IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR.JUSTICE BASANT BALAJI

MONDAY, THE 4TH DAY OF JULY 2022 / 13TH ASHADHA, 1944

WA NO. 1476 OF 2019

AGAINST THE JUDGMENT IN WP(C) 16431/2013 OF HIGH COURT OF KERALA

APPELLANT/S:

1 GOVERNMENT OF KERALA, TAXES, B-DEPARTMENT, THIRUVANANTHAPURAM-695001.

2 GOVERNMENT OF KERALA, INDUSTRIES 'J' DEPARTMENT, REPRESENTED BY ITS SECRETARY, THIRUVANANTHAPURAM-695001.

3 THE ASSISTANT COMMISSIONER, SPECIAL CIRCLE (1), COMMERCIAL TAXES, ERNAKULAM-682015.

4 THE DEPUTY COMMISSIONER (APPEALS), COMMERCIAL TAXES, ERNAKULAM-682015.

BY SPL GOVERNMENT PLEADER (TAXES) MR. MOHAMMED RAFIQ

RESPONDENT/S:

1 WAVES ELECTRONICS (P) LTD., PLOT NO.17/SDF, 1ST FLOOR, PB.NO.541, COCHIN SPECIAL ECONOMIC ZONE, KAKKANAD, KOCHI-682037, REPRESENTED BY ITS MANAGING DIRECTOR MR.P.I.CHACKO.

2 P.I.CHACKO, MANAGING DIRECTOR, WAVES ELECTRONICS (P) LTD., RESIDING AT 155-A, 'ALAPPATT', 15TH LANE, TOC-H ROAD, VYTTILA, KOCHI-682019.

BY ADV ABRAHAM JOSEPH MARKOSE

OTHER PRESENT:

SRI. MOHD. RAFIQ SPL GP

THIS WRIT APPEAL HAVING COME UP FOR HEARING, THE COURT ON 04.07.2022 DELIVERED THE FOLLOWING:

J U D G M E N T

S.V.Bhatti, J.

We have heard the learned Special Government Pleader, Mr Mohammad Rafiq and the learned Senior Counsel, Mr Abraham Joseph Markos, for the appellants and the respondents, respectively.

2. The respondents in W.P.(C) No.16431/2013 are the appellants, and the respondents herein are the petitioners in W.P.(C) No.16431/2013. The parties are referred to as arrayed in the Writ Petition.

Averments in W.P.(C) No.16431/2013

3. The 1st petitioner/Company is engaged in the manufacture and sale of electrical control systems. The manufacturing unit of the 1st petitioner is located within the Cochin Special Economic Zone (CSEZ), Kakkanad. The 1st

petitioner, because of its location in a Special Economic Zone (SEZ), claims statutory/other benefits given to units located in an SEZ. As part of its turnover, the 1st petitioner claims to have two portfolios: *viz.* exports outside the country and deemed exports in the permitted Domestic Tariff Area (for short 'DTA'). The petitioner, for availing the benefits, is subjected to the condition of obtaining positive foreign exchange earnings. In December 2002, the 1st petitioner commenced its operations from CSEZ.

3.1 The 1st petitioner in this writ petition raises a fundamental issue *viz.* whether the units in SEZs registered under the Kerala General Sales Tax Act 1963 (for short 'Sales Tax Act')/VAT, the sales tax be levied and demanded on deemed export to DTA; and alternatively, whether the petitioner is entitled to exemption from levy of sales tax because of the policy decision of the State Government declared for units

established in SEZs in the State of Kerala. The Kerala Special Economic Zone Policy dated 17.06.2003 of the State Government holds out an incentive from levy of sales tax, duties, local taxes, and levies on the sales attracting tax liability including Sales Tax Act. The Government, in the exercise of its power under Section 10 of the Sales Tax Act, incorporated Sl. No.68 to the First Schedule of notification no. GO (P) No.179/99/TD dated 31.12.1999 and granted total sales tax exemption on the sales from units located in SEZs. The KVAT Act 2003, which came into force with effect from 01.04.2005, did not contain a similar exemption from payment of Value Added Tax. The petitioner, under a *bona fide* belief, believed that the replacement of the Sales Tax Act by the KVAT did not affect the policy dated 17.06.2003 (Ext.P2) extending tax incentives. On the returns filed by the 1st petitioner under the KVAT Act for the year 2008-09, assessment order dated 25.02.2011 was made, which has

been the subject matter of appeal, revision etc. before the authorities under the KVAT Act. The 1st petitioner was assessed by the Department under the KVAT Act for the Assessment Years 2009-10 and 2010-11 by turning down the claim of the 1st petitioner for exemption from payment of sales tax/value-added tax.

3.2 While matters stood thus on 06.10.2008 (Ext.P9), the State Government released the amended SEZ Policy on incentives to different categories of industries located in SEZs. Paragraph 6 of the SEZ Policy holds out that industrial enterprises in the SEZs alone are exempted from the tax being collected under the Sales Tax Act (including VAT) for ten years from the date on which it starts functioning. The concluding portion of the said Policy document states that based on this Policy, changes will be made to the existing notification, and a new notification will be issued. It is admitted that no such

notification was issued by the Government extending tax incentives. The assessment and the levy of sales tax on permissible DTA sales by the 1st petitioner on the ground that the Sales Tax has been substituted with VAT are illegal. Under the Sales Tax, the qualifying circumstance was the establishment of the unit in an SEZ. The stand of respondent nos. 3 and 4 that in the absence of a specific provision under the VAT Act, or permissible exemption notification thereunder the sales of 1st petitioner to DTA attract VAT, is illegal and impermissible.

3.3 The petitioner lays emphasis that the State is bound by the Principles of Promissory Estoppel, and the authorities are barred by the said principles from imposing any tax on the DTA sales by units in the SEZs. The 1st petitioner, in terms of Ext.P2 Policy, read with Ext.P9 Policy is entitled to claim exemption of payment of VAT up to the Assessment Year 2012-

13. The State Government is bound by the Policies covered by Exts.P2 and P9. The Doctrine of Promissory Estoppel precludes the State and its Officers from demanding VAT from the 1st petitioner on the sales effected by the 1st petitioner to DTA. The absence of a notification under VAT could not be a ground for refusing or denying the incentive/benefit, for the Policy of the Government guides the authorities on this behalf.

Reply of Respondents

4. The Assistant Commissioner (Law) filed counter-affidavit dated 09.09.2013. The averments made and the foundation in the writ petition for the declaratory relief, are categorically denied. The claim of 1st petitioner on DTA sales, namely sales from CSEZ to within the State of Kerala as deemed exports, is incorrect. The claim for exemption of payment of tax is covered by Exts.P2 and P3, but with effect from 01.04.2005 KVAT Act 2003 is implemented in place of the Sales Tax Act. It

is stated the notifications issued by the Government during the Sales Tax regime are repealed consequent to the introduction of the VAT Act by inbuilt statutory exemptions. The 3rd respondent categorically states that Exts.P2 and P3 do not have effect or currency under the VAT regime. To the extent up to 31.03.2005, the 1st petitioner was granted the exemption covered by Exts.P2 and P3. The assessments referred to in the writ petition relate to Assessment Years 2009-10 and 2010-11 and Assessment Year 2007-08 etc. and are made as per law. VAT is a state subject, and the competent Legislature enacted Value Added Tax for assessment and levy of tax for the intra-sale taking place in Kerala. Section 6(7)(b) of VAT deals with exemptions granted to CSEZ units, which reads as follows:

> "(b) Sale of any building material, industrial inputs, plant and machinery including components, spares, tools and consumables in relation thereto to any developer or industrial unit or establishment situated in any Special Economic Zone in

> the state for setting up of the unit or use in the manufacture of other goods shall, subject to such conditions or restrictions as may be prescribed, be exempt from tax".

Therefore, under the VAT regime, sales to SEZ alone are exempted, and sales from SEZ are not exempted. The reply of respondents, summed up, is that a unit in SEZ is not entitled to exemption from payment of tax, and, on the other hand, sales to SEZ are exempted from VAT. The Doctrine of Promissory Estoppel is not applicable as State Government did not give any promise on exemption on DTA sales. The extent to which the State Legislature thought it fit exemptions are incorporated into Section 6(7)(b) of the KVAT Act. Therefore, the assessment and levy of VAT are governed by the provisions of the VAT Act and are legal.

Consideration by the Learned Single Judge

5. The impugned judgment relies on the decisions of the

Apex Court in *State of Punjab v. Nestle India Ltd*.[1] and *Llyod Electric and Engineering Ltd. v. State of Himachal Pradesh*[2] for applying Promissory Estoppel and granting the declaratory reliefs. The Government did not file a counter-affidavit during the pendency of the Writ Petition. However, the 3rd respondent/Assistant Commissioner alone filed a counter-affidavit. Hence, the learned Judge presumed that the contentions canvassed by the 1st petitioner are admitted. Ext.P9 Policy is not so far revoked; it can be concluded that the benefits covered by Ext.P9 Policy are granted to units established in SEZs. It is further held that the Policy in Ext.P9 intended for SEZ is not disputed, and *Llyod Electric and Engineering Ltd.'s* case is more or less similar to the issue on hand. By holding that two Departments of Government cannot speak in two different voices, the benefit of tax exemption is

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1 AIR 2004 SC 4559

2 (2016 1 SCC 560

denied. The reasons stated by the respondent for denying the benefit, *viz.* the absence of a notification exempting payment of VAT under the KVAT Act, is unsustainable because when the Government is encouraging the Special Economic Zone, it is only just and proper that the Policy announced by the Government is allowed to be implemented, i.e., under the VAT regime. Yet another finding in the judgment on which serious contentions are raised by the appellant, for convenience, is excerpted hereunder:

> "16. ..... Therefore though exemptions are to be granted by issuing notifications as prescribed under the Act and the earlier notifications ceased to exist by operation of Section 32 (1) of the KVAT Act, 2003, and though Section 6 (7) (b) exempt the units in SEZ from payment of tax for sale to the units alone, the petitioners are entitled to the benefit of the declaration in Ext P9, It is also relevant to note that the judgment rendered in Lloyd's case was by a bench of 3 judges, whereas in Amin Merchant's case it was by a bench of 2 judges."

Hence the Writ Appeal.

6. The 1st petitioner relied on the correspondence between the Industries Department and the Commercial Tax Department in support of its case that the Policy is still applicable under the VAT regime. Considering the importance of the issue, we have granted liberty and also directed the Chief Secretary of Government to place before the Court the stand of Government for and on behalf of all the Departments.

6.1 Statement dated 30.03.2022 of Additional Chief Secretary, Taxes (B) Department for and on behalf of the State is placed on record. The averments therein are that the Statement Government, after the enactment of the Special Economic Zone Policy, renewed the SEZ Policy of 2003 by Ext.P9 Policy dated 06.10.2008 exempting payment from the Sales Tax Act (including VAT) for the first ten years from the date of commencement of the business. The applicable laws for levy

and demand of Sales Tax were the Central Sales Tax (CST) and the Value Added Tax Act. CST does not confer export status to sales from SEZ to DTA. Section 6(7)(b) of the KVAT Act deals with sales to SEZ and payment of tax is exempted at the point of sale into SEZ. The subject controversy relates to sales made by the 1st petitioner from SEZ to DTA, not converse. The statement refers to and relies on Section 32 of the KVAT Act, 2003 on the operational limitation in the area of exemptions from payment of tax, and an inbuilt prohibition is incorporated for granting exemption under the KVAT Act. The incentive or benefit under the KVAT regime is deferment of tax payable. The situation is covered by Section 6(7)(b) of the KVAT Act, and now the benefit claimed on the Policy, firstly, is without a statutory notification, and, in the absence of notification under an enactment which governs the field, is untenable and unenforceable.

6.2 The Scheme of exemption under the Sales Tax Act

and the KVAT Act is different. No power, i.e., jurisdiction, is vested with the Government to grant an exemption under the KVAT Act. In the absence of a provision of law on sales to DTA as deemed export, sales to DTA attract payment of sales/value-added tax. At present, under the VAT regime, sales to SEZ at the first point alone are exempted from sales tax. SEZ Policy does not envisage sales from SEZ to DTA as deemed export. The claim of the petitioner for exemption of payment of sales tax on sales made from SEZ to DTA is untenable. Summarized the objections for the relief of declaration and extension of Doctrine of Promissory Estoppel, the reply of the Additional Chief Secretary needs to be reproduced, which reads thus:

> "1. After the enactment of KVAT Act, no exemption can be granted unless otherwise provided under the said Act and the exemptions already granted under the KSALES TAX Act will cease to exist from the date of the promulgation of the new Act.

> 2. Clause 6 of the SEZ policy of the Government of Kerala dated 06.10.2008 shall have effect from the date of policy and the industrial units can be granted exemption from tax, subject to the legal provisions in the enactment.
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> 3. In this particular case, Government has no objection to give the benefits till KVAT act came into force. However, after the enactment, Government has no statutory power to provide such exemption and hence the policy could not be given effect to."

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7. Mr Mohammed Rafiq contends that the judgment under appeal is unsustainable from any perspective, for the judgment under appeal has not appreciated the pleadings and the applicable legal principles to the very case pleaded by the writ petitioner. In the case on hand, the writ petitioner established the unit in Cochin Special Economic Zone in December 2002. On 17.06.2003, i.e., after the establishment of the unit by the petitioner, the Kerala Special Economic Zone Policy was declared, followed by a statutory exemption notice

dated 13.02.2004. The Government has extended the benefit as long as the law under which exemption notification was issued, namely the Sales Tax Act was in force. With effect from 01.04.2005 KVAT Act is in force in the State of Kerala, hence the benefit of exemption is traceable to the KVAT Act.

7.1 The State legislature, in its wisdom, considering the exigencies and the legislative power the State has on sales tax/ value-added tax provided inbuilt exemptions in the Statute i.e., KVAT Act. Added to the inbuilt exemption in the KVAT Act power for granting exemption by the Government is absent in KVAT. Any claim for exemption beyond the provisions of the KVAT Act would be contrary to the scheme of the KVAT Act. The Policy dated 06.10.2008 (Ext.P9) refers to granting exemption from the obligation of tax under the Sales Tax/VAT for ten years from the date on which it (industry) starts functioning. Firstly, it does not apply to industries already

started, because for existing industries exemption is taken care under the KVAT Act; secondly, the exemption clause could become binding or operational by a notification under the applicable law. To give effect to the Policy in Ext.P9, the condition precedent being a new notification is issued to bring the Policy within the existing statutory framework. In the absence of a notification under the KVAT Act, by way of declaration, as made in the impugned judgment, the Court in its jurisdiction under Article 226 shall not declare a right in favour of the writ petitioner without statutory flair or a vested right.

7.2 The case of the petitioner is not that the exemption is claimed on the strength of Policy (Ext.P2) dated 17.06.2003 read with exemption notification (Ext.P3) dated 13.02.2004, but the claim is based on Ext.P9. Ext.P3 does not stipulate the period during which the exemption from payment of Sales Tax was granted. If a minimum or maximum period is stipulated and

during the currency of the stated period, changes are carried out to a declared policy, then an argument is available. The converse, according to him, is that the State Government or, for that matter, State Legislature, have retained the discretion to make necessary changes to the notification in Ext.P3 dated 13.02.2004. The right claimed by the petitioner rests on the amended Policy made in Ext.P9. Ext.P9 does not create a right, either statutory or vested, in favour of the petitioner and the declaratory relief, for any purpose, acts counter to the competence of the State Legislature and the KVAT Act. It is vehemently argued that the Doctrine of Promissory Estoppel, in the case on hand, is set up against the jurisdiction of the State Legislature, there cannot be Promissory Estoppel against a Statute, and the power of the State Legislature in bringing forth legislation is within its competence. The exemptions sought are in respect of indirect taxes, and the equitable Principle of

Promissory Estoppel is very liberally applied by the impugned judgment against the power and competence of the State Government to make legislation.

7.3 The exemption on the sales made to DTA is unavailable because the writ petitioner is established in a Special Economic Zone. The petitioner availed a few benefits while establishing the unit on the condition to contribute to the foreign trade of the Country. The sales effected by the writ petitioner to DTA cannot be treated as export, and the said contention is not supported by any law. The judgment under appeal now grants the status of exports or deemed exports to the sales made by the writ petitioner to DTA. The judgment under appeal in paragraph 16, excerpted in paragraph no.5 (supra), takes note of the absence of notifications under the KVAT Act and the inbuilt mechanism in terms of Section 6(7)(b) read with Section 32(1) of the KVAT Act, still by observing the

petitioners are entitled to the benefit of the declaration in Ext.P9, is untenable. A broad finding without a legal basis has been recorded in the impugned judgment. He places reliance on the judgments reported in *M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*[3]; *Home Secretary, U.T. Of Chandigarh v. Darshjit Singh Grewal*[4]; *Kasinka Trading v. Union of India*[5]; *Shabi Construction Co. v. City & Industrial Development Corporation*[6]; *Dr Ashok Kumar Maheshwari v. State of U.P.*[7]; *Bangalore Development Authority v. R Hanumaiah*[8]; *Prashanti Medical Services and Research Foundation v. Union of India*[9]; and *Augustan Textile Colours Limited v. Director of Industries*[10] for the propositions on Promissory Estoppel applicability to fiscal matters, estoppel against Statute, and competence of State Legislature. He prays for setting aside

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3 (1979) 2 SCC 409
4 (1993) 4 SCC 25
5 (1995) 1 SCC 274
6 (1995) 4 SCC 301
7 (1998) 2 SCC 502 at page 506
8 (2005) 12 SCC 508
9 (2020) 14 SCC 785
10 2022 SCC OnLine SC 427

the judgment under appeal.

8. Mr Joseph Markos, appearing for the writ petitioner, contends that in continuation of communication of Government of India vide letter No.D(P)/1/2002-CSEZ/5805 dated 06.09.2002 of D.C. CSEZ, Government of India, Ext.P2 Policy document was issued by the State Government. The Government Order (Rt) No.576/2003/ID dated 17.06.2003 extends incentives to industries established in SEZ from payment of State taxes, duties, local taxes, and levies. In furtherance of the above two Government Orders and the exercise of the power under Section 10 of the Sales Tax Act, 1963 amendment to Schedule 1 of the Sales Tax Act was introduced. Sl No.68 in Schedule 1 to Sales Tax Act deals with the class of industrial undertakings and other establishments, trading units, and developers in the SEZ from payment of tax. Therefore, the Policy resulted in exemption from payment of State taxes and even with the

consolidation and amendment of law by the KVAT Act, the declared policy of the State cannot and could not be bypassed. The petitioner places its right to Ext.P9 Policy and claims the benefit of exemption from State taxes up to 2012-13 by reckoning the commencement of the industry in December 2002. The Assessment Orders on DTA sales are contrary to the policy covered by Exts.P3 and P9.

8.1 By relying on the very judgments considered by the learned Single Judge, he canvasses that a statement in the form of a promise has been treated as a sufficient requirement for granting the benefit of the exemption on the Principle of Promissory Estoppel in the reported cases. It is argued that Ext.P9 is a Policy document declared and released by the State Government, with a full understanding or requirements of law under the KVAT Act. What cannot be carried out ought not to have been incorporated in Ext.P9 Policy, and the absence of

notification under the KVAT Act is not a very important circumstance which could be put against the writ petitioner, because it is a matter of inter-departmental functioning and had nothing to do with the writ petitioner. The reason for praying for declaratory relief is that the petitioner assumes and seeks enforcement of the right created by a combined reading of Exts.P2, P3 and P9 Policies of the State Government. There is no infirmity in the judgment under appeal.

8.2 Learned Senior Counsel emphasizes that a practical view is taken by the State and such right has ripened into a right in the petitioner, and the petitioner traces the right to Ext.P9 Policy and seeks a declaration from the Court under Article 226 of the Constitution of India. He relies on *Nestle India Ltd.* and *Llyod Electric and Engineering Ltd.* cases (supra); *S.V.A. Steel Re-Rolling Mills Ltd. v. State of Kerala*[11]; *The State of Jharkhand*

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[11] (2014) 4 SCC 186

v. Brahmputra Metallics Ltd[12]; and *Assistant Commissioner (CT) LTU v. Amara Raja Batteries Limited*[13].

9. We have taken note of the rival contentions and perused the record. We would like to, at this stage of our consideration, recap the case of the writ petitioner very briefly: the writ petitioner was established in December 2002 in CSEZ, and the Government issued a Policy dated 17.06.2003 (Ext.P2) followed by an exemption notification dated 13.02.2004 (Ext.P3) under Section 10 of the Sales Tax Act. Thereafter, the amended Policy dated 06.10.2008 (Ext.P9) was issued. The petitioner has a right under the Sales Tax regime to claim exemption from payment of sales tax and is claimed as continued by the amended Policy Ext.P9 dated 06.10.2008. Independent of the claim under the Policy, the petitioner argues that the sales to DTA are not liable to tax under VAT. The respondent opposes

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12 MANU/SC/0906/2020

13 (2009) 8 SCC 209

the prayer for declaration etc on the ground that the right recognized by Ext.P3 cannot be extended beyond the validity of the Sales Tax Act. Under the VAT regime, inbuilt statutory exemptions are available. KVAT does not have an enabling provision to confer jurisdiction on the State Government to issue notification for exemption from payment of VAT. The Principle of Promissory Estoppel, both in law and fact, is not applicable to the case of the petitioner. The declaratory relief by referring to the Promissory Estoppel operates against the competence of the State Legislature and the Statute. Therefore, the declaration prayed for *per se* is illegal, unconstitutional and unavailable to the petitioner.

9.1 We notice from the undisputed circumstances that the writ petitioner, based on a promise in the form of a Policy document, did not establish the industry in CSEZ. On the contrary, in its pleading, it is averred that the writ petitioner

established the industry in CSEZ in December 2002, i.e., prior to the Policy in Ext.P3. The Policy document and the exemption are dated 17.06.2003 and 13.02.2004. Between 01.04.2005 and 06.10.2008, there was no order of the State Government enabling the petitioner or similarly situated units to continue to claim the exemption granted from payment of sales tax by Ext.P3. The claim is invigorated with the amended Policy dated 06.10.2008 in Ext.P9. In this background, the petitioner claims declaratory relief.

9.2 The prayer as made in the writ petition, namely writ of mandamus, or declaration, is a discretionary relief, either as common law or constitutional remedy. Declaration, by its very nature, is a judgment that states one's entitlement to certain rights. The rights stated briefly could be statutory, constitutional, or vested rights. Judicial discretion is exercised for according a declaratory relief. In other words, judicial

discretion is the power of the Court to act, order, or grant a remedy by discerning the course prescribed by law or through or according to the law, what would be the just. In the process, the Court considers the nature of the obligation or right in respect of which relief is sought by the party, the circumstances in which the subject decision came to be made, and the effect of such declaration on the obligation or rights of the parties. A writ court exercises discretion to set at rest the claim or doubtful claim between the parties. The discretion is also exercised in such a manner as to put an end to a dispute arising in the circumstances of the case. In other words, whether the circumstances alone are sufficient? or the law has to be applicable? or on the circumstances as applicable to the orders and Acts, the declaratory relief is to be granted. In other words, the relief of declaration is not a matter of course. The declaratory relief traces the entitlement, therefore, to the

Principle of Promissory Estoppel.

9.3 A host of precedents on the Principle of Promissory Estoppel and applicability and enforceability are not stated in our judgment for it would be sufficient to preface what the Principle of Promissory Estoppel means:

(a) "The doctrine of promissory estoppel is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. Promissory is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact. 'Promissory estoppel and estoppel by conduct are two entirely distinct theories. The latter does not require a promise.'[14]

(b) "1514. Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal

[14] TAYLOR SCHWING, California Affirmative Defenses S 34: 16, at 35 (2d ed. 1996) (quoting Division of Labor Law Enforcement v. Transpacific Transp. Co., 88 Cal App 3d to pay and 823, 829 (Cal Ct App 1979).

promise or assurance which was intended to affect the legal required by relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on pay despite it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."[15]

(c) Doctrine of "promissory estoppel" has been evolved by the Courts on the principle of equity to avoid injustice[16].

(d) The rule of 'promissory estoppel' can be invoked only when it is shown that there was a declaration or promise made which induced the party to whom the promise was made to alter its position to its disadvantage. Doctrine of 'promissory

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[15] Halsbury's Laws of England, Fourth Edition, Vol.16 in Para 1514 at page 1017

[16] Ashok Kumar Maheshwari v. State of UP, 1988 SCC LSS 592 at 597 [Indian Evidence Act (1 of 1872), S. 115]

estoppel' has been evolved by the Courts on the principle of equity, to avoid injustice. [17]

(e) The principle of 'promissory estoppel' is that where one party has by his word or conduct made to other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in future; knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it if it would be inequitable to allow him to do so[18].

(f) It is quite fundamental that the doctrine of 'promissory estoppel' cannot be used to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power.

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[17] Sharma Transport v. Govt. of A.P., (2002) 2 SCC 188, 200]

[18] Sharma Transport v. Govt. of A.P., (2002) 2 SCC 188, 200, para 131

The doctrine cannot also be invoked if it is found to be inequitable or unjust in its enforcement[19].

(g) The rule of 'promissory estoppel' cannot be invoked for the enforcement of a promise contrary to law or outside the authority or power of the Government or the person making that promise[20].

10. In *M/s. Motilal Padampat Sugar Mills Co. Ltd.* case (supra), the Principle of Promissory Estoppel is stated thus:

> "Where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the

[19] Delhi Cloth and General Mills Ltd. v. Union of India, AIR 1987 SC 2414, 2419, 2420. [Income-tax Act (43 of 1961), S. 143(3)]

[20] Ashok Kumar Maheshwari v. State of U.P., (1998) 2 SCC 502, para 22: AIR 1998 SC 966.

parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. Of course the basic requirement for invoking this principle must be present, namely, that the fact-situation should be such that "injustice can be avoided only by enforcement of the promise".

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The doctrine of promissory estoppel is not really based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice. There is no reason why it should be given only a limited application by way of defence. It can be the basis of a cause of action.

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It is true that to allow promissory estoppel to found a cause of action would seriously dilute the principal which requires consideration to support a contractual obligation, but that is no reason why this new principle, which is a child of equity brought into the world with a view to promoting honesty and good faith and bringing law closer to justice, should be held in fetters and not allowed to operate in all its activist magnitude, so that it may fulfil the purposes for which it was conceived and born. (Paras 12 and 13)

10.1 In *Home Secretary, U.T. Of Chandigarh v. Darshjit Singh Grewal* case (supra) while dealing with the applicability of the

Principle of Promissory Estoppel against the statutory provision, the Supreme Court held that

> "....It is thus abundantly clear that an equitable rule by the rule of promissory estoppel cannot be invoked to repeal a statutory provision – which can indeed be termed mandatory."

10.2 In *Kasinka Trading v. Union of India* and *Shabi Construction Co. v. City & Industrial Development Corporation* (supra), it has been considered whether promissory estoppel, which is based on a 'promise' contrary to the law, can be invoked. The decision laid down that the rule of promissory estoppel cannot be invoked for the enforcement of a 'promise' or a 'declaration' which is contrary to law or outside the authority or power of the Government or the person making that promise.

10.3 In *Bangalore Development Authority v. R Hanumaiah* (supra), in paragraph 34, the Supreme Court held as follows:

> "34 There is no provision in the Act and the Rules framed thereunder enabling BDA to reconvey the land acquired to implement a scheme for forming of sites and their allotment as per Rules. The Rules do not provide for reconveyance. In the absence of any provision in the Act or the Rules framed thereunder authorising BDA to reconvey the land direction cannot be issued to BDA to reconvey a part of the land on the ground that it had promised to do so. The rule of promissory estoppel cannot be availed to permit or condone a breach of law. It cannot be invoked to compel the Government to do an act prohibited by law. It would be going against the statute. The principle of promissory estoppel would under the circumstances be not applicable to the case in hand."

10.4 After considering the case law on Promissory estoppel, the extent of enforceability and the circumstances in which the Principle of Promissory Estoppel is not enforced, the Supreme Court in *Augustan Textile Colours Limited v. Director of Industries* (supra) has held as follows:

> "33. In the later case of *Bangalore Development Authority v. R. Hanumaiah*, it was however specifically declared that the

equitable principle of promissory estoppel cannot be invoked for condoning or enforcing a promise, expressly prohibited by a statute. This Court speaking through Justice Ashok Bhan pronounced as under:

> "34. ...In absence of any provision in the Act or the Rules framed thereunder authorizing BDA to reconvey the land, direction cannot be issued to BDA to reconvey a part of the land on the ground that it had promised to do so. *The rule of promissory estoppel cannot be availed to permit or condone a breach of law. It cannot be invoked to compel the Government to do an act prohibited by law. It would be going against the statute. The principle of promissory estoppel would under the circumstances be not applicable to the case in hand*."

34. From the above reading of the relevant judgments, it is abundantly clear that the equitable principle of promissory estoppel cannot be *invoked for enforcing promises in the teeth of the provisions of law*. Having concluded that the Government Order (20.03.2004), granting Sales Tax/Works Contract Tax exemption was *ultra vires* the Section 10(1) of the KSALES TAX Act, the promise, in furtherance of Government Order,
in the form of BIFR Scheme dated 17.01.2005 being unlawful, cannot in our view, be enforced on equitable consideration.

35. Further, in Arcelor Mittal Nippon Steel (Supra) this Court

has held that:

> "22.... *The principle of promissory estoppel shall not be applicable contrary to the Statute*. Merely because erroneously and/or on misinterpretation, some benefits in the earlier assessment years were wrongly given, cannot be a ground to continue the wrong and to grant the benefit of exemption though not eligible under the exemption notification."
>
> (emphasis supplied)

11. The judgment under appeal considers the decisions relied on by the writ petitioner. We notice that the consideration before us is whether the ratio laid down in *Nestle India Ltd.* and *Llyod Electric and Engineering Ltd.* cases (supra) could be applied *albeit* correctly to the objections raised by the respondent. Reverting to the circumstances of the case, we notice that the writ petitioner was established in an SEZ in December 2002. On the date of establishment of the industry there is no Policy on tax incentives, or the writ petitioner acted

on the promise and made the investment. *Ex post facto* to the establishment and commencing of production, the Policy was declared and exemption notification, as part of the implementation of the Policy, was extended to the existing industries and the writ petitioner as well. The exemption notification in Ext.P3 dated 13.02.2004 is under Section 10 of the Sales Tax Act and Section 10 empowers the Government to issue, by way of incentive, exemption from payment of sales tax by the industries established in an SEZ. Sl. No.68 in Ext.P3 exemption notification deals with all the industries established in SEZ, and it does not deal with DTA sales from or into SEZ. Sl. No.68 of Schedule 1 of the notification does not assure the minimum or the maximum period during which the said benefit or exemption is offered to industries located in SEZ. The Sales Tax regime is consolidated resulting in amendments and replaced by VAT. Section 6(7)(b) read with Section 32(1) of the

KVAT Act are contextual for the present consideration and are excerpted hereunder.

> "Section 6(7)(b)
>
> 6. Levy of tax on sale or purchase of goods –
>
> *** *** ***
>
> (7) Notwithstanding anything contained in sub-section (1), -
>
> *** *** ***
>
> (b)- Sale of any building material, industrial inputs, plant and machinery including components, spares, tools and consumables in relation thereto to any developer or industrial unit or establishment situated in any Special Economic Zone in the state for setting up of the unit or use in the manufacture of other goods shall, subject to such conditions or restrictions as may be prescribed, be exempt from tax"
>
> Section 32(1)
>
> 32. Deferment of tax payable by Industrial Units.- (1) Where the Government had granted any exemption in respect of the tax payable by any industrial unit under the Kerala General Sales Tax Act, 1963 (15 of 1963) or, the Kerala Surcharge on Taxes Act, 1957 (11 of 1957) for any specified period under any notification issued under section 10 of the KSALES TAX Act, 1963 (15 of 1963) under the Industrial policy of the State, or

> where any application or other proceedings is pending on the date of commencement of this Act, such exemption granted or due to be granted shall have operation only till the day preceding the date of commencement of this Act:
> Provided that the Government may, by notification, which may be subject to such conditions and restrictions as may be specified therein, order to defer the payment of the whole or any part of the tax payable by such industrial units under this Act, which shall not be more than the unavailed portion of the exemption to which such unit would have been eligible had the notification issued under the KSALES TAX Act, 1963 (15 of 1963) been in force on the date of commencement of this Act, and that the tax or taxes so deferred shall be repaid, after the expiry of the period for which such deferment is granted, in such instalments over a period of five years, in such manner as may be specified."

11.1 Ext.P9 Policy grants exemption from payment of sales tax/VAT and the said Policy by itself is not an enforceable document since Ext.P9 envisages issuance of a notification for giving effect to the Policy decisions borne out by Ext.P9. It is at this juncture, that we hold the absence of power for issuing

exemption notification comes in the way of the declaratory relief sought by the petitioner. To say that the Government has the power to grant exemption from payment of VAT, and different departments in the Government have not acted in tandem and notification was not issued either for the continuation of benefit or extension of benefit, the State Legislature preferred to exercise discretion through legislation than by any mode in the matters of fiscal relaxation to units established in SEZ. In our considered view, it is altogether different if the Government could not act in spite of available power to grant an exemption under the KVAT Act. The State Legislature is competent to decide the purpose, policy, and area of applicability of the Policy. Under the VAT regime, the sales affected in favour of industries in SEZ alone are exempted from payment of sales tax, but not the converse. The logic appears to be simple from the present mechanism, namely, to enable an

SEZ located in the State to purchase raw materials etc., without the incidence of sales tax for achieving competitive prices for the products manufactured in the SEZ established in the State of Kerala. The declaration sought in the writ petition, in our considered view, particularly by keeping in perspective the ratio referred to in the judgments noted above, we are of the view that the declaratory relief as prayed for, on the Principle of Promissory Estoppel, is not made out or available to the petitioner.

11.2 Let us look at the consequence of declaratory relief now granted by the impugned judgment:

(i) The Policy in Ext.P3 does not stipulate the minimum or maximum period during which the incentive declared is offered.

(ii) The incentive was implemented by suitable amendments to Sl. No.68 of Schedule 1 of the notification dated

31.12.1999.

(iii) The Kerala General Sales Tax Act is amended and KVAT Act is enacted, and with effect from 01.04.2005 KVAT Act is the Statute under which the obligation to pay VAT is fastened.

(iv) KVAT firstly has provided for exemption as an inbuilt mechanism and the Legislature in its wisdom decided the extent of incentive through Section 6(7)(b) and Section 32 of the Act. The right of the petitioner does not fall, admittedly, within one or other situations.

(v) The declaratory relief now granted has the effect of being contrary to the discretion of the Legislature and against the Statute.

(vi) The relief creates a stand-alone situation in the working of the KVAT Act.

(vii) The petitioner without establishing a statutory/

vested/ constitutional right cannot be given the benefit of tax incentive by applying the ratio of *Nestle India Ltd.* and *Llyod Electric and Engineering Ltd.* cases (supra).

11.3 The benefit of the Policy (Exts.P2 and P3) has been extended to the petitioner during the currency of the said Policy documents. A declaration is sought to extend the benefit contrary to the Statute (i.e., KVAT), and the declaration could be over and above what is accepted as a Policy by the State Legislature in Section 6(7)(b) read with Section 32(1). The declaration could be a singular instance under the Act despite attracting the incidence of liability for the sales made to DTA, still, the petitioner could be allowed to have the exemption from payment of tax. With respect, we notice that the findings recorded by the learned Single Judge in paragraph 16 (excerpted supra) are untenable because such a conclusion extended the benefit of tax incentives without valid and legal

grounds. Hence, the grant of declaratory relief as prayed will be contrary to the State Policy and Statute and would go against the competence of the State Legislature.

For the above reasons, we are of the view that the judgment under appeal needs to be interfered with and accordingly set aside. Writ Appeal is allowed as indicated above.

Sd/-
S.V. BHATTI
JUDGE

Sd/-
BASANT BALAJI
JUDGE

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