supreme Court in *U.P. Power Corpn. Ltd.* v. *Sant Steels and Alloys (P) Ltd.*, (2008) 2 SCC 777, which took a very restrictive view of Section 49 of the Electricity (Supply) Act of 1948, stating that any notification issued thereunder can only be revoked or modified if express provision was made for such revocation under Section 49 itself. Further, such revocation could take place under the General Clauses Act only if such withdrawal was in larger public interest, or if legislation was enacted by the

legislature authorising the Government to withdraw the benefit granted by the notification. The matter was referred to the larger three judge bench in ***Shree Sidhbali Steels*** (supra) which overruled *Sant Steels case* (supra), stating that its interpretation of Section 49 of the Electricity Supply Act was plainly incorrect, and that Sections 14 and 21 of the General Clauses Act made it clear that power under the said sections can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued. Thus, while deciding the case, one of the questions that fell for consideration before the three judge bench of the Supreme Court was whether a benefit given by a statutory notification can be withdrawn by the Government by another statutory notification under a different statute and whether the principle of promissory estoppel would be applicable to exercise of statutory powers. The Court observed as under:

> *"31. It is an admitted position that the Notification dated 28-6-1996, granting rebate to the industries set up in hill areas, was issued in exercise of powers conferred by Section 49 of the Electricity (Supply) Act, 1948. By the said notification rebate in electricity charges to the extent of 33.33% was given to the industries, which were set up in the hill areas during the specified period. It is also an admitted position that thereafter, by Notifications dated 18-6-1998 and 25-1-1999, issued in exercise of the powers conferred by Section 49 of the Act of 1948, the percentage of rebate granted by the earlier notification was reduced to 17%. However, by Notification dated 7-8-2000 the benefit, which was granted to the industries set up in the hill areas regarding rebate in the electricity charges, was completely withdrawn. What is relevant to notice is that it is not in dispute that the Notification dated 7-8-2000 withdrawing the benefits granted earlier, was issued in exercise of powers conferred by Section 24 of the Uttar Pradesh Electricity Reforms Act, 1999.* ***The abovementioned fact makes it evident that the benefits, which***

were granted and/or curtailed in exercise of statutory powers, were subsequently withdrawn in exercise of another statutory power conferred by another statute, namely, the Uttar Pradesh Electricity Reforms Act, 1999. In the light of the abovementioned facts, the question whether the principle of promissory estoppel would apply to exercise of statutory powers will have to be considered.

32. x x x

33. Where public interest warrants, the principles of promissory estoppel cannot be invoked. The Government can change the policy in public interest. ***However, it is well settled that taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppel cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute****. Thus, the Government or public authority cannot be compelled to make a provision which is contrary to law."* (emphasis supplied)

34. In ***I.T.C Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P and Ors.***, (1996) 6 SCC 634, the controversy was over the applicability of an exemption notification issued under the Andhra Pradesh Non-agricultural Land Assessment Act, 1963. The only mode of publication of such exemption order was publication in the Andhra Pradesh Gazette. After such publication, orders granting exemption were required to be laid before the Legislative Assembly. There was no other mode of publication prescribed. It is in that context the Supreme Court found an order of exemption granted in a Government order, which was not published in the Official Gazettes nor issued under any enactment was not enforceable. The Supreme Court held that the Government can act only in

accordance with the statute. One of the submissions before the Court was that even if it is held that publication of GOM in the Gazette was mandatory and the non-publication in the Gazette as required would render it invalid, yet, GOMs could be treated as a representation and a promise and the doctrine of promissory estoppel can be invoked to carry out such representation. The Court while dealing with this submission holds in paragraph 30 as under:

> *"30. It is submitted that by allowing the Government to go back on such representation, the appellant will be prejudiced. The learned counsel also contended that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. The counsel further submitted that allowing the Government to go back upon its promise contained in GOMs No. 201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention,* ***it is necessary to keep in mind the distinction between an administrative act and an act done under a statute.*** *If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous.* ***Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any***

administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith*. Where, of course, the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution). The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest.* ***It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel****. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority."* (emphasis supplied)

35. Thus, what clearly emerges from the decisions taken note of hereinabove is that the plea of promissory estoppel cannot be enforced against an act done in accordance with the statutory provisions of law. Under Section 174 (2) (c) of the CGST Act, express provision has been made by the Parliament to provide that any tax exemption granted as an incentive against investment through a notification under, *inter alia*, the erstwhile Central Excise Act, shall not continue as a privilege if the said notification is rescinded, and in the present case, the notification which granted 100% excise duty exemption was, in fact, rescinded. Thus, in the absence of any challenge by the Petitioner to the rescission of the said notification which granted exemption or to the *vires* of the proviso to Section 174 (2) (c) of the CGST Act, no plea of promissory estoppel is

maintainable. The language used in the proviso to Section 174 (2) (c) is clear and unequivocal, and leaves no room for a different interpretation.

36. In view of the aforesaid reasons we find no merit in this petition and dismiss the same along with the pending application.

SANJEEV NARULA, J

VIPIN SANGHI, J

MARCH 02, 2020
Pallavi