

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1009 OF 1998

1. Finolex Cables Limited	}	
a company incorporated	}	
under the provisions of the	}	
Companies Act, 1956 and	}	
having its registered office	}	
at 26-27 Mumbai Pune road,	}	
Pimpri, Pune - 411 018	}	
	}	
2. T. M. Arsiwalla	}	
Director - Finance of the	}	
above company, residing	}	
at B-8, Melody Complex,	}	
ICS Colony, Ganeshkhind,	}	
Pune 411-007	}	Petitioners
versus		
1. The State of Maharashtra	}	
	}	
2. The Commissioner of Sales	}	
Tax, Maharashtra State,	}	
Mumbai, having his office	}	
at Vikrikar Bhavan, 8 th floor,	}	
Mazgaon, Mumbai - 400 010	}	
	}	
3. Additional Commissioner	}	
of Sales Tax, Pune Zone,	}	
Pune, having his office at	}	
Tilak Bhavan, 14-A, Navi	}	
Peth, Pune - 411 030	}	Respondents

Mr. P. C. Joshi with Mr. Piyush Shah for
the petitioners.

Mr. V. A. Sonpal - Special Counsel for the
respondents.

CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.

Reserved on 12th April, 2016
Pronounced on 20th August, 2016

JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. By this writ petition under Article 226 of the Constitution of India, the petitioners seek a declaration that section 41D of the Bombay Sales Tax Act, 1959 amended by way of insertion by the Maharashtra Act No. XVI of 1995 called the Maharashtra Tax Laws (Levy and Amendment) Act, 1995 as also Rule 31AAA of the Bombay Sales Tax Rules, 1959 as ultra vires the constitution of India being beyond legislative competence of the Maharashtra State legislature, void and of no legal effect.

2. The declaration is claimed, according to the petitioners, because these provisions curtail/restrict/withdraw the sale tax incentives by way of deferral availed by the petitioners.

3. In the alternative and in the event this court were to uphold the constitutional validity of the above provisions, then, they ought to be read down so as not to affect the sales tax incentives by way of deferral as availed by the petitioners. They would pray that this court should, therefore hold that the availment of the petitioners is in accordance with Package Scheme of Incentives, 1983, the agreements entered into pursuant thereto, the eligibility certificate and the certificate of entitlement issued thereunder. This court, therefore, should call for the records and proceedings of the petitioners' case and to quash and set aside the

notice Annexure 'S' to the petition. There are other prayers and writs which claim a restraint and prohibition against the respondents so as to prevent them from enforcing the notice.

4. Before we proceed further, we would prefer to reproduce a copy of this notice. This notice Annexure 'S' at page 221 of the paper book is in the following terms:-

“FORM 40

“Tilak Bhavan” 14-A,
Navi Peth, Pune - 411 030

Notice to a person when it is proposed to pass an order
which affects him adversely under section 55 or 57 of the
Bombay Sales Tax Act, 1959.

(See rule 62 of the Bombay Sales Tax Rules, 1959)

To

M/s Finolex Cables Ltd.
Urse Division, Urse, Tal, Maval, Dist. Pune

Registration No. N 25 H 336 Licence No. -----

Permit No. ----- Recognition No. -----

Authorisation No. -----

Whereas it is proposed to pass an order to the effect mentioned below, you are hereby informed that if you wish to prefer any objection against such order you should attend at the office of the undersigned at above address at 11.00 A. M. on the 27-10-1997.

Gist of the order proposed to be passed:-

Separately attached for the period 1.4.91 to 31.3.92.

Seal

Place: Pune

Sd/-
Signature : _____
RHTADVI

Dated: 3/10/1997

Designation: Additional
Commissioner of Sales Tax
Pune Zone, Pune”

5. The background for the same is to be found in the case of the petitioners.

6. The case projected is that petitioner no. 1 is a company incorporated under the provisions of the Indian Companies Act, 1956 and it carried out at the relevant time the business of manufacture and sale of jelly filled telephone cables, submersible insulated winding wires etc. The raw materials, *inter alia*, consumed for the manufacture are copper wire rod, HDPE, LDPE, jelly compound, polyester tape, polyol tape, steel tape etc. The other materials are set out in para 12(i) of the writ petition. It is the case of the petitioners that they are registered under the Bombay Sales Tax Act, 1959 (for short “the BST Act”) and the Central Sales Tax Act, 1956 (for short “the CST Act”). They have been regularly assessed to tax.

7. The petitioners made Application No. 2166(86)-TL dated 31st December, 1986 to the Government of India, Ministry of Industry, Department of Industrial Development, for grant of Industrial Licence under the Industries (Development and Regulation) Act, 1951 for the expansion in manufacture of jelly filled telephone cables.

8. The government of India, Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approval, by letter No. CIL 157(88) dated 21st July, 1988 communicated approval of expansion from 5,00,000 CKM of jelly filled telephone cables to 10,00,000 CKM at the petitioners' unit at Village Urse, Taluka Maval, District Pune. The Government of India, Ministry of Industry, Department of Industries Development, Secretariat for Industrial Approvals, by their letter dated 7th February, 1991 re-endorsed the capacity of the petitioners' industrial undertaking at village Urse, Taluka Maval, District Pune, for the manufacture of jelly filled telephone cables from 19(Tan) lakh CKM to 12(Twelve) lakh CKM.

9. Respondent no. 1 in continuation of past policies, formulated a scheme popularly known as the Package Scheme of Incentives, 1983. The said scheme was introduced under its Resolution No. IDL-1082/(4077) IND-8 dated 4th May, 1983. The purpose of the scheme was to achieve dispersal of industries outside the Bombay-Thane-Pune belt. Applications were invited from eligible units.

10. The petitioners made an application to the State Industrial and Investment Corporation of Maharashtra in the prescribed form for eligibility under Part I of the Package Scheme of

Incentives, 1983 for a proposed new unit for manufacturing five lakh CKM jelly filled telephone cables at village Urse, Taluka Maval, District Pune. The said application was made by the petitioners after complying with the requirement of completing all initial effective steps.

11. The petitioners, thereafter, entered into an agreement dated 18th August, 1988 with the Governor of Maharashtra (Government) in order to enable the petitioners to avail sales tax incentives by way of deferral under the Package Scheme of Incentives, 1983 in respect of their new unit at village Urse, Taluka Maval, District Pune. The petitioners also entered into an agreement dated 18th August, 1988 with the Governor of Maharashtra (Government) towards special capital incentives available to the petitioners under the Packaged Scheme of Incentives, 1983.

12. The State Industrial and Investment Corporation of Maharashtra Limited, after processing the petitioners' above application, issued Eligibility Certificate No. FINC(I)/ 1983/ DEFERRAL/EC-2101 dated 6th June, 1990. The eligible unit was located at Village Urse, Taluka Maval, District Pune. The goods to be manufactured were jelly filled telephone cables with a capacity of 5 lakh CKM per annum, and submersible insulated winding

wires with a capacity of 8000 K. M. per annum. The raw materials required as inputs were shown as copper wire rod, HDPE, LDPE, jelly compound, polyester tape, polyol tape, steel tape. The capital cost of the project was shown at Rs.1672.90 lakhs. The date of commencement of production was endorsed as 5th May, 1990. The maximum entitlement of sales tax incentives by way of deferral was fixed at Rs. 1338.32 lakhs. The eligibility certificate was valid for five years from 1st April, 1990 to 30th April, 1995.

13. In terms of the Package Scheme of Incentives, 1983 and the eligibility certificate issued thereunder, the Deputy Commissioner of Sales Tax (Headquarters) and Director of Training, Maharashtra State, Bombay issued Certificate of Entitlement No.N-25/H/R-31B/217 dated 12th June, 1990 for availing sales tax incentives under Part I of the Package Scheme of Incentives, 1983 of Government of Maharashtra by way of deferment of sales tax liability. The terms and conditions set out in the certificate of entitlement with regard to the incentives are identical to those set out in the eligibility certificate.

14. The petitioners are a large/medium scale industrial unit qualified under the caption new unit under the Package Scheme of Incentives, 1983. The petitioners' unit fell in Group 'C'. The

incentives available under the Package Scheme of Incentives, 1983 were that the petitioners were entitled to sales tax incentives by way of deferral of Rs.1338.32 lakhs. The period of eligibility was five years from 1st April, 1990 to 30th April, 1995. The petitioners have since been manufacturing and selling their goods and have availed the sales tax incentives available under the Packaged Scheme of Incentives, 1983, the agreements entered into pursuant thereto, eligibility certificate and certificate of entitlement issued thereunder.

15. The petitioners have filed their returns and for the period 1st April, 1991 to 31st March, 1992, which forms the subject matter of the instant petition, have already been assessed by order of assessment dated 31st March, 1995 passed under section 33(3) of the Act. The claim of the petitioners towards sales tax incentives in view of the Package Scheme of Incentives, 1983, eligibility certificate and certificate of entitlement was examined and allowed by the assessing officer. Likewise, assessment under section 9(2) of the CST Act was finalised.

16. The petitioners had carried the matter in appeal before the Deputy Commissioner of Sales Tax (Appeal) on certain issues. The Deputy Commissioner of Sales Tax (Appeals) by his order dated 18th March, 1996 partly allowed the appeal and did not

reverse the findings of the assessing officer in respect of the sales tax incentives claimed and allowed. Likewise, the petitioners' appeal against the order of assessment passed under the CST Act also came to be disposed of.

17. Respondent no. 1 retrospectively amended section 41D by way of insertion to the BST Act by Maharashtra Act XVI of 1995 called the Maharashtra Tax Laws (Levy and Amendment) Act, 1995.

18. Respondent no. 3 has issued notice dated 3rd October, 1997 in Form 40 under section 57 of the BST Act read with Rule 62 of the Bombay Sales Tax Rules together with gist of order proposing therein to revise the order of assessment and the order passed in appeal by restricting the sales tax incentives, levying interest under section 36(3) (b) and penalty under section 36(2) (c) read with *Explanation II*.

19. The petitioners say and submit that section 41D of the BST Act amended by way of insertion by Maharashtra Act XVI of 1995 called the Maharashtra Tax Laws (Levy and Amendment) Act, 1995 and Rule 31AAA of the Bombay Sales Tax Rules, 1959 amended by way of insertion by Notification No. STR-1195/CR-80/Taxation-I dated 31st May, 1996 are ultra vires the Constitution of India, beyond the legislative competence of respondent no. 1, violative of Articles 14, 19(1)(g), 265 and 300A

of the Constitution of India, void, invalid and inoperative and/or otherwise not attracted to the case of the petitioners and in violation of the doctrine of promissory estoppel. The petitioners further say and submit that the notice dated 3rd October, 1997 in Form 40 issued by respondent no. 3 under section 57 of the BST Act read with Rule 62 of the Bombay Sales Tax Rules, 1959 together with the gist or order is without jurisdiction and/or in excess of jurisdiction and/or improper exercise of jurisdiction and is illegal, bad in law, suffers from a mistake apparent on the face of the record and is violative of the doctrine of promissory estoppel.

20. An affidavit in reply has been filed for opposing admission and granting interim reliefs in this petition. In this affidavit, it is stated that the petitioners have enclosed agreement before issue of EC 1983 Scheme, which is shown as Exhibit 'K' to the writ petition at page 143. Relying upon page 4 para 1 at page 146 of the petition that the petitioners had agreed for maximum production in their unit for manufacture of jelly filled telephone cables not exceeding 5 lakh CKMs per annum and the petitioner being aware the stipulations that the incentives under the scheme are relating only and exclusive to the eligible unit and only for the products and for maximum production at the eligible unit as

considered admissible under the eligible certificate to be issued to the petitioners, it is not open to the petitioners to argue otherwise. The eligibility certificate is then referred in para 4 and it is stated that the petitioners were aware that they are eligible for sales tax incentives to the extent of 5 lakhs CKMs per annum only. It is stated that the Additional Commissioner of Sales Tax, Pune Zone, on scrutiny of the assessment and appeal record of the petitioners for the period from 1st April, 1991 to 31st March, 1992, observed that the petitioners' total sale of jelly filled telephone cable products for value of Rs.75, 75, 47, 016/- were allowed for deferral under 31-B, whereas, the admissible sales as per the entitlement certificate are at Rs.45,45,00,000/- in respect of 5 lakhs K.M. Thus, the sales of jelly filled telephone cable produced and sold in excess of 5 lakhs K.M. has become taxable since it is produced in excess of production capacity ceiling. It was, therefore, proposed to levy tax on the excess production by taking recourse to section 57 of the BST Act. That is by revising assessment order and appeal order and hence, notice in Form 40 was issued to the petitioners and the petitioners were requested to show cause as to why the orders passed should not be revised on the basis of the gist enclosed along with the notice in Form 40. Instead of giving a reply to the notice, the writ petition was filed.

21. In paras 6 and 7 of this affidavit, this is what is stated:-

“6. I say and submit that while considering the representations made by the manufacturers in backward area and considering their grievances put forth by them/ eligible units in backward areas, the Government of Maharashtra has also taken into account the misuse of benefits given to eligible units, malpractices noticed by the Sales Tax Department, undue advantage taken of certain loop-holes in the package scheme of incentives and modus operandi used by certain eligible units brought to the notice of the Government by the Sales Tax Department, the Government has introduced and amended Section 41 C and 41 D of the B. S. T. Act, 1959 w.e.f. 1.10.1995 to check unhealthy competition with existing units in developed areas and also to monitor the cumulative benefits of incentives smoothly, legally and correctly. The amendments were not made with an intention to put forth some restrictions on a legible units in backward areas or to curtail the benefits by way of Sales Tax incentives enjoyed by such units in backward areas. The Government can modify the package scheme of incentive in the public interest and also withdraw some concessions given earlier. In this respect I rely on the Supreme Court decision in the case of M/s. Arvind Industries and others Vs. State of Gujrat and others (Civil Appeal No. 951 of 1976 and M/s. Vijay Oil Mills Co. Vs. Commissioner of Sales Tax and others (Civil Appeal No. 1011 of 1977) decided on 23.8.1995 and reported in 99 STC 333. It is held by the Supreme Court that the Government is entitled to modify or withdraw benefits.

7. I say and submit that the Rules under Section 41 D of the B. S. T. Act, 1959 have since been framed and published on 31st May, 1996. During the time, the 1979 Scheme 1983 Scheme and 1988 Scheme were inforce, certain restrictions were specified by the Government of India under the Industrial Development and Regulation Act. These restrictions inter alia provided that no unit will produce more than the capacity prescribed for such unit under the industrial Licence issued to it. In other words production in excess of licenced capacity was prohibited. This was a law inforce as passed by the parliament. It will not be proper for the State Government to grant incentive to production in excess of the licenced capacity as such grant would be contrary to the spirit and letter of the Industrial Development and Regulation Act. It was necessary that such incentive should be related to the licenced capacity of the unit. For

such reason the section has been enacted and Rules have been framed. Thus I say and submit that the provisions of section 41 D are valid piece of Legislature introduced in the interest of public.”

22. Thus, it is submitted that there are remedies available for seeking redressal and reliefs. Therefore, the writ petition should not be entertained.

23. The petitioners filed a rejoinder affidavit and controverted the statements in the affidavit in reply. The petitioners in para 3 of the rejoinder affidavit referred to the Package Scheme of Incentives, 1983 and the agreement entered in pursuance thereto, the eligibility certificate and the certificate of entitlement issued thereunder. It is stated that the petitioners have correctly availed sales tax incentives by way of deferral during the subsistence of the eligibility period and up to the exhaustion of the total sales tax incentives admissible under the scheme. Para 2 of the eligibility certificate has been reproduced and it is submitted that only two conditions are prescribed. These are exhaustion of the total sales tax incentives and the expiry of the period of eligibility whichever event occurs earlier. The respondents cannot take into account factors or reasons which are extraneous and non germane to the package Scheme of Incentives, 1983. It is stated that the petitioners are entitled to avail benefit of sales tax incentives by way of deferral up to the

total prescribed sales tax incentives and within the period of validity. The petitioners have thus reiterated their stand in the writ petition. At pages 242 to 244 of this petition, this is what is stated by the petitioners in their rejoinder affidavit:-

“ I say that the Respondents are estopped from curtailing/restricting/withdrawing the incentives availed by the petitioners. I say that Respondents reliance on the decision of the Honourable Supreme Court in the case of Arvind Industries and Others 99 STC 33 is misplaced. In that case the Honourable Supreme Court had observed that the appellant had failed to make out any factual basis for a case of promissory estoppel. I say that in the instant petition, the Government of Maharashtra had announced a package Scheme of Incentives, 1983, inviting applications from eligible units. Terms and conditions were set out in the Scheme. I say that the Petitioners after completing the initial effective steps had filed an application for availing the incentives. The Petitioners had also entered into agreements. Letters of intent was issued by the Respondents. Physical inspection of the eligible Unit was also carried out. Eligibility Certificate and Certificate of Entitlement were issued by the Respondents. I say that the doctrine of promissory estoppel is clearly applicable in the instant case and the Respondents cannot take actions at variance with the prescribed conditions, which are to the detriment of the petitioners. I say that the Petitioners have acted on the representations made by the respondents in the Package Scheme of Incentives 1983, the Agreement entered in pursuance thereto, the eligibility Certificate and Certificate of Entitlement issued thereunder and altered their position and it is therefore not permissible for the Respondents to resile from their promises or representations to the prejudice, of the Petitioners.

6. I say that the Petitioners interalia carry on the business of manufacture and sale of Jelly Filled Telephone Cables and Insulated Electrical Wires. I say that the Government of India, Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals had by their letter dated 7th February, 1991 communicated approval of expansion from 5,00,000 CKM of Jelly Filled Telephone Cables to

7,00,000 CKM of Jelly Filled Telephone Cables at village Urse. I say that this letter is annexed as Exhibit H to the petition at Page No. 72. I say that the total Production capacity was enhanced to 12,00,000 CKM of Jelly Filled Telephone Cables, that is 5,00,000 CKM of Jelly Filled Telephone Cables to be manufactured at the petitioners unit at Pimpri, and 7,00,000 CKM of Jelly Filled telephone Cables to be manufactured at the eligible unit at village Urse. Earlier the Government of India, Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals had by letter dated 21st July, 1988, at Exhibit G at page 67 of the petition, communicated approval for expansion in production of Jelly Filled Telephone Cables from 5,00,000 CKM to 10,00,000 CKM, out of which 5,00,000 CKM of Jelly Filled Telephone Cables was to be manufactured at the petitioners unit at Pimpri, and 5,00,000 CKM of Jelly Filled Telephone Cables were to be manufactured at the eligible unit at village Urse. I say that in 1991, the Government of India had delicensed the petitioners industry. I say that the production capacity in the petitioners eligible unit at village Urse has increased from time to time due to unbuilt capacity. I say that the petitioners have availed the benefit of Sales Tax Incentives by way of Deferral only in respect of the production at the Eligible Unit at village Urse. I therefore say that advertence to this aspect of the matter by the Respondents to the effect that licenced capacity has relevance in determining disbursal of incentives and the licenced capacity of the Petitioners is less is totally misplaced and without appreciation of facts set out in the petition.”

24. The petitioners have pointed out as to how they have availed the benefits in terms of the scheme and not in contravention thereof.

25. Thereafter, a detailed affidavit in reply has been filed by the respondents, after the writ petition was admitted. In this detailed affidavit, apart from denials, in para 10, this is what is stated:-

“10. With reference to grounds of the Petition in Para A, I say that the amendments in question do not in any

manner levy fresh taxes for the first time as falsely alleged. If the Package Scheme of Incentives is read in its proper perspective, it will be explicitly clear that the scheme of calculation of cumulative quantum of benefits was already in the Scheme and by the amendment of the Act, it has been brought in the statute books for the purpose of clarification and thereby avoiding misinterpretation by the dealers to claim more benefits than what they are entitled as per the Scheme. The amendments merely have provided the procedure and the substance thereof is in consonance and conformity with the Package Schemes announced from time to time. Without admitting that the amendment in any manner sought to levy taxes retrospectively, it is within the competence of the legislature to enforce fiscal statutes retrospectively when clear intention thereof is found in the enactment, especially when it is clarificatory in nature, as also the principles of promissory estoppel does not apply to Statutory enactment when the same is in larger interest of the society. The amendments have been brought to avoid large scale, excessive or unlimited claims of incentives irrespective of the sanction as per eligibility and entitlement certificates and contrary to the principles of the Schemes. The Petitioner is seeking to interpret the scheme in the sense that the moment the eligibility certificate and entitlement certificate are obtained, it gets unlimited and unfettered right to claim entire sales tax exemption or deferment for any quantity of the goods manufactured and sold in the unit in utter disregard to the Eligibility and entitlement Certificates. The proposition of law canvassed by the Petitioner is misconceived and not in conformity with the settled position in law.”

26. Thereafter, it is denied that the respondents have upset the scheme or the promises and assurances given in the past. They submit that the amendments are in conformation of the scheme.

In para 12, the respondents have explained their stand thus:-

“12. With reference to ground (d) of the Petition, I say that Petitioners were entitled to the availment of the benefits only to the extent of quantifies, the items specified, for the period, at the unit specified and to the extent as provided in the Certificates and it is not correct to isolate the quantum aspect as referred to in the eligibility certificate to be ignored as against the other

specifications. I say that to interpret the scheme in the manner in which the Petitioner seeks to interpret it will lead to logical absurdity and large scale revenue loss not envisaged by the Respondent and throw the implementation of the scheme out of gear. The Petitioner and the Respondents clearly spelled out the extent of the benefits available in the eligibility and entitlement Certificates. If the distorted interpretation of the Petitioner is accepted, there will be unprecedented loss of revenue not envisaged and will not the purpose of the Scheme in as much as instead of decentralization of industries, it will paradoxically concentrate the industries in backward areas and perhaps even unjustifiable shift from developed to undeveloped areas which is not the intention of the Respondents. The amendments, in fact, are as much clarificatory as by way of some extension of benefits to the eligible units in as much as the extra productions above the sanctioned limit is made unlimited in case of SSI units and 25% in the case of the other MDI units over and above the capacity enumerated in the Eligibility Certificate.”

27. It is stated that even without the amendments in the statute, the respondents are entitled to recover the excess sum as per the provisions of the scheme. However, the respondents have permitted, by the impugned amendment, higher level of production to the extent of 125% instead of restricting to the limit specified in the eligibility certificate. It is, therefore, unwarranted on the part of the petitioners to challenge the amendment, which, in fact, confer additional benefits on them rather than curtailment thereof. It is stated that the continuation or curtailment of the incentives is sole discretion of the respondents considering the facts and circumstances, keeping in view its budgetary constraints and need for promotion and decentralization of industries. The respondents submit that the

quantity up to which the petitioners are eligible to claim benefits in the eligibility certificate is explicit and patent. It is known to the petitioners. It is not correct to say that the eligibility certificate is silent about the quantity up to which the incentives will be available. The Petitioners claimed incentives in excess of the permissible limit mentioned in the eligibility certificate. As provided in the scheme, it does not confer any right on the petitioners to claim incentives unless they obtain eligibility certificate for such expansion or installation of a factory in such areas. For the additional capacity, the petitioners have not obtained the eligibility certificate. Therefore, they are not entitled to extension of the benefits as claimed. Thus, it is stated that it is not just a quantum of the benefit but also with reference to the quantum of production which is to be found in the scheme. Once that is part and parcel of the scheme, then, there is no substance in the constitutional challenge. In para 22 of the affidavit in reply, the arguments on the principle of promissory estoppel are dealt with and it is submitted that the said principle cannot be applied for the reasons and grounds set out in the said paragraph. On these statements in the rejoinder affidavit, it is submitted that the petition be dismissed.

28. On the above material, we have to consider the submissions of the learned counsel appearing for the parties.

29. Mr. P. C. Joshi learned counsel appearing for the petitioners contended that the notice in Form 40 initiating the revision proceedings relied solely on the alleged conditions in entitlement certificate. The State in the first affidavit in reply relied on column 5 of the eligibility certificate which described the unit and was not a condition for grant of incentive while the second affidavit in reply refers to production capacity endorsed in the eligibility certificate and the later inserted section 41D and Rule 31AAA framed thereunder. Both are not expressly retrospective, however, the respondents seek to apply the later inserted legislation to the closed matters decided in accordance with the law then in force. Such an action cannot be sustained nor supported by any provisions of law nor such orders can be said to be erroneous or improper for justifying any revisional action under challenge before this Court.

30. By the action of revision, the later inserted section 41D is sought to be applied in a discriminatory and arbitrary manner. If the petitioners were not holding any entitlement certificate, there would have been no restriction on the quantity of product to be manufactured while the revision action on the basis of section

41D an artificial restriction not intended nor contemplated under the scheme is sought to be applied in a discriminatory manner.

31. Mr. Joshi further submitted that the petitioners were entitled to defer the tax payable in the periodical returns as well as the dues on assessment as per Rule 3B/C against the validity period of the entitlement and eligibility certificate from 1st May, 1990 to 30th April, 1995. The petitioners exhausted the financial ceiling of Rs.1338.32 crores on 31st January, 1994. The assessing authority, while passing the order of assessment for the period 1991-92 and the appellate authority followed Rule 31B/C that prevailed during the relevant period.

32. Mr. Joshi further submitted that Section 41D was inserted on 1st October, 1995 while the order of assessment was passed on 31st March, 1995. Therefore, the said section cannot have any application especially when the required rule was not even framed till 31st May, 1996 by insertion of Rule 31AAA.

33. Mr. Joshi further submitted that while the proposed revision action referred to the entitlement certificate as mentioned in notice in Form 40 dated 3rd October, 1997, the respondent finding that revisional action cannot be defended, a new case is sought to be made out by referring to column 5 of the

eligibility certificate. Such an action cannot be permissible especially when the basic jurisdiction of initiation of revisional proceedings is under challenge.

34. The reliance of the respondents on column 5 of the eligibility certificate is also erroneous and contrary to the law laid down by this court in the case of *State of Maharashtra vs. Maharashtra Metal Powder Ltd.*¹ decided on 24th November, 2015. The aforesaid appeal arose out of the single judge judgment in the case of *Maharashtra Metal Powder Ltd. vs. the State of Maharashtra*² decided on 15th October, 2009.

35. Mr. Joshi further submitted that Rule 31AAA insofar as it adversely affected the right of deferral under the provisions of Package Scheme of Incentives, 1983, is invalid and contrary to the scheme as well as the law settled by this court in the case of *Prasad Power Control*³ followed in the case of *Shakti Arora Expert Ltd.*⁴.

36. Mr. Joshi further submitted that Rule 31B/C provided for repayment of deferred amount after a period of 12 years in six annual installments. Section 38B was later on amended providing for premature repayment of deferred amount on the

1 Letters Patent Appeal No. 305 of 2011

2 WP/896/1993

3 41 VST 436

4 2012 (56 VST 62)

basis of net present value in accordance with Rule 31D. The petitioners made such repayments much in advance and was certified by an order dated 29th September, 2003. Therefore, the impugned notice in Form 40 is infructuous and is required to be quashed.

37. Mr. Joshi further submitted that the petitioners having invested huge amount for establishing a unit in a backward area of the State of Maharashtra, solely with the understanding that it will have the benefit of deferring the amount of sales tax, purchase tax and central sales tax for a period of 12 years and would be allowed to collect the same and utilise it for that period as a running capital. The erroneous interpretation by the authorities under the Act contrary to Package Scheme of Incentives have violated the principles of promissory estoppel. The latest judgment of the Hon'ble Supreme Court of India on the point is in the case of *Devi Multiplex and Anr. vs. State of Gujarat and Ors.*⁵.

38. Mr. Sonpal appearing for the respondents submits that the writ petition has no merit and must be dismissed. He would submit that the petitioners are not entitled to any relief and for the reasons more particularly and elaborately set out in the

5 (2015) 9 SCC 132

affidavit filed in reply. There is absolutely no foundation laid for the constitutional challenge. The petitioners do not have a vested right in claiming any relief much less in terms of the prayers of this writ petition. Mr. Sonpal summarised his contentions by urging that the impugned notice is not without jurisdiction as falsely contended. Mr. Sonpal urges that:-

- (a) Section 41D is not scheme specific and provides for restriction in respect of all schemes prior to and after the amendment.
- (b) The notice under section 57 does not refer to section 41D or Rule 13AAA.
- (c) The agreements, the eligibility certificate and entitlement read together clearly demonstrate that there is ceiling to the maximum quantity that can be covered for availment of incentives irrespective of section 41D or Rule 13AAA.
- (d) The challenge to constitutional validity or legislative competence does not survive in view of the field of legislation under Entry 54 of List II of Seventh Schedule is not transgressed.
- (e) The notice under section 57 is within the powers expressly provided by the BST Act and therefore, it cannot be claimed that the notice is without jurisdiction.
- (f) The amendment is in no way imposing fresh levy in the present context inasmuch as the scheme, agreement,

eligibility certificate and entitlement certificate clearly provided for ceiling of maximum production.

(g) The provisions in the present context are statutory incorporation of the conditions of the scheme, agreement, eligibility certificate and entitlement certificate.

(i) The insertion of Rule 31AAA is for benefit of the dealers inasmuch as it has given weighted ceiling from the basic available to the dealers. The Rule provides for no ceiling for SSI Units and weighted additional allowance of 110 to 125 of maximum production capacities to be ceiling instead of the ceiling fixed in the scheme, agreement, eligibility certificate and entitlement certificate.

(j) Presuming while not admitting that there is in any manner fresh levy of taxes or additional levy of taxes retrospectively, firstly there is no bar to enact a legislation with retrospective effect including levy of the taxes from retrospective effect. [J. K. Spinning and Weaving Mills Ltd. vs. Union of India 1987(32) ELT 234 (SC)]

(k) The scheme, agreement, eligibility certificate and entitlement certificate clearly and in no ambiguous terms, unequivocally and explicitly provide that the availment of deferral shall be subject to the quantitative limits fixed in the eligibility and entitlement certificates. Thus, there is no curtailment contrary to the scheme. The scheme, agreement, eligibility certificate and entitlement certificate nowhere provide that the incentives can be claimed without any ceiling. Therefore, there is no question of once promising to grant and then subsequently withdrawing any incentive as alleged.

(l) The petitioners have fairly admitted in para 13(g) that they were entitled to avail sales tax incentives by way of deferral in respect of the quantum specified in those certificates. Thus, the amendment in no way affects the petitioners whereby the availment is reduced below the licenced capacity or the capacity mentioned in the application, agreement, eligibility certificate or entitlement certificate.

(m) The petitioners are entitled to 25% more production over the licenced capacity or approved production as mentioned in application, agreement, eligibility and entitlement certificate and amendment cannot be said to prejudice but benefit the petitioners.

(n) There cannot be estoppel against the statute.

(o) The power to grant exemption incorporates in itself the power to withdraw in public interest.

(p) The public interest is paramount.

(q) The incentives available are unit based and not company based incentives that is to say incentives are in respect of the eligible unit of the petitioners as approved and not for whole turnover of the petitioners from every unit other than at the village Urse.

(r) The permission of Central Government to increase production from 5 lacs to 10 lacs was not a project specific at Urse village but petitioners specific which expanded present capacity from 5 lacs at Pimpri in Haveli taluka to additional 5 lacs at Urse village at Maval taluke totaling to

10 lacs. Another expansion of two lacs is also petitioners specific and not unit specific.

(s) It is not the case of the petitioners that excess production over 5 lacs CKM is related only to the Urse unit.

(t) The principle of promissory estoppel is not applicable in the present facts and circumstances as supported by the judicial precedents.

39. With the assistance of both counsel appearing for both sides, we have perused the writ petition and the annexures thereto. We have also perused the affidavits placed on record. We have also perused the relevant statutory provisions and the decisions.

40. The facts have already been recorded in detatils.

41. In this case, we are concerned with the Package Scheme of Incentives, 1983. It is common ground that in order to achieve dispersal of industries outside the Bombay-Thane-Pune belt and to attract them to the underdeveloped and developing areas of the State, the Government of Maharashtra has been implementing a package scheme of incentives to new units/expansion setup in the developing regions of the State since 1964 under a scheme popularly known as Package Scheme of Incentives.

42. This scheme was continued up to 31st March, 1983 with amendments from time to time. In the light of experience gained

during the period, a modified 1983 package Scheme of Incentives has been introduced from 1st April, 1983, rationalising the scope, various scales and mode of release of incentives particularly with a view to ensure that incentives are made available to the intending units promptly. It has been clarified that the scheme will remain in operation for a period of five years from 1st April, 1983 to 31st March, 1988. Consistent with the objectives of the scheme, however, the Government may, at any time, make any amendments to the scheme.

43. Thereafter, the salient features of the scheme are set out. These features are under several heads, namely, classification of areas, coverage, eligibility, expansion/diversification, export-oriented unit, resource-based unit, edible oil industry, incentives. We are concerned here with some features and would refer to those in details. As far as classification of areas is concerned, the areas in the State have been classified into four groups as detailed in the annexure to the scheme. Bombay Metropolitan Area and Pune Metropolitan Area being considered as developed areas, are covered under Group 'A', where no incentives are available. Rest of the State is divided in three groups, namely, Group 'B', Group 'C' and Group 'D' depending on the industrial backwardness of the area concerned the incentives are offered in these areas on a

graded scale. The minimum amount of incentives is available in Group 'B' and maximum amount is available in areas covered under Group 'D'.

44. As far as expansion/diversification is concerned, an existing unit in any of the areas under Group 'B', Group 'C' and Group 'D' desirous of expansion/diversification in the same taluka where the existing unit is located, will also be considered eligible for incentives under the 1983 Scheme if it satisfies the conditions set out at internal page 4 running page 78 of the paper book. The units which may have filed on or before 31st March, 1983 applications for eligibility under the 1979 Scheme are advised to approach the concerned implementing agencies regarding their eligibility. Such units may not be considered eligible under the 1983 scheme. However, decision regarding eligibility in such cases will depend on facts of each case to be decided by the implementing agencies. There are two types of incentives - (a) Part - I which includes special capital incentives and (b) Part - II. Both parts of the incentives are mutually exclusive and no unit will be eligible to get both the incentives simultaneously. The option once exercised hereunder shall be final and binding on the unit. These incentives and particularly with regard to sales tax read as under:-

“INCENTIVES UNDER PART I

For New Units (including a Pioneer Unit which is a New Unit)

A new eligible unit under Part I will be entitled to:

- (i) Sales Tax Incentive either by way of exemption or by way of deferral; and
- (ii) Special Capital Incentive.

For Expansion/Diversification (including 'Expansion/Diversification qualifying as a Pioneer Unit' with Fixed Capital Investment exceeding Rs.25 crores)

In the case of Expansion/Diversification the eligible unit will be entitled to;

- Sales tax incentive only by way of deferral;
- No Special Capital Incentive will be admissible for Expansion/Diversification.

Sales Tax Incentive by way of Exemption:

An eligible unit will be exempted from payment of -

- (a) Sales tax under the Bombay Sales Tax Act, 1959, on purchases of raw materials and sales of finished products of the eligible unit; and
- (b) Central Sales Tax payable under the Central Sales Tax Act, 1956, on the sales of finished products of the eligible unit effected in the course of inter-State trade or commerce.

SALES TAX DEFERRAL

An eligible unit will be entitled to defer the payment of following taxes:

- (a) Purchase tax payable under the Bombay Sales Tax Act, 1959, on the purchases of raw materials;
- (b) Sales tax payable under the Bombay Sales Tax Act, 1959, on the sales of finished products of the eligible unit; and

(c) Central sales tax payable under the Central Sales Tax Act, 1956, on the sales of finished products of the eligible unit effected in the course of inter-State trade or commerce.

An amount of sales tax liability so deferred shall be paid by the eligible unit after 12 years in six equal annual instalments.

The scales of incentives under Part I either by way of Exemption/Deferral will be as follows:

Eligible Units in Area	Period	Ceilings
For Medium/Large Scale Units		
Group 'B' and Resource-based units	3 years or earlier if the ceiling is reached	75 per cent of fixed capital investment
Group 'C'	5 years or earlier if the ceiling is reached	80 per cent of fixed capital investment
Group 'D'	7 years or earlier if the ceiling is reached	85 per cent of fixed capital investment
Pioneer units	9 years or earlier if the ceiling is reached	90 per cent of fixed capital investment
For Small Scale Units		
	As per the scales in B/C/D areas respectively depending on location of the unit	100 per cent of fixed capital investment

”

45. These features, as elaborately pointed out, would indicate as to how the policy was devised so as to encourage dispersal of the industries. That was also evolved so as to de-congest certain areas. Then what we have is the form of application for eligibility styled as Form No. 1. The petitioners filled in this application in the prescribed form for eligibility under Part - I of the 1983

Scheme of Incentives. That was in connection with their proposed new unit for manufacturing 5 lacs CKM jelly filled telephone cables at Village Urse, Taluka Maval, District Pune. The petitioners pointed out in that application that they are public limited company. It is a light engineering industry and project, for which, registration is obtained for manufacture of jelly filled telephone cables. The petitioners also pointed out that they are informally in possession of land. Agreement for sale has already been signed, sale deed and conveyance will be effected on 29th February, 1998. The permission for non agricultural use has been granted by the Government. They pointed out that their registration authority is the Ministry of Industry, Department of Industrial Development and they have obtained registration on 26th May, 1987. Their annual capacity is 5 lacs CKM for this proposed unit. The location of the unit, the fixed assets, which are being acquired and other details including registration obtained under the BST Act and the CST Act have been set out. They have stated that they would abide by the terms and conditions of the letter of intent/eligibility certificate to be issued in pursuance of this application. This application is made on 1st February, 1988 and the above details can be found in the Form, which is prescribed and filled in and copy of which is available at page 103 to 111 of the paper book.

46. Then, what we have on record is the letter of the Government of India, Ministry of Industry, Department of Industrial Development, which is on the subject of grant of industrial licence under the Industries (Development and Regulation) Act, 1951. This suggests that the existing capacity of the unit and to manufacture the jelly filled telephone cables is 5 lacs CKM. The letter was issued and it was with standard conditions attached and valid for a period of one year. Then, what we have on record is the communication from the Maharashtra Pollution Control Board (the consent). Terms thereof are also set out in that document. The copies of this are to be found at pages 129 to 140 of the paper book. Then, what we have is the other details in respect of cash flow statement. Annexure 'K' at page 143 is the agreement by the petitioners with the Governor of Maharashtra.

47. We would refer to the necessary details of this agreement.

48. The agreement was entered into after the petitioners approached the Government for sales tax incentives under the said 1983 Scheme and requested the Government to permit them to avail the sales tax incentives by way of deferral of the sales tax liability under the deferral scheme as outlined in the Government Resolution dated 5th July, 1982, which, the Government agreed to

provide. The Government has called upon the entrepreneur to enter into a general agreement as required under the said scheme and the procedure which the entrepreneur has agreed to is then appearing in the clauses of the agreement. Since reliance is placed on clause (2) of the agreement, we reproduce it as under:-

“2. The Entrepreneur hereby confirms that he is aware of that the incentives available to him under this scheme are relating only and exclusives to the eligible unit and only for the products and for maximum production at the eligible unit as considered admissible under the Eligible Certificate to be issued to him.”

49. A bare perusal thereof would indicate that the petitioners have confirmed that they are aware of the incentives available under this scheme are relating only and exclusively to the eligible unit and only for the products and for maximum production at the eligible unit as considered admissible under the eligibility certificate to be issued to it. Thereafter, there are various clauses and which would bind the parties.

50. We have also before us the agreement dated 18th August, 1988 and which records that the petitioner company would get Rs.20 lacs as special capital incentives or such similar amount as may be found admissible. Then, what we have before us is the incentives under part I of the 1983 Scheme as notified and that is Annexure 'N' at page 174 of the paper book. That states in clause (11) that maximum entitlement of sales tax incentive by way of

deferral not to exceed Rs.1338.32 lacs. The validity period was stipulated as 1st May, 1990 to 30th April, 1995. The terms and conditions, based on which the eligibility certificate is issued, are found in the document itself and at page 180 of the paper book, clause (vii) reads as under:-

“(vii) During the Operative Period of Agreement(s) entered into by the Holder of this Eligibility Certificate for Incentives under the 1983, 1988 Scheme, the industrial unit, for which this Eligibility Certificate is issued, shall not without prior approval of SICOM atleast 30 days prior to contemplated event:

- (a) sell or otherwise dispose of/ lease/ hire/ shift/ remove/transfer/alienate in any manner, with or without consideration, any of the fixed assets of the eligible unit;
- (b) writ off/keep the fixed assets in disuse without writing them off;
- (c) close the unit or shift the unit in part or its entirety from its existing location to any other location;
- (d) change or alter the constitution/ management/constituents comprising the ownership of the unit;
- (e) where the unit is owned by a limited company/co-operative society/trust, the limited company, co-operative society, trust as the case may be shall not merge or amalgamate with any other limited company/co-operative society/trust or permit or cause any other limited company/co-operative society/trust to be merged with the existing company/co-operative society/trust.”

51. Thereafter, an addendum was issued to this eligibility certificate and that is to be found on 3rd March, 1992. Thus, there was an eligibility certificate dated 14th January, 1992 to which an addendum is issued on 3rd March, 1992.

52. That there is an assessment order, which has a clear reference to all this and what the petitioners are aggrieved by is not the assessment order, but their returns filed for the year 1991-92, which is the subject matter of this petition, was assessed by these assessment orders passed under the BST Act and the CST Act, copies of which are at Annexures 'O' and 'P'. The petitioners having carried the matter in appeal before the Deputy Commissioner of Sales Tax, Mumbai (Appeals), he did not disturb the findings of the Assessing Officer in respect of the sales tax incentives claimed and allowed. So, both the appeals were disposed of by orders, copies of which are at Annexures 'Q' and 'R'.

53. However, the retrospective amendments to the statute resulted in the notice at Annexure 'A'. The gist of the order leading to the notice reads as under:-

“GIST OF ORDER

M/s Finolex Cables Ltd.
R.C.No. : N 25 H 336
Period : 1.4.91 to 31.3.92

On scrutiny of Assessment order dated 31.3.95 passed by Sr. Asstt. Commr. Of Sales Tax (Assessment) A-22, Pune Division R. C. No. N-25-H-336/MAH N 25 F-1959 for the period 1.4.91 to 31.3.92 under the B.S.T. & C.S.T. Act and Appeal order No. DC/APP/PN/A-91/95-96/761 dated 18.3.96 under B.S.T. Act 1959 and No.DC/APP/PN/CA-66/95-96/762 dated 18.3.96 passed by the Dy. Commr. Of Sales Tax (Appeals) Pune, it is observed that while assessing the dealer total sales of jelly filled telephone cable products for value of Rs.75,75,47,016/- were allowed for deferent under 31-B whereas the

admissible sales as per the Entitlement Certificate (Capacity 5 lakhs K. M.) for which the sale value arrives only at Rs.45,45,00,000/-.

Thus the sales of jelly filled telephone cable produced & sold in excess of 5,00,000 K. M. has become taxable since it is produced in excess of production capacity ceiling.

In view of the above facts, the Sr. Asstt. Commr. Of Sales Tax (Assessment) A-22, Pune Division, Pune has not applied his mind properly while allowing all sales for defertment. Had the Sr. Asst. Commr. Of Sales Tax (Assessment) A-22, Pune Division, Pune properly gone through the Entitlement Certificate No. N-25/H/R-31/B-217, he would have not allowed sales in excess of 5,00,000 K. M. capacity. The Assessment order passed by the Sr. Asstt. Commr. Of Sales Tax (Assessment) A-22, Pune is not just and proper. The Dy. Commr. Of Sales Tax (Appeals), Pune has not taken corrective action to set right the defect and salvage loss of Govt. Revenue and hence his order in Appeal is also not proper.

I therefore propose to revise the Assessment order and appeal order disallowing the excess benefit of defertment and to levy interest 36(3)(b) & penalty u/s 36(2)(c) Expl. II by passing revision order.

You are therefore requested to attend this office on 27.10.1997 at 11.00 A. M. and submit your explanation in writing as to why said revision order should nto be passed. In case, if you fail to attend or respond, matter will be completed without further notice to you which please be noted.

	Sd/-
Place:- Pune	Signature :- _____
	RHTADVI
Dated :	Addl. Commissioner of Sales Tax, Pune Zone, Pune"

54. The petitioners submit that the revision in the assessment order and the appellate order disallowing the excess benefit of deferral amount is proposed to be made and even interest would be levied.

55. The petitioners have submitted, as already noted above, that the attempt is a retrospective tax effect, for the first time. That is sought to be given and that is impermissible.

56. That is relying upon the two provisions. Section 41D of the BST Act and Rule 31AAA of the BST Rules read as under:-

“41D. Annual ceiling on benefits to be availed of under Package Scheme of Incentives. (1) Notwithstanding anything contrary contained in any of the package Scheme of Incentives, no eligible Unit to whom the eligibility Certificate has been granted shall be eligible to draw the benefits in any year, whether preceding or succeeding the date of commencement of the Maharashtra Tax Laws (Levy and amendment) Act, 1995 (Mah. XVI of 1995), in respect of the production in excess of the annual production capacity of that unit as may be prescribed by the State government, having regard to licensing provisions of the Industries (Development and Regulation) Act, 1951.

(2) The benefits availed of by any eligible unit in contravention of sub-section (1) shall be and shall be deemed to have been withdrawn and such Unit shall be liable to pay the tax in respect of sales or purchases, in so far as they relate to such excess production referred to in sub-section (1).

Rule 31AAA. Appraisal of annual production capacity. - The annual production capacity of an eligible unit to whom the eligibility certificate has been granted under any package scheme of incentives, shall, in respect of any period commencing on or after the 1st January 1980, be taken to be as shown in the table below:-

Serial No.	Package Scheme of Incentives	Type of unit	Annual production capacity
1	1979 Scheme	(a) Small-scale industrial units including (a) small-scale units manufacturing electronics equipments;	No ceiling in respect of annual production capacity.

		(b) Medium scale and large scale units.	(b) Capacity means 125 per cent of the capacity as indicated in the registration certificate or licence issued by the competent authority under the Scheme or the capacity as appraised by the term lending financial institution or bank whichever is less.
2	1984 Scheme	(a) Small-scale industrial units including (a) small-scale units manufacturing electronics equipments; (b) Medium scale and large scale units.	No ceiling in respect of annual production capacity. (b) Capacity means 125 per cent of the capacity as indicated in the registration certificate or licence issued by the competent authority under the Scheme or the capacity as appraised by the term lending financial institution or bank whichever is less.
3	1988 Scheme	(a) Small-scale industrial units including (a) small-scale units manufacturing electronics equipments; (b) Medium scale and large scale units.	No ceiling in respect of annual production capacity. (b) Capacity means 110 per cent of the capacity as indicated in the registration certificate or licence issued by the competent authority under the Scheme or the capacity as appraised by the

			term lending financial institution or bank whichever is less.
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”

57. Mr. Sonpal relies upon these provisions to submit that this opens with a non obstante clause. It overrides any contrary stipulation in any of the package scheme incentives. No eligible unit to whom the eligibility certificate has been granted shall be eligible to draw the benefits in any year, whether preceding or succeeding the date of commencement of the Maharashtra Tax Laws (Levy and amendment) Act, 1995, in respect of the production in excess of the annual production capacity of that unit as may be prescribed by the State Government, having regard to licensing provisions of the Industries (Development and Regulation Act, 1951. These benefits are deemed to have been withdrawn.

58. The argument before us is that this section was inserted by the above amendment w.e.f. 1st October, 1995 and therefore, would not govern anything prior thereto, particularly the period under consideration in this petition.

59. As far as Rule 31AAA is concerned, that Rule deals with a situation of appraisal of the annual production capacity of an eligible unit to whom the eligibility certificate has been granted

under any package scheme of incentives in respect of any period commencing on or after the 1st January, 1980. That would be taken in terms of the table shown above. Mr. Joshi appearing for the petitioners has placed reliance on the decision of a learned Single Judge of this court in the case of *Maharashtra Metal Powders Private Limited* (supra). There, somewhat identical controversy was dealt with by the learned Single Judge. Paras 2, 3, 4, 7, 9, 10 and 12 of this decision read as under:-

3. It does not appear to be in dispute that the petitioner installed additional machinery in December, 1987 by availing a further loan of Rs.10 lacs, and stepped up their production beyond 300 MT per annum and availed sales tax exemption for 398.963 MT for period from 01.07.1986 to 30.06.1989, 612.812 MT for period from 01.07.1987 to 30.06.1988, 557.261 MT for period from 01.07.1988 to 30.06.1989. Thus, in the three years amount of excess sales tax exemption incentive availed was Rs.2.11 lacs for 98.963 MT in the first year, Rs.6.03 lacs for 312.802 MT in the second year and Rs.7.38 lacs for 257.261 MT in the third year, in all Rs.15.52 lacs. It is not in dispute that the total exemption availed had not exceeded Rs.70.08 lacs.

4. It is likewise not in dispute that the Sales Tax Officer concerned had assessed petitioners liability to pay sales tax for all those three years, and, by orders dated 16.03.1990 and 30.03.1992, held the petitioner entitled to a refund. Question of excess availment came up only in assessment order dated 30.03.1993 for the period from 01.04.1989 to 31.03.1990.

7. The learned counsel for the petitioner submitted that assessments for the relevant years were completed and in fact Assessing Officer had held the petitioner entitled to a refund. However, the Assistant Commissioner of Sales Tax issued a notice on 26.11.1992 along with a gist of order indicating that the petitioner was liable to pay tax as well as penalty. Notice and the gist of order showed that the Assistant Commissioner intended to exercise his revisional jurisdiction under Section 57 of the Bombay

Sales Tax Act.

9. Reliance on judgment of the Supreme Court in *State Bank of India Vs. Chandra Govindji*, reported at (2000) 8 SCC 532 is misplaced. The judgment is unhelpful as the Court merely observed that earlier adjournment which was granted cannot be the ground for rejecting the adjournment, which was finally sought. Such prayer for adjournment would have been considered only on the ground on which it was sought. It may be seen that even so viewed adjournment, sought on the ground that the Advocate was busy before other authorities, could not have been granted. It was improper for the Advocate to seek adjournment for fourth time on the ground that he was busy in attending to some other cases. Even before Civil Courts the counsel being busy in other courts is no ground for adjournment and there is no reason why before the Revenue Authorities such a ground should be entertained. It cannot be said that the petitioner was denied reasonable opportunity of being heard. The opportunity which was available, was squandered away by the petitioner, for which he must blame himself. Therefore, no interference is called for in the order on this ground.

12. In order to examine these rival contentions it would be necessary to find out what were the terms on which this incentive was made available to the petitioner. The eligibility certificate issued by SICOM on 05.09.1983 gives details about the petitioner company, its plant and investment therein in items (1) to (9). The certificate then stipulates as under:-

“This Eligibility Certificate under Part-I of the 1979 Package Scheme of Incentives (hereinafter referred to as :the 1979 Scheme:) is hereby issued to M/s. Semi Conductor Packages Private Limited for their new unit set up at Village : Moregaon, Dist : Bhandara for manufacture of Pyrotechnic Aluminium Powder, 300 M.T. Per annum involving Fixed Capital Investment of Rs.82.45 lacs approved as detailed on prepage.

2. The period of this Eligibility Certificate shall stand automatically curtailed

(i) from the point of time when the total sales tax incentive admissible under the Scheme/ the sales tax incentive as per the entitlement under the scheme availed of/ drawn exceeds

the limits laid down in Clauses 2.13/ 5.3 of paras 1 and 2 of the Deferral Scheme notified under Government Resolution, No. IDL7082/(3559)IND8, dated July 5, 1982, namely eighty five percent of the Gross Value of Fixed Capital Investment of Rs.82.45 lacs i.e. Rs.70.08 lacs of Rs.82.45 lacs.

OR

(ii) from the date from which the Certificate of Entitlement issued by the Commissioner of Sales Tax is cancelled or revoked, whichever event occur earlier.”

60. Then, the court dealt with the rival contentions from para 20 and held thus:-

20. I have considered the contention of the learned Assistant Government Pleader about applicability of this Rule 6.2 and find that it has no relevance to the petitioner's case, since the petitioner's unit is not a 'Near New Unit' or unit which was already existing sought to be expanded or diversified under 1979 Scheme. This clause would apply to a unit which was already granted exemption or incentive under 1979 scheme and sought to expand or diversified. The learned Assistant Government Pleader submitted that even for expansion or diversification of a unit, which had been granted incentive under 1982 scheme, the same rule would apply. Even if this contention is accepted for a while, it would have only enabled the petitioner to apply for eligibility certificate in respect of the capital incentive for augmentation of the capacity. It does not put a restriction on augmentation of the capacity as such. It must be borne in mind that an enabling provision has to be distinguished with a restrictive covenant. Rule 6.2 is an enabling provision and not a restrictive provision.

21. Thus, the conditions incorporated in eligibility certificate, certificate of entitlement, indentures, two schemes of 1979 and 1982 do not show that there was either any restriction on augmentation of capacity by a new unit for claiming incentive by way of exemption for

such additional production, so long as the total incentive claimed did not exceed the monetary ceiling as also the time restriction.

22. At the cost of repetition it has to be stated that if a unit exhausted monetary ceiling before the time period elapsed the incentive was to come to an end, irrespective of the fact that the period of validity was still available. Likewise, even if the unit did not exhaust the entire monetary ceiling on the incentives if the period of validity was over, the unit would not be entitled to seek incentives beyond that period. Except for these two conditions, there is no third condition about annual ceiling on production. Reference to annual production in the certificate of eligibility in Clause 5 is only in the nature of enumeration of facts about the unit. At the cost of repetition it has to be pointed out that Clause (1) of the certificate names the holder of the certificate, clause (2) gives address of the unit, clause (3) gives office address, clause (4) gives DGTD registration number, clause (5) enumerates class of goods or products manufactured by the eligible industrial unit, clause (6) is about capital cost of the project of the eligible unit, clause (7) is about various sales tax registration, clause (8) mentions a date of commencement of the production and clause (9) states the Sales Tax Officer with whom returns are to be filed. Thus, the reference to 300 MT per annum in Clause (5) of this certificate is merely descriptive of the goods to be produced and is not a condition of eligibility. The conditions, subject to which Eligibility Certificate was granted, are enumerated separately in the certificate itself and those do not refer conditions to any ceiling on production.

23. The revenue would have been entitled to deny the benefits of the incentive granted to the petitioner only upon showing that there was a condition putting ceiling on the annual production and that such condition was breached. In the absence of any such stipulation in the two certificates issued, in the two schemes as also the indentures, it would not be open to the revenue to put such an

additional restriction, particularly when the petitioner has not claimed any additional capital incentive for the additional investment of Rs.10 lacs made for augmenting capacity in December, 1987.

61. A letters patent appeal was filed to challenge this order being Letters Patent Appeal No. 305 of 2011 and that also has been dismissed.

62. We find much substance in the contentions of the petitioners. Once there was no embargo or prohibition on augmentation or increase in the production capacity and the expansion has been sanctioned, then, the impugned notice, which totally disregards all this, cannot be sustained. The petitioners have pointed out that there is a promise and contained in this package scheme of incentives, which promise can be culled out from the various terms and conditions. The petitioners have submitted and rightly so that they had availed sales tax incentives during the relevant period, namely, 1st April, 1991 to 31st March, 1992. The period of eligibility had not expired nor had the quantum fixed been achieved. It is in these circumstances that the assessing officer allowed the incentives claimed after duly examining the record. Even the appellate order confirms this position. Now, the third respondent desires to restrict the incentives availed of by the petitioners and levy interest under section 36(3)(b) and penalty under section 36(2)

(c) read with *Explanation II*. Respondent no. 3 has observed that the incentives have to be restricted in view of the annual licence/registration/production capacity, which was never envisaged in the package scheme of incentives, the agreement entered in pursuance thereof, the eligibility certificate and the certificate of entitlement. That is why the petitioners have rightly submitted that the revisional powers cannot be exercised so as to defeat the scheme and such a scheme which contains clear assurances and promises on behalf of the State provided the petitioners fulfill the conditions thereof cannot be set at naught by the process undertaken.

63. The petitioners have pointed out that they have set up their unit in a backward area of Pune District, which is categorised as 'C' zone in the Package Scheme of Incentives, 1983. That was on the basis of the incentives available to them. The petitioners never apprehended at that time that the benefits under the scheme would be curtailed or denied in the manner done. The period of eligibility was reckoned as from 1st April, 1990 to 30th April, 1995 and the quantum of incentives was 1338.32 lacs. It is in these circumstances that they have challenged the legality and validity of the legal provisions referred above.

64. The petitioners have also relied upon a Division Bench

judgment of this court in the case of *Commissioner of Sales Tax, Mumbai vs. PCE VEE Textile Ltd.*⁶. The facts and circumstances of that case were also identical. It is in this backdrop that the Division Bench, from paras 15 onwards, held as under:-

15. It is pertinent to note that the 1993 Scheme was initially made applicable only to the new units /pioneer units / prestigious units established in the backward area. However, para 3.8(I)(i)(c) of 1993 scheme reads as follows:-

"3.8 Gross Fixed Capital Investment

(I) Gross Fixed Capital Investment shall mean and include, in the case of:

(i) New Fixed Assets - The value of new Fixed Assets acquired at site and paid for

Explanation-

(a)

(b)

(c) Any acquisition of new Fixed Assets outside the project scheme accepted by the Implementing Agency can be considered for the purposes of proportionate incentives during the residual eligible period provided such acquisition is not less than 25% of the Gross Fixed Capital Investment at the end of the previous financial year of the Eligible Unit."

Thus, para 3.8 (I)(i)(c) of the 1993 scheme envisaged grant of proportionate incentives to a unit acquiring new fixed assets outside the project scheme, provided such acquisition was not less than 25% of the Gross Fixed Capital Investment.

16. In the light of the representation received from the Industries particularly the existing units, the State Government deleted para 3.8(I)(i)(c) and substituted a new para 3.8.(I)(i)(c) by issuing Government Resolution dated 6/7/1994. The newly substituted para 3.8 (I)(i)(c) reads as follows :-

" 3.8 (I)(i)(c)

Any acquisition of the new Fixed Assets outside the project scheme accepted by the implementing Agency can be considered for incentives, other

than Special Capital Incentives, provided such acquisition is not less than 25% of the Gross Fixed Capital Investment at the end of the previous financial year. A separate Eligibility Certificate will be issued for availing of such benefits with eligibility period as admissible to new unit in the relevant area and for the relevant category of units as per the scheme. However, for the purpose of sales tax benefits, the quantum of entitlement will be limited to 75% of that admissible to a new unit in the relevant area and for the relevant category of units as per the scheme. A unit cannot, however, claim benefits for acquisition of new Fixed Assets under this clause more than twice.

Explanation : Existing units will also be entitled for benefits under this clause, provided acquisition of new Fixed Assets by such units is not less than 25% of the Gross Fixed Investment at the end of the previous year. "

As per the newly substituted para 3.8(I) (i)(c) not only the units acquiring new fixed assets outside the project scheme but also the existing units acquiring new fixed assets not less than 25% of the gross fixed assets became entitled to the incentives under the 1993 scheme irrespective of the fact that the acquisition of the new fixed assets resulted in increase in the production capacity or not. However, in such cases, the quantum of incentives was limited to 75% of the incentives available to a new unit in the relevant area and for the relevant category of units. Thus, as per the newly inserted para 3.8 (I)(i)(c) of the 1993 scheme, the eligible units were required to obtain a separate eligibility / entitlement certificate from the SICOM/ sales tax authorities with the quantum of incentives which the existing unit is entitled to and the period within which those incentives could be availed. Neither para 3.8(I)(i)(c) nor any other provision under the 1993 scheme nor any provision under the BST Act / CST Act provide for utilization of the incentives in each year proportionately on the finished products attributable to the fixed assets newly acquired by the Existing Unit.

17. In these circumstances, the question to be considered is, whether the Deputy Commissioner of Sales Tax after determining the quantum of incentives and the time period during which the said incentives could be availed,

was justified in inserting conditions (i) and (m) in the Entitlement Certificate so as to impose ceiling on the utilization of the incentives per year? In other words, the question is, if the grant of incentives to an existing unit under the 1993 scheme is based on newly acquired fixed assets and not on the production capacity of the newly acquired fixed assets, whether the Deputy Commissioner of Sales Tax could impose conditions to the effect that the said incentives can be availed proportionately to the production of the finished products attributable to the newly acquired fixed assets?

18. While admitting that there is no specific provision in the 1993 scheme for availing the incentives on proportionate basis, it is contended on behalf of the applicant that since the incentives are given to an Existing Unit on acquisition of certain additional fixed assets and the said incentives are to be utilized on the tax payable on the finished products, it must be held that the incentives under the 1993 scheme are to be availed on the finished products attributable to the new fixed assets acquired by the Existing Unit. It is contended that in the present case, the assessee had expressed its inability to maintain separate books of account. As a result, identification of the finished products attributable to the newly acquired fixed assets was not possible and, therefore, the Dy. Commissioner was justified in determining the proportionate quantity of finished products attributable to the newly acquired fixed assets at 59.84% of the total production and accordingly direct the assessee to avail the incentives on 59.84% of the total production till the time period set out in the Entitlement Certificate or till the quantum of incentives granted under the 1993 scheme are exhausted, whichever is earlier.

19. We see no merit in the above contentions. Admittedly, there is no provision in the entire 1993 scheme as amended on 6/7/1994 requiring the existing unit to avail the incentives proportionate to the finished products attributable to the newly acquired fixed assets. In fact, unlike in the 1988 scheme, where the basis for grant of incentives was increase in the installed capacity, in the 1993 scheme, the basis for grant of incentives is acquisition of new fixed assets and not increase in the production capacity. If increase in the production capacity is not the criteria for grant of incentives under the 1993 scheme, then there is no question of availing the quantum of incentives under the 1993 scheme proportionately to the products attributable to the newly acquired fixed

assets. In the present case, admittedly, the acquisition of new fixed assets has not resulted in increase in the production capacity of the existing unit. In such a case, the question of availing the incentives on the finished products attributable to the newly acquired fixed assets does not arise at all.

20. It is pertinent to note that para 3.8 I (i)(c) as it stood originally, did provide for availing the incentives by a unit acquiring new fixed assets outside the project scheme on proportionate basis. However, that para has been substituted with effect from 6/7/1994 and in the newly substituted para 3.8 I(i)(c) the provision for availing the incentives on proportionate basis has been completely omitted. Thus, the 1993 scheme as amended in 1994 makes a specific departure from the earlier schemes and provides for availing the incentives not on the proportionate basis but on the total production of the Existing Unit. In these circumstances, imposing conditions for availing the incentives on prorata basis would be contrary to the 1993 scheme of incentives.

21. It is, however, contended by the learned A.G.P. that since the incentives as per para 5.1 (I)(A)(iii) of the 1993 scheme are available on the finished products and definition of the term 'finished products' contained in para 3.6 of the 1993 scheme read with Rule 31B of the Bombay Sales Tax Rules, 1959, ('BST Rules' for short) require every unit to maintain separate books of account in respect of the finished products, it is abundantly clear that the incentives under the 1993 scheme are to be availed on the finished products attributable to the newly acquired capital assets and, therefore, in the absence of any possibility of maintaining books of account for identification of the finished products attributable to the newly acquired fixed assets, the Dy. Commissioner was justified in incorporating the impugned conditions in the Entitlement Certificate.

26. It is pertinent to note that with a view to impose ceiling on the utilization of incentives by an eligible unit under different schemes, by Finance Act, 2001 section 41BB has been inserted into the BST Act, thereby empowering the State Government to prescribe different ratios for different classes of dealers under different schemes. In the Statement of Objects & Reasons for inserting Section 41BB in the B.S.T. Act, it is clearly stated that the said Section is introduced with a view to restrict grant of incentives in proportion to the goods

manufactured in the expansion unit located in the backward areas of the State. However, for the reasons best known to the State Government, till date no Rules have been framed prescribing different ratios for different class of dealers under different schemes. In these circumstances, the argument that the Dy. Commissioner was justified in imposing ceiling on the utilization of the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets cannot be accepted.

27. It is contended by the learned A.G.P. that Section 41BB is a general provision and is not relevant in the context of availing incentives under the 1993 scheme. Relying upon the decision of the Apex Court in the case of Mahim Patram Private Limited V/s. Union of India reported in (2007) 6 VST 248 (S.C.), it is contended that even though the State Government has not framed the Rules and prescribed the ratio for availing the incentives, the Dy. Commissioner was justified in imposing ceiling for availing the incentives under the 1993 scheme on prorata basis. We see no merit in the above contention. In the case of Mahim Patram (Supra), the provisions of the C.S.T. Act clearly provided that till the Central Government frames Rule under the C.S.T. Act for determination of the turnover in relation to interstate works-contracts, determination of the turnover may be carried out by the Assessing Officer in a State in terms of the Rules made by that State Government. In the present case, neither the 1993 Scheme nor the B.S.T. Act nor the B.S.T. Rules contain a provision for availing the incentives on prorata basis. Moreover, Section 41BB inserted to the B.S.T. Act by Finance Act, 2001 specifically requires the State Government to prescribe the ratio for availing of the incentives on prorata basis and admittedly, till date the State Government has not prescribed the ratio for availing the incentives by different classes of dealers under different schemes. Thus, the decision of the Apex Court in the case of Mahim Patram Private Limited (supra) is wholly distinguishable on facts. Therefore, in the absence of any provision under the 1993 scheme and alternatively, in the absence of any ratio prescribed by the State Government by framing Rules, it was not open to the Deputy Commissioner of Sales Tax to direct the assessee to avail the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets.

65. The only argument of Mr. Sonpal is that clause 2 of the

agreement entered into with the Governor of Maharashtra Annexure 'K' dated 18th August, 1988 would enable the respondents to exercise the power as is sought to be exercised by the impugned notice. Mr. Sonpal has relied upon this clause to urge that the amendment does not impose any fresh levy, but throughout there was a ceiling of maximum production. When we repeatedly asked him as to where does he find this stipulation, Mr. Sonpal then changed track and argued that the incentives are unit based and not company based. The incentives are in respect of the eligible unit of the petitioners as approved and not for whole turnover of the unit and from every unit other than at Village Urse. The permission of the Central Government to increase production from 5 lacs to 10 lacs was not a project specific at Urse Village but petitioners specific which expanded present capacity from 5 lacs at Pimpri in Haveli Taluka to additional 5 lacs at Urse Village at Maval Taluka totaling to 10 lacs. Another expansion of two lacs is also petitioner specific and not unit specific. Therefore, the excess production over 5 lacs CKM cannot be said to be for the Urse unit. If the above argument is noted, then, implicit therein is the admission that there is no ceiling on the maximum production. Mr. Sonpal then submits, relying upon the judgment of the Hon'ble Supreme Court of India in the case of *J. K. Spinning and Weaving Mills Ltd. vs. Union of*

*India*⁷, that there could be fresh or additional levy of taxes retrospectively and such legislation can be invoked. We do not think that any of these submissions can be accepted. Even the argument on the incentives being unit specific, there has to be a specific term based on which the same can be canvassed. That is absent.

66. In the case of *J. K. Spinning* (supra), the Hon'ble Supreme Court was considering a different controversy altogether. There was no issue as the present one. Therefore, we do not think that any assistance can be derived from the principle therein.

67. Mr. Joshi is right in contending that the petitioners were entitled to defer the tax payable in the periodical returns as well as the dues on assessment as per Rule 31B/C as against the validity period of the entitlement and eligibility certificate from 1st May, 1990 to 30th April, 1995. The petitioner exhausted the financial ceiling of Rs.1,338.32 crores on 31st January, 1994. The assessing authority, while passing the order of assessment for the period 1991-92 and the appellate authority, followed Rule 31B/C. Once section 41D was inserted on 1st October, 1995, while the order of assessment was passed on 31st March, 1995, then, we do not think that against such a finalised process and assessment,

7 1987(32) ELT 234 (SC)

the amended provisions can be invoked. Mr. Joshi is right in relying upon the order passed by the Nagpur Bench of this court in Letters Patent Appeal No. 305 of 2011 decided on 24th November, 2015. In the view thereof, column 5 of the eligibility certificate cannot be relied upon. The Division Bench held thus:-

1. Heard Ms Bharti Dangre, learned Government Pleader for appellant and Mr S. P. Dharmadhikari, learned Senior Advocate for respondent at length. Perused the eligibility certificate and impugned judgment delivered by the learned single Judge.

2. Learned Government Pleader submits that augmentation in production capacity by Rs. 10 lacs ought to have been treated as an expansion and, therefore, the concession flowing from 1979 Package Scheme of Incentives is erroneously held available to the respondents. Second contention is, as the production capacity exceeded 300 MT per annum, the condition of eligibility was again breached.

3. With the assistance of respective counsel, we have perused relevant clauses. We find that expansion undertaken by respondent cannot be held to be prohibited under paragraph 5.1 of the 1979 Package Scheme of Incentives. Respondent-Unit is admittedly a New Unit and para 5.1 explains that incentive under Part-I will not be available to a Near New Unit or for Expansion/Diversification of the Existing unit. Once we find that respondent-Unit is a new unit and it is neither a near new unit nor an existing unit, the conclusion of learned single Judge that it would be impermissible to say that the respondent-Unit could not have expanded the capacity of its new unit for which exemption was granted, does not call for any interference.

4. Similarly, the other bone of contention is about annual production capacity. In Certificate issued to respondent-Unit on 5th September 1983, name of product is mentioned against column no. 5 and thereafter production capacity of 300 MT per annum has been recorded. There is nothing on record to show that production capacity was an essential term or

condition of eligibility under 1979 Package Incentive Scheme. Consideration by learned single Judge in this respect also does not show any error or perversity.

5. We, therefore, find no case made out for interference. Letters Patent Appeals are, therefore, dismissed. No costs.

68. A somewhat identical issue was dealt with by this court in the case of *Prasad Power Control* (supra) followed in the case of *Shakti Arora Expert Ltd.* (supra). Following these two judgments and applying them to a case of the present nature, which was somewhat similar to the case before us (*Rajesh Steel Industries and Anr. vs. Development Corporation of Konkan Ltd. and Anr.*⁸ decided on 12th July, 2016), the Division Bench of this court held as under:-

24. We are having completely at our disposal the legal position elucidated and set at rest by the judgment of the Division Bench of this Court in **Prasad Power Control Pvt. Ltd. and Another Vs. Commissioner of Sales Tax, Mumbai and Others**,⁹ wherein identical question of law relating to the Package Scheme of 1988 was raised.

25. In that case also, the challenge was raised to the Constitutional validity of Section 41B read with Rule 31AA to the extent, it was found repugnant to the industrial policy contained in 1988 Package Scheme. Identical arguments were advanced by these very learned counsels for parties appearing in those proceedings also. Facts of these proceedings are more or less similar to the facts of the said case. In that case also the petitioners had set up an industrial unit to manufacture electrical goods at village Mahim, Taluka Palghar, District Thane, an area declared as backward, with a view to avail of the exemption method of the assessment tax under the 1988 Scheme. The said

⁸ Writ Petition No. 3862 of 1996

⁹ (2011) 41 VST 436 (Bom.)

scheme was similar or one may even call identical with the Scheme of 1983 with which presently we are concerned. Both the schemes were introduced by the State Government with a view to achieve dispersal of industries outside the Mumbai-Pune-Thane belt. To attract these units to the under developed and developing areas, the State Government had evolved a Package Scheme of Incentives to new units set up in the developing regions.

26. In view of introduction of Rule 31AA to the Act and Rules having effect from 1st January, 1980, petitioners in that case had challenged the Constitutional validity of Section 41B and Rule 31AA by contending that the petitioners' vested right in computing the CQB as per para 2.11 of 1988 GR was prejudicially affected. It was urged that the petitioners cannot be divested retrospectively by introduction of such rules. The same line of argument, advanced in this case that, Rule 31AA is merely of the clarificatory nature and does not introduce any new method of CQB and, therefore, does not divest the petitioner therein of his vested rights, was advanced by the learned counsel for the Revenue and while dealing with this argument, it was held by Division Bench of this Court as follows:

"A plain reading of para 2.11 of the 1988 GR clearly shows that the quantum of benefits availed of by a unit covered under the 1988 scheme has to be calculated with reference to the tax that would have been payable by a unit if not covered under the 1988 Scheme on assessment at the maximum rates of tax specified under the local sales tax law as applicable from time to time.

Sales tax/purchase tax are levied on sale/purchase of certain goods at the rates specified in the Schedule to the BST Act. Where the sales/purchases are covered under the partial/total exemptions granted under the BST Act/BST Rules, then, the sales tax/purchase tax in respect of those sales/purchases becomes payable at the rates prescribed under the exemption provisions. In respect of sales/purchases covered under the exemption provisions, the rate of tax applicable is the rate of tax set out in the exemption provisions and not the rate of tax set out in the Schedule to the BST Act. Thus, computation of tax at the maximum rate arises only when the sales/purchases are covered under the exemption provisions. Where the

sales/purchases are not covered under the exemption provisions, the tax is payable at the rate prescribed under the Schedule to the BST Act and there is no question of paying taxes at the maximum rates of tax.

31. *Para 2.11 of the 1988 GR neither directly nor indirectly provides that in calculating the CQB availed of by a unit covered under the 1988 Scheme, the exemption provisions contained in the BST Act/BST Rules should be ignored. Para 2.11 of the 1988 GR provides that the notional tax liability of a unit covered under the 1988 Scheme would be the tax payable by a unit not covered under the 1988 Scheme, would be the tax determined as payable after taking into consideration the exemptions granted under the BST Act/BST Rules. Therefore, the CQB availed of by a unit covered under the 1988 Scheme, as per para 2.11 of the 1988 GR had to be computed on the basis of the tax payable by a unit not covered under the 1988 Scheme as per the provisions including the exemption provisions contained in the BST Act/BST Rules.*

32. *The expression "computed at the maximum rates of tax under the local sales tax law" clearly denotes that the computation is not referable to the rate of tax specified in the Schedule to the BST Act, but is referable to the maximum rate of tax payable in view of the exemption provisions contained under local sales tax law. By using the wider expression "local sales tax law", it is amply made clear in para 2.11 that it is the tax which is actually payable by a unit not covered under the 1988 Scheme should be the basis for calculating the CQB availed of by a unit covered under the 1988 Scheme. Para 2.11 of the 1988 GR cannot be construed to mean that the computation of tax has to be made by ignoring the exemption provisions contained in the BST Act/BST Rules. When a notification issued under section 41 of the BST Act grants partial exemption, then the tax payable pursuant to the notification is the maximum rate of tax payable on sale/purchase of goods referred to in the notification. There is nothing in para 2.11 to suggest that the tax payable by a unit in the light of notification issued under section 41 of the BST Act should not be treated as the maximum rate of tax payable under local sales tax law. As noted earlier, the Schedule*

to the BST Act does not prescribe maximum/minimum rate of tax. It is only when partial exemption is granted under the sales tax law, the question of paying tax at the maximum rate arises. In these circumstances, it is not possible to accept the contention of the Commissioner that the expression "computed at the maximum rates of tax" in para 2.11 of 1988 GR refers to the rate of tax specified in the Schedule to the BST Act and not to the rate of tax payable under the sales tax law including the exemption provisions contained in the sales tax law.

33. As noted earlier, para 2.11 of the 1988 GR refers to the tax payable by a unit not covered under the 1988 Scheme at the maximum rate of tax specified under the local sales tax law. If a unit not covered under the 1988 Scheme sells the electrical goods exclusively to a undertaking engaged in the generation and distribution of electrical energy, then the maximum rate of tax payable by that unit would be at six per cent or four per cent depending upon the period of sales/purchases, in spite of the fact that the rate of tax prescribed under the Schedule to the BST Act is 10 per cent. Similarly, if the unit which is not covered under the 1988 Scheme makes sales/purchases to the undertakings which are not engaged in the generation and distribution of electrical energy, then the exemption provisions would not be applicable and the tax payable by that unit would be at 10 per cent as per the Schedule to the BST Act. Para 2.11 of the 1988 GR neither stipulates that in determining the notional tax liability, the exemption provisions under the BST Act/BST Rules have to be ignored nor does it stipulate that the sales to the undertakings engaged in the generation and distribution of electrical energy should be treated as sales to undertakings which are not engaged in the generation and distribution of electrical energy. Therefore, in our opinion, the expression "computed at the maximum rates of tax" in para 2.11 of 1988 GR simply refers to the tax actually payable by a unit not covered under the 1988 Scheme as per the local sales tax law including the exemption provisions contained in the BST Act/BST Rules.

Once it is held that para 2.11 of the 1988 GR

provides for computation of notional tax liability on the basis of the tax actually payable by a unit not covered under the 1988 Scheme under the provisions of the sales tax law which includes the exemption provisions contained under the BST Act/BST Rules, then it would have to be held that rule 31AA inserted with effect from March 24, 1995 to the extent it directs the Commissioner to compute the CQB by ignoring the exemption provisions is bad in law. The reason being that the petitioners had established a unit in the backward area on the assurance contained in the 1988 GR to the effect that the CQB would be computed at the maximum rates specified under the local sales tax law and not at the rate specified in the Schedule to the BST Act. The said terms and conditions which forms the basis for entering into a contract between the State Government and the petitioners could not be altered retrospectively by introducing rule 31AA with effect from March 24, 1995.

27.

28.

29. Before concluding, it was further held in the said decision that,

".....we may note that the package schemes of incentives were issued by the State Government from time to time with total exemption for the period specified therein, so as to attract establishment of units in the backward areas of the State. When the package scheme of incentives itself was to operate based on the exemption granted under the sales tax law, it is difficult to envisage that in calculating the CQB, the scheme intended to ignore the exemptions available under the sales tax law. In any event, as noted above the language used in para 2.11 of the 1988 GR does not either directly or indirectly indicate that in calculating the CQB the exemption provisions contained under the sales tax law have to be ignored."

30. In the end, it was concluded that,

".....calculation of CQB availed of by a unit covered under the 1988 Scheme as per para 2.11 of the 1988 GR had to be made with reference to the tax payable by a unit not covered under the 1988 Scheme at the maximum rates of tax specified under the local sales tax, which includes the exemption provisions contained in the BST Act/BST Rules and, therefore, rule 31AA inserted to the BST Rules with effect from March 24, 1995 to the extent it provides that the calculation of CQB under the 1988 Scheme has to be made by ignoring the exemption provisions contained under the sales tax law is illegal and contrary to law."

69. Therefore, after following the above principles and applying them to the present case, we do not think that any larger question much less about the legality and validity of the provisions needs to be considered. We are of the view that the petition must succeed without examining the issue as to whether section 41D and Rule 31AAA can be held to be unconstitutional and ultra vires Articles 14 and 265 of the Constitution of India. We are of the opinion that the amended provisions cannot be invoked and applied in the present factual controversy.

70. Therefore, the writ petition succeeds. Rule is made absolute in terms of prayer clause (c).

(G.S.KULKARNI, J.)

(S.C.DHARMADHIKARI, J.)