

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.12328 OF 2016

Mahindra & Mahindra Limited
Gateway Building, Apollo Bunder
Mumbai- 400 001

...Petitioner

V/s.

1. State of Maharashtra
through the Secretary
Ministry of Finance,
Mantralaya, Mumbai-400 021.

2. The Deputy Commissioner of Sales
Nashik Division, Nashik,
Maharashtra

...Respondents

Mr.P. C. Joshi i/b Mr.Rajan Umesh Chandra Mishra and Mr.Vaibhav
Prakash Patankar for the Petitioner.

Mr.Sonpal, Special Counsel along with Mr.B.V. Samant, AGP for
Respondent Nos.1 and 2-State.

**CORAM : S.C. DHARMADHIKARI &
SMT.BHARATI H. DANGRE, JJ.**

RESERVED ON : 20th FEBRUARY 2018

PRONOUNCED ON : 14th AUGUST 2018

JUDGMENT : (Per Smt.Bharati H. Dangre,J)

1. The petitioner, a company incorporated under the
Companies Act, engaged in the manufacture and sale/resale of

automobiles and spare-parts has invoked the writ jurisdiction of this Hon'ble Court praying for quashing and setting aside the order dated 31st March 2016 passed by the Deputy Commissioner of Sales Tax, Nashik Division under Section 9(2) of the Central Sales Tax Act, 1956 read with Section 25 of the Maharashtra Value Added Tax Act, 2002 (for short 'MVAT Act') for the assessment year 2006-2007. A writ is sought to quash and set aside the said order and its retrospective effect in case of the petitioner company and it is alleged that the said order is passed without jurisdiction and also against the settled principle of law as enunciated in the various judgments delivered by this Court as well as by the Hon'ble Apex Court.

2. The petitioner company was registered as a dealer under the Bombay Sales Tax Act, 1959 and is also registered as a dealer under Section 16 of the Maharashtra Value Added Tax, 2002 (for short 'MVAT Act') and the certificate of registration came into effect from 01.04.2006. The respondent No.1 is a State of Maharashtra through the Secretary Ministry of Finance whereas respondent No.2 is an authority under the MVAT Act, 2002 and discharging the duties under the Act and the Rules made thereunder.

3. Before advertizing to the controversy involved in the present petition we would delve into the antecedent events which would be necessary to be referred to for an effective adjudication of the present Writ Petition. The existing regime of the Bombay Sales Tax Act, 1959, empowered the State Government under Section 41 to grant Tax exemption either in full or in part in public interest. The Package Scheme of Incentives are a reflection of the exercise of said powers conferred on the State Government. Section 41 read thus :-

“Section 41-Exemptions-Subject to such conditions as it may impose, the State Government may, if it is necessary so to do in the public interest, by notification in the Official Gazette, exempt any specified class of sales or purchases from payment of the whole or any part of any tax payable under the provisions of this Act (any notification issued under this section may be issued so as to be retrospective to any date not earlier than the 1st January 1960.”

The State Government to encourage the dispersal of the industries to the less developed areas of the State by making provision for grant of incentives on Sales Tax to the eligible units either by way of exemption or deferral of Sales Tax payable on the finished products. The Package Scheme of Incentives was introduced for the first time by the Government of Maharashtra and

was known as Package Scheme of Incentives, 1964 so as to encourage dispersal of the industries to less developed areas of the State, in the form of incentives of the Sales Tax to the eligible units. The quantum of sales tax incentives was spread over for a period of 15 years as determined based on the quantum of eligible gross fixed capital investment. The said Package Scheme of Incentives came to be suitably amended in 1969, 1973, 1976, 1979, and 1983. On 30.09.1988 a new Package Scheme of Incentives was introduced with a view to rationalize the scope, scale and mode of release of incentives and accelerate the dispersal of industries from the developed areas of the State to the undeveloped regions. This scheme was again amended by notifying another scheme on 07.05.1993 and was known as Package Scheme of Incentives of 1993.

Under the Package Scheme of Incentives of 1988 the area of the State was classified into groups. Group-A comprised of developed areas, where no incentives were available, Group-B comprised of areas where some development had already taken place. Group-C areas were those areas which were less developed than those in Group-B; Group-D were the least developed areas not covered by Group-A, B and C and “No Industry Districts”, as notified by the Government of India. The salient feature of the said scheme

provided that the existing/new units in the areas covered by Group B,C,D or No Industry Districts which were created on or after 01.10.1988, additional fixed capital investment for the additional production or manufacturing facilities either for the manufacture of the same product or for diversification were eligible for incentives subject to a minimum stipulated threshold of additional fixed capital investment. The requirement of the additional fixed capital investment stipulated that it should exceed 25% of the gross fixed capital investment and in case of expansion, the additional fixed capital investment had to result in an increase of the existing installed capacity by at least 25%. The expression "Sales Tax liability" was assigned a definite connotation under the scheme to include sales tax/additional tax/turnover Tax payable by the eligible unit on the sale of finished products. The Sales Tax incentives under the scheme could be available by way of exemption or by way of deferral which was admissible to a new unit/pioneer unit as also in the case of expansion or diversification of units set up in Groups B,C or D or No Industry Districts. An exemption was available in respect of Sales Tax payable under the Bombay Sales Tax Act, 1959 on the sale of finished products for the eligible unit. The quantum of sales tax incentives was prescribed under the said scheme and for eligible units undertaking expansion or diversification, the quantum

was linked to a proportion of fixed capital investment and was limited to a stipulated period.

4. The Package Scheme of Incentives of 1988 was succeeded by a scheme of 1993 and the object of this scheme was to achieve a dispersal of industries outside Bombay-Thane-Pune belt and attract them to the underdeveloped and developing areas of the State, particularly, regions away from Bombay-Thane-Pune belt. The coverage of the scheme extended to the eligible units in the industries set out in first schedule of the (Industries Development and Regulation Act, 1951) as amended from time to time as well as industries falling within the preview of small scale industries board, coir board, silk board, khadi and village industries board etc., hotel poultry and agro industries and cold storage. The said scheme was to operate for a period of 5 years from 01.10.1993 to 30.09.1988. The concerned District Industries Center (DIC) were appointed as implementing agencies for the purpose of implementation of the scheme. Under the said scheme a pioneer unit was defined as a unit to mean and include a large scale new unit set up or large scale fixed capital investment made by existing unit after 01.10.1993 in Group B/C/D/D+ areas for which at least one final effective step is taken after 01.10.1993 subject to the following requirements:-

(a) A new unit with fixed capital investment exceeding Rs.100 Crore in Group B area or Rs.30 Crore in Group C Area or Rs.15 Crore in Group D area or Rs.5 Crore in Group D+ area been set up as the first unit in point of time in a Taluka where there is, as on 01st October 1993, no such existing unit or;

(b) A new unit be setup with or an existing unit undertaking in the same Taluka, fixed capital investment exceeding Rs.300 Crore in Group B or Rs.60 Crore in Group C or Rs.30 Crore in Group D or Rs.10 Crore in Group D+ area.

The sales tax incentives were taxable to a new/pioneer/precipitous unit set up in Group B/C/D/D+ area and they were admissible by way of exemption/deferral/interest free unsecured loan. The quantum of Sales Tax incentives were specifically carved out in respect of the medium scale/large scale units as well as applicable to the small scale industrial units based on where it is a pioneer or a non-pioneer unit. The Gross Fixed Capital Investment was defined in para 3.8 (I)(i)(c) of the scheme which read thus :-

“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 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.”

5. The above paragraph came to be amended by a Government Resolution dated 06.07.1994 and the word “proportionate” came to be deleted. As a necessary sequel, it was stipulated that an acquisition of new fixed assets outside the project scheme accepted by the implementing agency could be considered for incentives other than special capital incentives, if the acquisition was not less than 25% of the gross fixed capital investment. However, for the purposes of sales tax benefits, quantum of entitlement would be limited to 75% of that which is admissible to a new unit. Existing units were also held entitled for benefits of the said scheme.

On 17.01.1998 a circular was issued by the Commissioner of Sales Tax, which stipulated that under the scheme

of 1993, incentives would be given in proportion of the expansion capacity to the total capacity or the investment ratio of new fixed capital investment to the total gross fixed capital investment after the expansion/investment and not on the entire production of an eligible unit covered under such category.

Section 41BB came to be introduced on 27.03.2001 by Maharashtra Act No.22 of 2001 which reads thus :-

“41BB-Proportionate incentives to an Eligible Unit in certain contingencies – (1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit, to whom the Eligibility certificate has been granted, shall be eligible to draw the benefits in the current year or in any year, whether preceding or succeeding the date of commencement of section 12 of the Maharashtra Act 22 of 2001, only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratios may be prescribed for different classes of dealers and different schemes.

(2) The benefits availed of by an Eligible Unit in contravention of sub-section (1), if any, shall be and shall be deemed to have been withdrawn and such unit shall be liable to pay tax in respect of the turnover of sales and purchases in excess of the turnover arrived at under sub-

section (1) and accordingly any benefit which is withdrawn shall be arrears of tax as provided in subsection.

(3) For recovery of arrears of tax as provided in subsection (2), the Commissioner shall require the unit, by order in writing, to pay the tax, interest and penalty on such turnover on which the benefits are not available and serve on the dealer notice of demand accordingly;

Provided that, no order under this section shall be passed without giving the dealer a reasonable opportunity of being heard.

Explanation-For the purposes of the provisions contained in Section 41BA and 41BB the terms “Existing Unit, Eligible Unit, implementing agency, Eligibility Certificate and Certificate of Entitlement” shall have the same meaning as provided in the relevant Package Scheme of Incentives.”

6. It is noted that the MVAT Act, 2002 came to be enacted by the State legislature and it came into force in the State of Maharashtra from 1.04.2005, which repealed the Bombay Sales Tax Act. Section 8(4) of the said act empowered the Government to provide for exemption for payment of whole of tax in respect of class or classes or sales of goods effected by unit holding as defined in Section 88 to whom the incentives are granted under the Package Scheme of Incentives, by way of exemption of payment of Tax.

Chapter-XIV of the MVAT Act contained provision in regard to the Package Scheme of Incentives and it defines the terms “Certificate of Entitlement” and “Eligibility Certificate”. The expression Package Scheme of Incentives included the 1988 and 1993 schemes. The Section 89 stipulated that where an eligibility certificate has been recommended by the implementing agencies under any Package Scheme of Incentives such eligible unit may apply for grant of entitlement certificate to the Commissioner who was empowered to grant such a certificate. Section 93(1) provided for proportionate incentives to an eligible unit on certain contingencies. Section 93(1) reads thus :-

“93. Proportionate incentives to an Eligible Unit in certain contingencies:-

(1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit to whom the Eligibility Certificate has been granted, shall be eligible to draw the benefits in any year, after the appointed day, only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratio may be prescribed for different classes of units and different schemes.”

7. The provisions of sub-section (1) of section 93 came to

be substituted by Maharashtra Act No.22 of 2009 and Section (3) of the amending Act provided that Sub-Section (1) of Section 91, as originally enacted shall be substituted by sub-section (1), (1A) and (1B) and shall be deemed to have been substituted sub-section (1), (1A) and (1B) of Section 93 read thus :-

“(1A) In case where the Eligible Unit has-

(a) maintained separate accounts of sales and purchase and is able to identify the sales and purchases pertaining to the increase in the production capacity or, as the case may be, the said eligible investment, then the portion of the turnover eligible for benefits will be decided solely on the basis of such identification;

(b) not maintained separate accounts of sales and purchases and is not able to identify the sales and purchases in relation to increase in the production capacity or, as the case may be, the said eligible investment, then such benefits shall be calculated after applying the formula in sub-clause (i) or, as the case may be, sub-clause (ii) given as under :-

(i) in case where there is increase in production capacity, then for the Package Scheme of Incentives for 1998, or, as the case may be, Package Scheme of Incentives for 1993, the formula shall be as below :-

$$\text{Eligible Turnover} = \frac{\text{Turnover} \times \text{Increase in production capacity}}{\text{Total production capacity after such increase.}}$$

(ii) in case where there is no increase in production capacity, then for the Package Scheme of

Incentives for 1993, the formula shall be as below :-

$$\text{Eligible Turnover} = \frac{\text{Turnover} \times \text{New Fixed Capital Investment}}{\text{Total gross fixed capital investments}}$$

(1B) When the eligible turnover comprises of multiple finished products, then-

(a) the production capacity of each of the finished products shall be separately considered in determining the corresponding eligible turnover, and

(b) eligible turnover shall relate to those products on which the eligible investment has made impact and when eligible investment does not add to production capacity, then it shall apply to all the finished products.

8. At the same time Section 93A came to be inserted to provide Section 93 shall apply to all eligible units, to whom eligible certificate and certificates of entitlement have been issued under any of the Package Scheme of Incentives if such certificates have been issued on or before the appointed date i.e. 1.04.2005.

The said enactment contained Section 94(2) which provided that notwithstanding anything to the contrary contended in the Act or in the Rules or in any part of the Package Scheme of Incentives, the eligible unit to whom an entitlement certificate has been granted for availing incentives by way of deferment of Sales Tax or Purchase Tax as the case may be, pay in respect of the any of periods during which the certificate is valid, prematurely in the place of amount of tax deferred by it, an amount equal to the net

value of the deferred tax and on making such a payment the deferred tax shall be deemed in the public interest to have been paid.

According to Section 93, notwithstanding, anything to the contrary contained in any Package Scheme of Incentives, an eligible unit shall be eligible to draw the benefits only that part of turnover of Sales and Purchases as may be arrived at by applying ratio prescribed by the State Government to the total turnover of Sales and Purchases of the said unit. The said section came to be substituted with a retrospective effect and we have already reproduced the said amendment, where the State Government had prescribed the formula for claiming the incentives by the eligible unit dependent on the increase in the production capacity. Apart from prescribing a manner of a computation, Section 93 of MVAT Act also provided for interest/penalty in case of wrongful utilization. The impact of the said amended provision is the cause of action for the present petitioner to approach this Court.

9. The validity of the said amending Act No.22 of 2009 was called in question in a bunch of petitions before this Court by invoking writ jurisdiction under Article 226 of the Constitution of India in case of *M/s.Jindal Poly Films V/s. State of Maharashtra* The

said amendment was challenged in the backdrop of the power of the legislature to enact the legislation with a retrospective effect and it was a specific submission that the retrospective effect was not in respect of the tax but it was in respect of an incentive scheme. It was submitted that the State legislature by the amendment has sought to collect a tax after the petitioner had availed the benefit of the exemption and passed on the benefit and therefore it was unreasonable since assessee was not able to collect the tax from the customer because of the exemption granted earlier. It was also urged that the said amendment was bad on account of the fact that the assessee would be liable to pay not only the tax but also interest and penalty which was held to be violative of Article 14 and 19(1) (g) of the Constitution. As against this the specific stand of the State Government was that the Package Scheme of Incentives, 1993 was specifically amended on 6.07.1994 and a conscious decision was taken not to provide for proportionality. The State Government also clarified that an enabling provision in form of Section 41BB was already introduced in the Bombay Sales Tax Act, 1959 in the year 2001 but the said provision was not invoked by framing the rules and infact the Sales Tax Department had attempted, by way of administrative decision to impose a norm of proportionality which came to be stuck down by this Court. On consideration of the

gamut of the matter, the Division bench did not find favour with the challenge to the constitutional validity of the Maharashtra Act No.22 of 2009 and arrived at a conclusion that the legislature has not transgressed the limitations on its constitutional powers while enacting the validating legislation. However, as far as sub-section (2) of Section 93 enactment was concerned which proposed to include a penalty and interest, it was held to be operating harshly and to that extent it was directed to operate prospectively. Thus, it was in the year 2013 that this Court had already tested the validity of the Maharashtra Value Tax (Levy and Amendment) Act, 2009 and has upheld the same which validated Section 93 with a retrospective effect from 1.04.2005. By virtue of the said provision any eligible unit to whom the eligibility certificate and the entitlement certificate has been granted before the appointed date, he would be entitled to draw the benefits only on that part of its turnover of sales/purchases as may be arrived by applying the provisions of sub-section (1) to the total turnover of sales and purchases and the eligible turnover was to be calculated by taking into consideration the turnover in proportion to the increase in production capacity in its proportion to the total production capacity after such increase. The said judgment delivered by this Court was carried to the Hon'ble Apex Court and the Hon'ble Apex Court by judgment delivered on 08.03.2017 in

Eurotex Industries and Exports Limited and Another V/s. State of Maharashtra and Anr.¹ as proved the view of the Hon'ble Division Bench of the Bombay High Court and dismissed the Appeal assailing the said judgment. By the said judgment the issue as to whether Section 93(1) of the MVAT Act could be given a retrospective effect has been put to rest. The position of law which thus emerges from the aforesaid judgment is that all the eligible units to whom the eligibility certificates and certificates of entitlement have been issued under any of the Package Scheme of Incentives, even certificates have been issued on or before the appointed date i.e. 1.04.2005 then the benefits permitted to be withdrawn would be proportionate to the increase in the production capacity and would render a person liable for assessment and claim of exemption on pro-rata basis and this is to be so construed to be on the statue book from 1.04.2005.

10. A brief chronology of events, leading to filing of Writ Petition as culled out, from the statement of facts as set out in the Writ Petition is narrated in the subsequent paragraphs. The petitioner a company registered under the provisions of the Sales Tax Act and later on under the MVAT Act has sought to derive

1 2017 SCC Online SC 608 Civil Appeal No.4491 of 2016

benefit of the Package Scheme of Incentives of 1993 formulated by the State Government. The State Government in order to encourage the dispersal of industries in the Backward area of the State and in the existing regime of the Bombay Sales Tax Act has floated schemes in the form of Package Incentives, thereby exempting the eligible units from being burdened with the liability to pay Sales Tax either by way of deferral or by way of complete exemption. The petitioner submits that it acted upon the stipulations as contained in the 1993 Scheme by extending the existing unit in the Backward area of the State, for which the eligibility certificate was issued in its favour by the implementing agency namely State Industrial and Investment Corporation (for short referred to as "SICOM") on 21st July 1999 with financial ceiling of Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only) to be deferred during the period from 01.09.1999 to 31.08.2013. The petitioner was also issued an entitlement certificate on 26.08.1999 and according to the paragraph 3 thereof, the petitioner was entitled to defer Sales Tax liability as per returns/assessment pertaining to the validity period mentioned in the certificate. According to the petitioner none of the conditions referred to the production capacity to be maintained or to be enhanced. It is specific case of the petitioner as set out in the petition that it availed incentives,

referred in the scheme as the Sales Tax liability, through the returns submitted periodically by deferring the Sales Tax payable on the sale of finished products in terms of the proportion to 78.32% of the total production and discharged liability by making payment for the remaining percentage as was reflected in the return submitted by it. The petitioner has placed on record the details of the amount deferred by it from 1999-2000 and it has submitted a statement which is annexed to the petition. The figures stated therein, according to the petitioner for each year are in accordance with the orders of assessment, conforming strictly to the proportion of tax dues deferred in accordance with the Package Scheme of Incentives 1993 and in terms of the entitlement certificate. According to the petitioner, the financial ceiling of the quantum was exhausted in March 2008 that is much prior to the end of the validity period of entitlement certificate that is 31.03.2013. According to the petitioner it complied with all the conditions and procedure under the scheme during the operative period of the eligibility certificate and since scheme provided repayment of the amount deferred after period of 10 years for the end of the operative period by five annual equal installments, that was also complied with by the petitioner for the first three years commencing from 1999-2000 to 2001-2002 as per the amended rule and for the rest of the period the repayments

were made in terms of the certificate.

11. As per the petition, in the year 2002 the petitioner established a new unit for manufacturing of vehicles under the brand name “Scorpio” and for this new unit he obtained a separate entitlement and eligibility certificate from the appropriate authority with the validity period commencing from 01-10-2002 and ending on 30th September 2016. The eligibility certificate for the second unit as well as the entitlement certificate did not contain any stipulation about the manner to be adopted by the petitioner for enjoying the deferred option on proportionate basis because under the said scheme, the petitioner was entitled to get deferral of 100% “Sales Tax Liability” for the period of 14 years. In terms of the said scheme, the petitioner while submitting its periodical returns deferred the entire amount due for the period in question and it is specific case of the petitioner that the Assessing Officer approved the deferral of tax for that unit by passing the periodical orders of assessment. The quantum of amount to be deferred for the second unit was scaled at Rs.880,49,94,000/- (Rupees Eight Hundred Eighty Crores Forty-nine Lakhs Ninety-four Thousand) and the petitioner submitted periodical returns after deferring Sales Tax liability which were approved by the Assessing Authority who

passed the orders of assessment, separately for that unit for the financial year 2002-2003 to 2008-2009. The petitioner has given the details of the quantum of amount deferred and confirmed in the respective orders of assessment by annexing a tabular form in support of its submission.

The petitioner is aggrieved by the change of mode of availment of the benefits and it is stated in the petition that the Maharashtra Act No.22 of 2009 dated 16.12.2009 introduced an entirely new mechanism of computing the quantum of incentives enjoyed, to the increase in the production capacity, which parameter was introduced for the first time and it is the case of the petitioner that it was never contemplated in the original as well as amended 1993 Package Scheme of Incentives. The grievance of the petitioner is that by amending Section 93 of the MVAT Act the rights which are vested in the petitioner are snatched away with retrospective effect causing irreparable loss to the petitioner. According to the petitioner it has established his unit in the backward areas based on the representation made by the State Government and complied with the provisions of law before the amendment was effected and the action of the State Government in going back on its representation, as being contrary to the spirit of the scheme under which the petitioner has availed the benefit. The petitioner's specific

case is that it sought expansion of its unit on the basis of the benefits that were declared under the Package Scheme of Incentives 1993. However, the amended Section 93 of MVAT Act deprived it of the said benefits and therefore the petitioner has approached this Court challenging the reopening of the assessments of the petitioners where it has already enjoyed the tax benefit by deferring it as contemplated by the Package Scheme of Incentives, 1993. As per the petitioner in view of the retrospective amendment to section 93 of the Act the taxes paid by the petitioner during the period 2006-2007 in accordance with the scheme and terms of the eligibility certificate, deemed to have fallen short and is fastened with consequential liability and interest.

12. Similarly, the part of incentive that remains to be enjoyed by the petitioner subsequent to 31.03.2008 that is the latter period during which the petitioner paid taxes in full would be deemed as excess payment and incentive availed at revised proportion would be availed by the petitioner as refund. However, the petitioner is deprived of the benefit and thus the submission of the petitioner is that by the impugned action taken in exercise of power of review under Section 25 of the MVAT Act, the petitioner is divested of the benefits conferred on it by the Package Scheme of

Incentives 1993. The petitioner would therefore, rely upon the principle of promissory estoppel and sets out a case that the petitioner acted on the promise contained in the form of the Package Scheme of Incentives floated by the State Government and it had resulted in creation of the legal relationship, which would bind both the parties and now it is not permissible for the State Government to go back on the promise contained in the form of Package Scheme of Incentives. The contention raised is that once the Government made the promise and the petitioner has acted upon such promise extended the unit and altered its position, then, the Government is bound to abide by the same. The petitioner submits that it has established its unit in the backward area, based on the representation made by the State and it complied with all the requirements as per law which were in existence prior to the amendment and now the State turning back on its representation in form of the modified scheme has deprived the petitioner of the benefits accruing to its unit in form of the promise given by the State and thus it alleges that the amendment to the scheme which introduced a completely new mechanism is hit by the principle of promissory estoppel. According to it the impugned action was never contemplated under the scheme floated by the State of Government, which encouraged the petitioner to establish the unit in the remote

backward area and subsequently expand the same on an understanding as reflected in the scheme granting benefits of incentives in terms of the said scheme. However, the entire mechanism now stands replaced by making the incentives proportional to the investments made which is contrary to the original scheme. The petitioner would submit that the exercise of power of review by Deputy Commissioner of Sales Tax in recomputing the quantum of deferment is erroneous. As per the petition, the petitioner has claimed deferment of tax for both the units for assessment year 2006-2007, in accordance with the Package Scheme of Incentives 1993 as amended in 1999 and strictly as monetary ceiling specified in the eligibility certificate and also in the entitlement certificate in terms of the approved ratio specified in the certificate issued for first unit and the grievance raised by the petitioner is that the tax demand as raised in the review order is erroneous and the deferment amount in terms of the original assessment order be restored.

13. The petitioner is aggrieved by the retrospective amendment to Section 93 of the MVAT Act and according to it the same prescribed an entirely new mechanism for determining the quantum of deferral amount as incentives under the package

scheme of 1993 which is not in accordance with scheme announced by the Government Resolution dated 07.05.1993. The petitioner submits that the scheme never contemplated the quantum of incentives to be based on the increase in the production capacity. It is the specific case of the petitioner that it had acted upon the scheme which was floated by the Government and while the scheme was in existence with its purpose to encourage the industrial units, it expanded his existing unit in the backward area for which the eligibility certificate was issued by the implementing agency namely M/s.SICOM Ltd on 21.07.1999 with the financial ceiling of Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only) to be deferred during the period from 01-09-1999 to 31-08-2013. According to the petitioner, consequent to the issue of the eligibility certificate, respondent issued an entitlement certificate on 26.08.1999. As per paragraph 3 of the certificate, the petitioner was entitled to defer the Sales Tax liability as per the returns/assessment pertaining to the validity period mentioned in the certificate and none of the conditions made any reference to the production capacity to be maintained or enhanced by the petitioner. According to the petitioner it availed the incentives, referred in the scheme qua the Sales Tax liability, through returns submitted periodically by deferring the Sales Tax

payable on the sale of finished products in terms of proportion of 78.32% of the total production and discharged its liability by making the payments for remaining percentage as reflected in the returns. The petitioner has given the details of the amount deferred by him from 1999-2000 which reflect the periodical orders of assessments for each year, confirming the proportion of tax dues which were deferred, strictly in accordance with the entitlement certificate. According to the petitioner the financial ceiling of the quantum got exhausted in March 2008 i.e. much prior to the end of the validity period of the eligibility certificate ending on 31.08.2013. According to the petitioner he complied with all the conditions and the procedure prescribed under the scheme during the operative period of eligible certificate. The scheme which contemplated repayment of the amount deferred, after period of 10 years from the end of operative period by five equal installments which was complied by the petitioner for first three years i.e. 1999-2000, 2001-2002 as per the amended rule and for rest of the period, the repayment due as per repayment order were made. In the year 2002, the petitioner established a new unit for manufacturing vehicles under the brand name "Scorpio" for which separate entitlement and eligibility certificates were procured. The said certificate granted validity period to the new unit from 01.10.2002

to 30.09.2016. Unlike the first unit the eligibility certificate for the second units as well as entitlement certificate did not contain any endorsement of the manner to be adopted by the petitioner for enjoying the deferred option of any proportionate basis because according to the petitioner under the existing scheme the petitioner was entitled to avail 100% deferral of Sales Tax liability for the period of 14 years. Accordingly, the petitioner while submitting its periodical returns deferred the entire amount due for the period in question and the assessing officer for that units also approved the deferral by passing an assessment order. The quantum of amount to be deferred for the second unit was mentioned at rate of Rs.880,49,94,000/- (Rupees Eight Hundred Eighty Crores Fortynine Lakhs, Ninetyfour Thousand). For the second unit also the petitioner continued to submit periodical returns after deferring Sales Tax Liability which according to the petitioner was approved by the Assessing Authorities who passed the assessment order separately for past units for the financial year 2002-2003 to 2008-2009. The quantum amount deferred and confirmed in the respective orders of assessment are specifically reflected by the petitioner along with the tables that have been compiled in a statement form annexed to the petition.

14. In support of the petition we have heard learned Advocate Mr.Joshi who would criticize the retrospective amendment of Section 93 of the MVAT Act and he would submit that in light of the retrospective amendment to Section 93, the Taxes paid by the petitioner during the period from 2006-2007 in accordance with the scheme and in terms of the eligibility certificates have been held to be deficit and deemed to be short paid with the consequential liability fastened on the petitioner to pay the interest. According to Mr.Joshi as far as the first unit is concerned, the quantum of financial ceiling having been exhausted, the petitioner made payment of tax for all their sale transaction from 01.04.2008 as an ordinary normal dealer and that was also confirmed by the Assessing Authority while passing the orders of the assessment for all the financial year preceding 2008-2009. After reaching the financial ceiling for the first unit, according to Mr.Joshi the respondent No.2 i.e. Deputy Commissioner of Sales Tax (Refund and Audit) proposed to revise the orders of the assessment by issuing a notice of 02.02.2012, which was objected by the petitioner. It has the submission of Mr.Joshi that the scheme of deferral permitted the unit to defer the collection of tax and pay the same in installments. According to him the unit established by the petitioner, him which was pioneer unit, which was issued the

eligibility certificate on 27.07.1999, by which the maximum entitlement of Sales Tax Incentives by deferral was not to exceed to Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only) and it was valid period of 14 years commencing from 01-09-1999 to 31-08-2013 and it came into effect from 01-09-1999. Mr.Joshi would submit that the eligibility certificate clearly mentioned that it is issued for additional fixed capital investment of Rs.33395.83 lakhs in the capacity as a pioneer unit. Mr.Joshi would thus submit that since the pioneer unit which the petitioner had established had already availed the benefits in view of the entitlement certificate with effect from 01-09-1999, the amended Section 93 do not apply to it. He would submit that it was the SICOM which had the right to carry out full inspection of the eligible unit and for its properties, assets, accounts, records, registers etc., as it deemed fit and therefore it could not have been deprived of the benefits conferred upon it by SICOM which had a power of review/monitoring the incentives availed by the petitioners unit every year. He would submit that the Deputy Commissioner of Sales Tax had passed an order on 26-08-1999, thereby certifying the petitioner, a registered dealer under Rule 31B of the Bombay Sales Tax Act in respect of its eligible Industrial Unit to defer the Sales Tax Liability as per the returns/assessment

pertaining to the period from 01.09.1999 to 31.08.2013 in terms of the eligibility certificate.

Mr.Joshi would invite our attention to the specific clause contained in the said certificate issued by the Deputy Commissioner of Sales tax (Incentives on Enforcement), Maharashtra State, Mumbai on 26.08.1999, and the following terms and conditions :-

“(i) If the holder of the certificate contravenes any of the provision of the Act or the Rules made thereunder or fails to use the goods in accordance with the terms of the declaration/certificates furnished by him, or contravenes any of the conditions of 1993 Package scheme then this certificate is liable for cancellation.

(j) This certificate shall not be valid and shall be automatically cancelled on happening of any of the events namely;

(i) The period from 01.09.1999 to 31.08.2013 expires or;

(ii) The monitory ceiling of benefits at Rs.267,16,66,000/- gets exhausted.

(k) The certificate is valid for the benefits maximum to the extent of Rs.267,16,66,000/-. (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only).

(l) The certificate is valid for the products and capacities enumerated below and pertaining to the investments related to this certificate (namely in Expansion) specified in column 2 and 4 respectively of the table given below :-

Sr. No.	Product		Capacity
1	2		3
1.	Armade/Commandar/Utility (Single/Double Cab) Vehicles	Existing Proposed for Expn. Total After expn.	31250 Nos.p.a. 18250 Nos.p.a. 49500 Nos.p.a.

(m) It is seen that the investment is made for expansion from 01.04.1995 onwards at Rs.333.95 Crores in the existing Unit having a gross block of Fixed Capital Assets as on 31.03.95 which stood at Rs.92.40 Crores. In terms of provisions of the 1993 Package Scheme of Incentives, on the pro-rata basis of Investments i.e.

Rs.333.95 Crores	=	<u>Investment in expansion</u>	=	78.32%
Rs.426.35 Crores		Total Investment after expansion		

the production at 78.32% of the total production shall alone be eligible for the benefits of deferral whereas in respect of 21.68 of the total production, the Unit has to discharge the tax liability on proata basis of investment indicated above. This option of investment for prorata basis is claimed by the Unit.

15. Mr.Joshi would place reliance on the judgment of this Court in case of *Finolex Cables and Another V/s. State of Maharashtra*². He would submit that the Division Bench of this Court, while dealing with Section 41D of the Bombay Sales Tax Act inserted with a retrospective effect by Maharashtra Tax Laws (Levy and Amendment), Act, 1995 has held that 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 proposing to revise the order of assessment in totally disregard to the same cannot be sustained. It is contended by Shri.Joshi that the Division Bench specifically held that when there was a promise contained in the Package Scheme of Incentives,

² 2017 (97) VST 349(Bom)

which can be culled out from the various terms and conditions and the petitioners has availed the Sales Tax incentives during the relevant period and the period has not expired nor the quantum fixed has been achieved, in that contingency, the revisional powers could not have been exercised by the Additional Commissioner to restrict it to the production capacity, when it was never envisaged by the Package Scheme of Incentives and the dealer was held to be entitled to defer the tax payable in the periodical returns as well as dues on assessment as against the period of entitlement and eligibility certificate. Shri.Joshi would also heavily rely on the judgment of this Court in case of *Rajesh Steel Industries V/s. Development Corporation of Kokan Ltd and Ors.*³ and also on the judgment in case of *Prasad Power Control Pvt. Ltd. V/s. Commissioner of Sales Tax*⁴ while interpreting Section 41B of the Bombay sales Tax Act and the availament of the cumulative quantum of benefits. Shri. Joshi would also place reliance on the judgment of the Hon'ble Apex Court in the case of *Devi Multiplex V/s. State of Gujrat*⁵ to canvas his submission of promissory estoppel wherein the Hon'ble Apex Court held that the scheme

³ (WP No.1862 of 1996)

⁴ (2011) 41 VST-436 (Bom)

⁵ (AIR-2015-SC-2348)

which promised incentives in the form of tax holiday for a particular number of years in respect of exemption of Sales Tax, Turnover Tax, Entertainment Tax etc., which was extended for further period subject to satisfactory progress, the State Government would be bound by the principle of promissory estoppel and the petitioner entitled to full benefit and advantage of scheme.

16. We have also heard learned counsel Shri.Sonpal, appearing for the Respondent Nos.1 and 2 who would justify the impugned orders. Shri.Sonpal would submit that the petitioner is a dealer and the company incorporated the provisions of the Companies Act 1956, which is engaged in the manufacture and sale of automobiles and spare-parts thereof. According to Shri.Sonpal the petitioner was registered as a dealer under the erstwhile Bombay Sales Tax Act, 1959 as well as under the provisions of MVAT Act 2002. According to him the dealer is known to produce utility vehicles like Scorpio and Bolero, Cars, Electric Vehicles, Picks up and Commercial vehicles. According to Shri.Sonpal the Maharashtra Act No.XXII of 2009 which substituted sub-section (1) of Section 93 granted the effect of deemed substitution with effect from 01.04.2005. According to him by virtue of sub section (1) of Section 93 which was inserted with a non-obstante clause, any

eligible unit to whom the Eligibility Certificate and certificate of Entitlement have been granted on account of the increase in production capacity or acquisition of new fixed assets, shall be entitled to draw the benefit only on that part of its turnover if turnover of sales or purchases as may be arrived at by applying the provisions of sub section (1A) of section 93.

Clause (a) of sub-section (1A) of Section 93 provides for a contingency where separate accounts of sales and purchases are maintained and the unit is able to identify the sales and purchases pertaining to the increase in production capacity or the said eligible investment, then, the portion of the turnover, eligible for benefits is to be decided solely on the basis of such identification.

17. According to Mr.Sonpal, in case of petitioner company, out of the total determined taxes payable on manufactured goods namely utility vehicles, payment of taxes at the rate of 78.32% were deferred to future dates in an assessment orders for Utility Vehicles Division though on production capacity wise the ratio works out to 32.87%. However, in case of Scorpio Unit the payment of taxes is 100%, since it was a new unit with deferral to the extent of 100% and this is clear from the assessment order, considering the Scorpio Unit to be an independent Utility vehicle and being separate new

unit. According to Mr.Sonpal Scorpio vehicle is nothing but a utility vehicle and this is an expansion unit so far it related to manufacture of Scorpio Vehicle, as can be seen from the Eligibility Certificate issued by the implementing Agency. According to him the ratio of deferment of taxes in case of Utility Vehicle works out to 36.87% of total tax payable and at the rate of 44.69% of balance in the present case of Scorpio Vehicle. According to him in the assessment order these ratios have been determined at the rate of 78.32% in case of Utility Vehicle and at the rate of 100% in case of Scorpio Vehicle.

18. According to him single TIN was granted to the petitioner under the MVAT Act and separate orders of assessment came to be passed, one for Utility Division and another for Scorpio Division by the Assistant Commissioner of Sales Tax. According to him the dealers have used SAP (Systems Applications and Production), as an accounting software and it was stated that separate books of accounts are maintained. In the assessment order these ratios have been determined at the rate of 78.32% in case of Utility Vehicles and rate of 100% in case of Scorpio Vehicle. At that relevant time though the amended Section 93 was in existence that it was not given effect to and therefore, based on the records, the assessment were carried out and a notice in Form 309, prescribed

under Section 25 of the MVAT Act was issued on 02.02.2012 with the gist of the order proposed to be passed under Section 25 of the MVAT Act.

Mr.Sonpal would emphasises that the issue as regards the amended section 93 vide Maharashtra Act No.22 of 2009 is no more *res integra* and has been already decided by the Bombay High Court in the case of *M/s.Jindal Poly Films Ltd V/s. State of Maharashtra* against which a SLP came to be filed. According to him the challenge to the constitutional validity of the said Act has been turned down and it has been held that the legislature has not transgressed the limitations on its constitutional power while enacting the validating legislation. Thus, except for setting aside the penalty with a retrospective effect, the retrospective effect given to Section 93 has been upheld. Further he would submit that this Hon'ble Court in case of *Pee Vee Textile* had clearly noted that the legislative intent embodied in Section 41BB of the Bombay Sales Tax Act, 1959 which could not be effectuated in absence of rule framed by the government prescribing the ratio of grant of proportionate incentives. However, it is this anomaly which is sought to be corrected by the enactment of the Maharashtra Act 22 of 2009. He would submit that if the legislature has determined that the purpose of the Package Schemes of Incentives should or

would be achieved by allowing incentives to be computed on proportionate basis, then the legislative intent cannot be regarded as unconstitutional.

19. Shri.Sonpal would submit that the principle of promissory estoppel as sought to be invoked by the learned counsel for the petitioner would not apply in respect of the statute. He would rely on the judgment in case of *Motilal Padampat Sugar V/s. State of Uttar Pradesh*⁶ He would submit that the petitioner was granted scheme of deferral and it has already enjoyed the deferral till 2009. He would submit that the submission of the learned counsel about the exercise of power of review under Section 25 is also not sustainable.

He would place reliance on the division Bench of this Court in case of *Jindal Poly Flims Ltd and Anr. V/s. State of Maharashtra and Ors.*⁷ and the latest judgment of the Hon'ble Apex Court in case of *Eurotex Industries and Exports Ltd and Anr. V/s. State of Maharashtra and Anr.* He would also place reliance on the judgment in the case of *Shri Bakul Oil Industries and Anr.*

6 AIR 1979 SC 621

7 (2013) 5-BCR-676

*V/s. State of Gujarat and Anr.*⁸ to advance his submission of the non-applicability of the principle of promissory estoppel where tax concessions are subsequently granted by the State.

20. We have carefully perused chronology of facts unfolded before us by the learned counsel for the rival parties and also the statutory provision in relation to the Package Scheme of Incentive. The petitioner which is company incorporated under the Companies Act is *inter alia* engaged in the manufacture and sale/resale of automobiles and spare-parts and is registered as dealer with the Sales Tax Authorities in State of Maharashtra. Based on the existing Package Incentive Scheme 1993 the petitioner applied to SICOM, a competent authority under the Bombay Sales Tax Act for an eligibility certificate and by an order dated 06th October 1999, the petitioner was conferred with an eligibility certificate under the Package Incentive Scheme 1993 along with entitlement certificate issued by the Deputy Commissioner of Sales Tax, Mumbai for expansion of its Unit located at Plot No.89, MIDC, Road No.17, Satpur, District-Nashik for the manufacture of Armada, Commander, Utility (Single/Double Cab Vehicles-Additional 18250 Nos.P.A. (Total after expansion 49 Thousand 500 Nos. per annum). The

⁸ (1987)-1-SCC-31

eligibility certificate describes the petitioner as “PIONEER” unit and the capital cost of the project for the eligible unit finds mentioned as Rs.3395.83 (Rupees Three Hundred Thirty Three Crores Ninety Five Lakhs Eightythree Thousand). The maximum entitlement of the Sales Tax Incentives by way of deferral was slabbed at Rs.2671.66 Lakhs (Rupees Two Hundred Sixty Seven Crores Sixteen Lakhs Sixty Six Thousand). The validity period from the entitlement certificate was slated to be 14 years from 1.09.1999 to 31.08.2013. The eligibility certificate was subject to review/monitoring every year and was issued for additional fixed capital investment of Rs.3395.83 (Rupees Three Hundred Thirty Three Crores Ninety Five Lakhs Eightythree Thousand).

The said certificate mentioned that the period of eligibility certificate shall be automatically curtailed :-

- (i) From the point of time when the total Sales Tax Incentives admissible under the Scheme/Sales Tax Incentives as per the entitlement under the Scheme availed on/drawn exceeds the limit laid down in para 95 of the Package Incentive Scheme notified under the Government Resolution dated 07.05.1993 namely 80% of the gross value of fixed capital investment actually made subject to ceiling of 80% of Rs.3395.83 lakhs (Rupees Three Hundred Thirty Three Crores Ninety Five Lakhs Eighty Three Thousand) i.e.

Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only) or;

(ii) From the date from which the certificate was entitlement issued by the Commissioner of Sales Tax is cancelled or revoked, which were events occurred earlier.

Thus, the petitioner was granted the eligibility certificate and was held entitled to the benefits sanctioned by the Government of Maharashtra under the 1993 scheme as modified from time to time. In particular, the Sales Tax Incentives were held to be admissible by way of deferral of Sales Tax liability.

The said eligibility certificate was subjected to several terms and conditions including the condition of maintaining true and proper account of the value of raw materials purchased, finished goods manufactured/sold by the manufacturing unit, raw materials etc. according to the rate of tax applicable to the transactions. The annexures to the eligibility certificate clearly set out the class of goods/products to be manufactured by the eligible industrial unit and it was described to the following effect :-

(i) Armada/Commander/Utility (Single/Double Cab) Vehicles.

Existing 31250 Nos. per annum

Proposed for expansion 18250 Nos. per annum and

total after expansion 49500 per annum.

21. On 26.08.1999 a certificate of entitlement for availing the Sales Tax Incentives under the 1993 Package Scheme of Incentive by way of deferment of Sales Tax liability came to be issued in favour of the petitioner. The said certificate declared that subject to the provisions of the Bombay Sales Tax Act, 1959/Central Sales Tax Act 1966 and the Rules framed thereunder and also the provisions of 1993 Scheme/procedure thereunder and the conditions stipulated thereunder M/s.Mahindra and Mahindra Ltd., are permitted to defer the Sales Tax Liability as per returns/assessment pertaining to period from 01-09-1999 to 31-08-2013, covered by the eligibility certificate dated 21-07-1999 to above or for such a shorter period as may be reduced by the implementing agencies which issued the said eligibility certificate. The conditions stipulated in the said entitlement certificate, enumerated several conditions which included the condition that the deferment shall be permitted only if the holder of the certificate files the returns by the dates prescribed and also that the deferment of Sales Tax liability shall be in respect of raw material purchased and sales of goods produced in the eligibility unit for the period from 1.09.1991 to 31.08.2013. It was also stipulated that the

petitioner shall pay the entire amount as per the order to be passed under Section- 33, 35, 55, 57 or 62 of the Bombay Sales Tax Act and under Section 9 of the Central Sales Tax Act for a period not exceeding in total 10 years as computed from the last date prescribed for publishing the last return for the period of each of the assessment order passed. After that the holder of the certificate shall pay the entire amount, in equal annual installment not exceeding five such installments on expiry of tenth year. The entitlement certificate also stipulated maintenance of separate books of account by the eligible unit. The monetary ceiling permissible to the petitioner was already mentioned in the entitlement certificate and the certificate was held to be automatically cancelled on happening of any of the events namely :-

- (a) The period from 01-09-1999 to 31-08-2013 expires or;
- (b) Monetary ceiling of benefits at Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only) gets exhausted. The certificate was thus held valid for the benefits maximum to the extent of Rs.267,16,66,000/- (Rupees Two Hundred Sixtyseven Crores Sixteen Lakhs Sixtysix Thousand Only).

22. Then another important stipulation contained in the

said certificate of entitlement provided for the availment of benefits under 1993 Package Scheme of Incentives on pro-rata basis of investment and it provided that the investment is made for expansion from 01.04.1995 onwards at Rs.333.95 Crores in the existing unit having a gross block of fixed capital assets as on 31.03.1995 which stood at Rs.92.40 Crores. In terms of the provisions of 1993 Package Scheme of Incentives, on the basis of pro-rata basis of investment i.e. investment in expansion divided by total investment after expansion to be calculated at :-

$$\frac{\text{Rs.333.95 Crores}}{\text{Rs.426.35 Crores}}$$

which is equaled to 78.32%. By applying the said formula, production at 78.32% was alone held eligible for the benefits of deferral whereas in respect of 21.68 of the total production, the unit had to discharge the Tax liability on pro-rata basis of investment as indicated in the certificate. It was clarified that the option of investment of pro-rata basis was claimed by the unit itself.

23. The petitioner obtained another eligibility certificate for Sales Tax Incentives under the 1993 Scheme for its Scorpio range of Utility Vehicles which were manufactured at the same manufacturing unit located at MIDC, Satpur, Nashik. The said

eligibility certificate was granted to the petitioner by SICOM on 30th August 2002. By the said certificate, maximum entitlement of Sales Tax Incentives by way of deferral was slabbed at Rs.880,49,94,000/- (Rupees Eight Hundred Eighty Crores Forty-nine Lakhs Ninety-four Thousand). The validity period of the said certificate was for 14 years i.e. from 1.10.2002 to 30.09.2016 to be extended by three years till 120% of the FCI is reached which ever is earlier. The said certificate of eligibility also contained stipulation that it shall automatically stand curtailed :-

(a) From the point when the total Sales Tax Incentives admissible under the Scheme/Sales Tax Incentives as per entitlement under the scheme of availed on/drawn exceeds is limit laid down in para 5 of the 1993 Package Scheme of Incentive as modified by Government Resolution dated 6.07.1994 and read with provision 1 and 2(a) of the Government Resolution dated 9.07.1999 namely 130% of the gross value of fixed capital investment actually made subject to ceiling of 130% of Rs.67730.63 Lakhs i.e. Rs.880,49,94,000/- or;

(b) From the date the certificate of entitlement issued by the Commissioner of Sales Tax is cancelled or revoked, whichever events occurred earlier.

24. This certificate was also subjected to certain terms and

conditions. This was followed by a certificate of entitlement issued by the Deputy Commissioner of Sales Tax, Maharashtra State on 09.10.2002. By the said certificate the petitioner was permitted to defer the Sales Tax liability as per the returns/assessment pertaining to the period from 1.10.2002 to 30.09.2016 (14 years). This also contemplated the petitioner assessee to pay the entire amount of Sales Tax liability in equal installments not exceeding five such installments on expiry of tenth year. The said certificate was liable to be automatically cancelled on expiry of the period or on reaching the monetary ceiling of benefits whichever occurred earlier and the maximum benefits were fixed at Rs.880,49,94,000/-.

25. The petitioner was thus entitled to utilize the benefits available under the 1993 Package Scheme between 1.09.1999 to 31.08.2013 or on the exhausting the monetary ceiling, whichever occurred earlier. According to the petitioner the Nashik plant availed the incentive's in the ratio/proposal prescribed in the entitlement certificate as also the circular and exhausted the monetary ceiling in the year 2008. As per the case of the petitioner it was assessed by the Assistant Commissioner of the Sales Tax for the Financial year 2006-2007 by order dated 29.03.2011 and the assessment order confirmed the deferment amount claimed by the

petitioner. These orders passed by the Assistant Commissioner came to be rectified on 27.02.2012 and the petitioner preferred an appeal to the Deputy Commissioner of Sales Tax, Nashik Division.

26. During the happening of the aforesaid events that is when the petitioner was enjoying the Sales Tax Incentives by way of deferral, the Bombay High Court decided a reference made over to it by the Sales Tax Tribunal on the question of law as to whether the Tribunal was justified in declaring that proportionate benefits theory is not applicable to the expansion unit covered under the 1993 Package Scheme of Incentives. It is pertinent to note that the 1993 Package Scheme of Incentives was made applicable initially to the new Units/Pioneer Units established in the backward area however by virtue of para 3.8 (I)(i)(c) of 1993 scheme the New Fixed assets came to be included in the gross fixed capital investment provided such acquisition is not less than 25% of the gross fixed capital investment at the end of the previous financial year. The said clause therefore envisaged grant of proportionate incentives on the Unit acquiring new fixed assets outside the project scheme subject to the stipulation that such acquisition was not less than 25% of the gross fixed capital investment. However, the State Government by issuing a resolution substituted the said condition thereby removing the word proportionate, resultantly not only the units acquiring new

fixed assets outside the project scheme but also the existing units acquiring the new fixed assets not less than 25% of the gross fixed assets were held eligible for enjoying the incentives under the 1993 scheme irrespective of the fact that the acquisition of the new fixed assets resulted into increase in production of capacity or not. However, the quantum is limited to 75% of the incentives available to new unit. The eligible unit however is required to obtain a separate eligibility/entitlement certificate from SICOM/Sales Tax Authorities with the quantum of incentives which the existing unit is entitled to and the period within which these incentives could be availed. Thus neither para 3.8(I)(i)(c) nor any other provision under 1993 Scheme or any provision contained in BST/CST Act provided for the utilization of the incentives in each year proportionate to the finished products attributable to the fixed assets newly acquired by the existing unit. The question which the High Court was called upon to decide was whether the Sales Tax Authorities after determining the quantum of incentives and the period during which the incentives could be availed was justified in imposing a ceiling on the utilization of the incentives per year and whether it was permissible to restrict the availment of incentives proportionately to the production of the finished products attributable to the new acquired fixed assets.

27. The Hon'ble Division Bench of this Court in case of *Commissioner of Sales Tax Maharashtra State Mumbai V/s. Pee Vee Textiles Ltd., in Sales Tax Application No.8 of 2007 in the reference application No.90 of 2001*, noted that there is no provision in the entire 1993 scheme or the amended scheme requiring the existing unit to avail the benefits proportionate to the finished products and infact unlike the 1988 scheme where the basis for grant of incentive was increase in the installed capacity, in 1993 scheme, the basis for grant of incentive was acquisition of new fixed assets and not in increase in production capacity and if this was not the criteria for grant of incentives, then, there was no question of availing the quantum of incentives under the 1993 scheme proportionately to the products attributable to the newly acquired fixed assets. The Division bench also referred to the requirement of maintaining separate books of accounts under Rule 13(i)(b) of the Bombay Sales Tax Rules, 1959 and noted that since the increase in production is not the criteria under the 1993 scheme and Rule 31(b) itself provided for availing the incentives on sale of finished products manufactured by eligible unit within the prescribed monetary limit and the time limit, the Deputy Commissioner was not justified in directing that the incentives being availed on pro-

rata basis by following an artificial method which is not at all contemplated in the 1993 scheme. Resultantly, in absence of any provision of availing the incentive on pro-rata basis and specifically in light of Section 41BB inserted in the Bombay Sales Tax Act, requiring the State Government to prescribe the ratio for availing incentives on pro-rata basis and admittedly the State Government having not prescribed the ratio for availing the incentives by different classes of dealers under the different schemes, it was held that it was not open for 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 acquired fixed assets. In the result the reference was answered in the positive in favour of the assessee and against the revenue. This judgment was delivered by the High Court on 13th October 2008.

28. Section 41BB of the Bombay Sales Tax Act came to be inserted on 27.03.2001, introducing a provision of proportionate incentives to an eligible unit in certain contingencies which included a provision of making the incentives dependent on the turn over of sales and purchases to be arrived at by applying a ratio prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year. By introduction of the said provision

the benefits availed of by an eligible unit in contravention of sub-section (1) was deemed to be withdrawn and such unit was liable for payment of tax in respect of turnover of sales and purchases in respect of the turnover and the benefit which was withdrawn was directed to be recovered as a tax. The said provision was introduced with a non-obstante clause, giving effect to it inspite of existence of any provision contained in package Scheme of Incentives.

The MVAT Act, 2002 which came into force from 01.04.2005 also contained a similar provision in form of section 93 which came to be amended retrospectively, thereby directing recovery of the benefits which were availed by any unit in contravention to the Scheme of the enactment and such benefits shall be deemed to have been withdrawn, making the unit liable to pay tax including penalty and interest in respect of the turnover of sales and purchases in respect of the turnover arrived at under the old scheme.

29. The issue as regards the retrospective effect given to Section 93 of the MVAT Act has thus been put to rest by the judgment of the Hon'ble High Court as well as the Hon'ble Apex Court (Supra). In the present matter the grievance of the petitioner flows from the same issue that is the retrospective amendment from

1.04.2005 which *inter alia* provided for incentives to be proportionate as per the formula provided in Section 93 more particularly to extent benefit under the Package Scheme of Incentives 1993 proportionately as per the expansion of production capacity, when the expansion is in pursuant to the additional investment and only when there is no increase in the production capacity, the method of incentives to be calculated is on the basis of the additional investment. The whole argument of the petitioner proceeds on footing that under the 1993 scheme there was no stipulation, making the incentives dependent on the proportion of the increase in the production capacity and infact according to the petitioner the Package Scheme of Incentives of 1993 did not provide for expansion and it was only by the Government Resolution dated 06.07.1994 the addition was permitted. The case of the petitioner is that term “proportionate” came to be removed by the Government Resolution, thus not making an availment of incentives proportionate to increase in the production capacity. The petitioner being a pioneer unit claims that the entitlement certificate permitted it 78% deferral and it has filed a return and paid tax on the remaining 21% and it exhausted the financial ceiling in March 2008. According to it, the essentiality certificate permitted it to defer the payment of Sales Tax and it deferred the payment to the tune of

78.68% for period of 10 years. However, in the meantime in March 2008 the ceiling limit in terms of the entitlement certificate was achieved and the certificate got cancelled. The argument of the learned counsel for the petitioner is that the Amendment Act of 22 of 2009 is not applicable to its case since on the date of the amendment the eligibility certificate was already cancelled, in view of the contingency that has occurred as contemplated in the entitlement certificate. As per the petitioner the amendment which curtailed the incentives to be availed in proportion to the total capacity of the unit, did not apply to the petitioner at all.

The said submission is not worth consideration since Section 93(1) stood amended with retrospective effect and by the validating Act, it has been held to be on the statute book from 1.04.2005. The contention of the petitioner that there was a promise contained in Package Scheme of Incentives and it could be carved out from its various terms and condition and therefore, it could not have been curtailed in the manner in which it has sought to be done also is not a sustainable argument. By the Package Scheme of Incentives the State Government has granted a tax concession but there is no embargo to withdraw the said concession under the Package Scheme of Incentives of 1988 and 1993 which were formulated under the provisions of the Bombay Sales Tax Act.

On introduction of the MVAT Act, the Package Scheme of Incentives came to be recognized as the schemes introduced and amended from time to time. Section 93 of the said enactment came to be amended by Maharashtra Act No.22 of 2009 with a retrospective effect introducing the scheme of proportionate incentives to an eligible unit in certain contingencies. Since the benefits granted to the petitioner under the scheme formulated under a statute came to be withdrawn and the petitioner is deprived of the said benefits by another statutory amendment, the concession withdrawn cannot be said to be arbitrary. The tax exemption granted in the Package Scheme of Incentives was only by way of concession for encouraging the industries to start operating in the underdeveloped areas and since it was concession it could be withdrawn any time and the Government was fully empowered to withdraw the same. The concept of promissory estoppel would not come to the rescue of the petitioner since the exemption is withdrawn by a legislation and there can be no applicability of said doctrine to a legislative act.

There can be no promissory estoppel against the legislation and exercise of legislative function and this position in law is well settle in form of limitations to the said doctrine. In ***Motilal Padampat Sugar Mills (AIR) 1979 SC-621***, the Hon'ble Apex Court observed thus :-

“That there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel can not be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority.”

30. The learned counsel for petitioner has placed reliance on the judgment in the case of ***Devi Multiplex Vs. State of Gujarat***⁹. The said judgment dealt 'with a situation where the Government of Gujarat had announced policy' named "New Package Scheme of Incentives for Tourism Projects, 1995-2000" with a view to make

available all fiscal and non fiscal incentives, reliefs and concessions enjoyed by industries to 'Tourism' which was accorded the status of an industry, in order to give a boost to tourism sector by attracting higher investment in the areas with tourism potential and to generate employment opportunities. The scheme promised incentives in the form of Tax holiday of 5-10 years in respect of exemptions from Sales Tax, Turnover Tax, Electricity Duty, Luxury Tax and Entertainment Tax etc. It also promised an initial period of specified years for going operational in the first instance, extendable by further for a further period subject to satisfactory progress to be found by the State Level Committee. When the State Government sought to constrict the said benefits in favour of the Petitioner, who had resumed construction work in furtherance of the promise made by the State Government and the said action of the State Government was upheld by the High Court, that the matter was taken to the Hon'ble Supreme Court which observed thus:-

“19. Coming to the facts of the present case, we find that the Scheme definitely promised incentives in the form of Tax holiday of 5-10 years in respect of exemptions from Sales Tax, Turnover Tax, Electricity Duty, Luxury Tax and Entertainment Tax upto 100 per cent of capital investment if a new unit was registered after 1.8.1995 and appropriate investment in fixed

capital assets was made. It also promised an initial period of two years for going operational in the first instance, extendable by further period of two years subject to satisfactory progress to be found by the State Level Committee. Even thereafter, the Unit could still approach the State Government for further extension. This was part of the core of the Scheme, which invited investment in tourism units promising tax holiday as stated above. Based on such representation, various units including that of the appellants having come forward and altered their position, the State Government would certainly be bound by the principles of Promissory Estoppel. The State Government was thus estopped from going back on the promise so made in the Scheme and could not have curtailed the period and the opportunity specifically made available within which the project could be completed so as to avail the benefits under the Scheme.”

The said judgment is however distinguishable from the present facts where the legislature itself has super imposed itself on the benefits granted under the Package Scheme of Incentives formulated in exercise of power vested in the State Government.

This Court in the case of ***Olympic Oil Industries Ltd. Vs. State of Maharashtra***¹⁰ , has categorically held that though there can be no promissory estoppel against the legislature in exercise of its legislative functions, the provision can be assailed on

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the ground that it is violative of Article 14 of the Constitution, being unreasonable, then, in a given case depending upon the facts and circumstances of the case, for testing the reasonableness of a provision, the said principle might become relevant. However, having regard to the facts and circumstances of the case and dealing with the classification made by the legislature in withdrawing the exemption qua edible oil units only is neither arbitrary nor unreasonable. It was held that the doctrine of promissory estoppel, assuming it applies, would be displaced in such a case, because on facts equity would not require that the legislature should be held bound by the promise or representation made by the Government. In the very nature of things the taxes are imposed in the public interest and taxation is the sovereign power of the legislature and raising revenue of the State is in the public interest and therefore, it cannot be a restriction on trade or business and cannot be said to be violative of Article 19(1)(g).

31. The existing regime in view of Bombay Sales Tax Act 1959 contained a provision for exemption and it was to be found in Section 41. It is stipulated that the State Government may, if it is necessary to do so in the public interest, exempt any specified class of sales or purchases from payment of the whole or any part of any

tax payable under the provisions of this Act, subject to the conditions which it may impose. It is permissible for the Government to grant such exemption with retrospective effect not earlier than 1st January 1960. The Bombay Sales Tax Act, 1959 itself contemplated the Package Scheme of Incentives which came to be introduced by way of a notification issued under Section 41 and included by way of Entry 136 which came to be inserted with effect from 01.10.1995. It contemplated issuance of a certificate of entitlement to be granted by the Commissioner and in order to determine where the cumulative quantum of benefits received by any dealer to whom a certificate of entitlement has been granted by the Commissioner has exhausted the monetary ceiling under the Package Scheme of Incentives whether before and after the commencement of the Maharashtra Tax (Amendment) Act 1994 the Commissioner was authorized to calculate the benefits in the manner prescribed in respect of the relevant period and available under the Package Scheme of Incentives. Section 41B came to be introduced in the statute with effect from 01.05.1994. Subsequently Section 41A and 41BB came to be inserted by Maharashtra Act No.22 of 2001, which introduced a scheme of proportionate incentives to an eligible unit in certain contingencies. By insertion of Section 41BB which contained the provision similar to the one

introduced in Section 93 of the MVAT, the eligible unit to whom the eligibility certificate has been granted was held eligible to draw the benefits in the current year or in any year, whether preceding and succeeding the date of commencement of the said Section, only on that part of its turn over of sales or purchases as may be arrived by applying the ratio as may be prescribed by the State Government to the total turn over of sales and purchases of the said unit in that year and different ratio could be prescribed to different classes of units in different schemes. Thus by inserting Section 41BB and by use of the non-obstatntive clause in the said Section, the formula applied in Section 41BB was to be complied with irrespective of anything that was contained in the package scheme of incentives.

32. When under a Package Scheme of Incentives was introduced by the State Government and when it granted benefits of tax exemption either in full or partial extent, it was done in exercise of powers conferred under Section 41 of the Bombay Sales Tax Act, 1959 as well as the section itself states that the power of exemption is being conferred by the State Government in order to enable the Government to act in public interest. It was open to the Government in exercise of its powers under Section 41 of the Bombay Sales Tax Act to exempt any class of sales or purchases

from payment of whole any tax payable under the provisions of any Act. It is open to the Government to restrict the benefits to the units set up in the backward areas which are engaged in the production of same type of goods as a new unit. The exemption accorded to new manufacturing or production units set up in backward areas by way of incentives for development of industries in backward areas, promotion of dispersion of industries all over the State, and for industrialisation of and creating employment opportunities in the backward areas, has a sound economic and public policy underlying it. The tax exemption was granted so as to encourage the new industrial units to be set up in the backward areas. The package scheme of incentives therefore provided the manner in which such incentives could be enjoyed by making it subject to certain conditions. The Legislature by inserting Section 41BB in the Bombay Sales Tax Act, 1959 made the eligibility of the benefits dependant on that part of its turnover of sales or purchase as may be arrived at by applying the ratios stipulated by the State Government to the total turn over of sales and purchases of the unit in that year. Section 93 inserted in the MVAT with retrospective effect also restricted the benefits to be drawn by making it proportionate only to that part of its turnover of sales or purchases as may be arrived at by applying the provisions of sub-section 1A to

the total turnover of sales and purchases of the said unit in that year. Section 91 of the MVAT mentions that the benefits flowing from the certificate of entitlement granted to any unit under any package scheme of incentives shall be availed only in accordance with the act, rules and notifications issued thereunder. Though the package scheme of incentives were formulated by issuing the Government Resolution from time to time and it came to be amended in the like manner, it finds its source to the power conferred on the State Government by the said State Legislature in permitting exemptions, subject to the terms and conditions which the State Government was empowered to set out. The said package schemes of incentives are thus subject to the statutory scheme and the rules framed thereunder and when the statute itself was amended with retrospective effect, the benefits to be enjoyed and flowing from the package scheme of incentives must be enjoyed strictly in the manner spelled out by the statute. Section 41BB of the Bombay Sales Tax Act 1959 so also Section 93 of the MVAT begins with words "Notwithstanding anything contained in the package scheme of incentives". In such circumstances, the argument of the learned counsel for the Petitioner that it had been promised the benefits under the 1993 Package Scheme of Incentives and it is sought to be deprived of the said benefits when its

certificate of eligibility is already cancelled, for the reasons that it has already reached the monetary ceiling in the year 2008 itself and he has already enjoyed on the basis of the entitlement certificate granted to it, is not sustainable argument or sound legal. Even though some concession was conferred on the Petitioner by virtue of a scheme, it is not an absolute concession and as the package scheme of incentives was subject to amendment, it cannot be thus said that the State Government has permitted the Petitioner to enjoy the benefits absolutely without any fetters. In any contingency, the exemption benefits which the Petitioner enjoyed till the year 2009 @ 70% deferral are not sought to be completely withdrawn. The Scorpio unit of the Petitioner is a unit separate in all aspects and it enjoys 100% deferral. Under the 1993 Package Scheme, the incentives were only to be availed by the unit which has expanded its investment by more than 25%. By insertion of Section 93 with retrospective effect, the Petitioner would fall within the purview of the said Section and which has been given effect from 1.4.2005. Once the validity of Section 93 has been upheld, the Petitioner cannot be permitted to argue that he was entitled to enjoy the benefits in terms of its eligibility and entitlement certificate. The attempt of Mr.Joshi by urging that the petitioner reached the ceiling limit in 2008, hence, the amended cannot be applied to it is futile

for if that contention is upheld the sweep of the Non-obstante clause is diluted. The Package Scheme may be of 1993 but it was in force in 2005 when the MVAT regime came in. It was then governed by this regime and was subjected to it.

33. The reliance on the judgment of the Apex Court in case of *Shri.Bakul Oil Industries and Another V/s. State of Gujarat and Another*¹¹ squarely covers the stand of the state Government. In the said case the appellant had commissioned an oil mill on the basis of the notification issued by the Government committing itself to grant exemption from payment of Sales Tax and Purchase Tax to the notified industries commissioned any time after 1.04.1970 before 31.03.1975 at places beyond the prescribed distances from the Municipal Unit of the cities named in the notification. Based on the said notification the appellant commissioned an oil mill but by issuing a subsequent notification the earlier notification came to be withdrawn. Dealing with an argument that the Government by virtue of the first and second notification had irretrievably committed itself to grant exemption from payment of Sales Tax and Purchase Tax to the notified industries commissioned after 01.4.1970 before the 31.03.1975 and therefore a vested right of

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exemption was acquired and it was not open to the Government to nullify the exemption by issue a subsequent notification, the Apex Court has observed that the State Government was under no obligation. It held as under:-

“9. Viewed from another perspective, it may be noticed that the State Government was under no obligation to grant exemption from Sales tax. The appellants could not, therefore, have insisted on the State Government granting exemption to them from payment of sales tax. What consequently follows is that the exemption granted by the government was only by way of concession. Once this position emerges it goes without saying that a concession can be withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. The notifications of the government clearly manifest that the State Government had earlier granted the exemption only by way of concession and subsequently by means of the revised notification issued on July 17, 1971, the concession had been withdrawn. As the State Government was under no obligation, in any manner known to law, to grant exemption it was fully within its powers to revoke the exemption by means of a subsequent notification. This is an additional factor militating against the contentions of the appellants.”

34. Further the contention of the appellant was also found to be untenable because of the fallacy contained, in their submission as that is wrong assumption that the appellant had acquired a vested right. Their lordship observed that the High Court rightly repelled the plea of acquiring vested right and an entitlement to claim exemption from payment of tax for period of five years notwithstanding the revocation of exemption and that the

exemption granted by way of concession for encouraging entrepreneurs to start industries in rural and under developed areas and it was always open to the State Government to withdraw or revoke the concession, by means of a legislation. The principle of promissory estoppel cannot be stressed against the statute. That being so in the given case and it was sought to be done by way of notification, the appellants were held entitled to the benefit of tax exemption for a limited period during which the concession was offered by the Government.

35. The reliance is also placed by the Petitioner on the case of *Prasad Power Control Pvt. Ltd. & Anr. (supra)* to press into service the principle of promissory estoppel and it would submit that the basic principle of promissory estoppel being that a person who by some statement or representation of fact causes another to act to his detriment in reliance of such representation of it is not allowed to deny it later, even though it is wrong and the said principle is based on equity. We have considered the arguments of the learned counsel and examined the issue in the backdrop as to whether it is permissible for the Petitioner to invoke the doctrine of promissory estoppel. It is settled position that principle of estoppel does not operate at the level of Government Policy, though estoppel has been

allowed to operate against the public authorities in minor matters of formality where no question of ultra-vires arises and hence the argument of promissory estoppel needs to be repelled in the given scheme of Package Incentives.

36. The learned counsel for the petitioner has assailed the impugned order passed in review and it is an argument advanced on behalf of the petitioner that the impugned order is in excess of the jurisdiction and there was no power of review. The submission is that the original order dated 29.03.2011 was passed after detailed verification of the records of two eligible units under the existing Package Scheme of Incentives, including the sale and purchase register and after physical verification at the plant, the invocation of Section 25 of the MVAT Act by the Deputy Commissioner and passing the impugned order on unfounded assumptions of lay out of the plants and on the records and accounts, is not legally sustainable. We have carefully perused the impugned order which has been passed in exercise of powers conferred under Section 25 of the MVAT Act 2002. Section 25 reads thus :-

“(1) After any order including an order under this section or any order in appeal is passed under this Act, rules or notifications, by any officer or person

subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine whether;-

(a) any turnover of sales or purchases has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, any claim is incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so far as it is prejudicial to the interests of revenue,

and after examination, may, by serving on the dealer a notice in the prescribed form, pass an order to the best of his judgment, where necessary.

(2)(a) For the purpose of the examination and passing of the order, the Commissioner may require, by service of notice in the prescribed form, the dealer to produce or cause to be produced before him such books of accounts and other documents or evidence which he thinks necessary for the purposes aforesaid.

(b) No order under this section shall be passed after the expiry of five years from end of the year in which the order passed by the subordinate officer has been served on the dealer.”

37. A perusal of the said provision would reveal that the superior officer of the Rank of Commissioner, may on the information received or on his own motion call for the record of an

order including an order passed under Section 25 itself or any order in appeal passed under the Act, rules or notification by any officer subordinating to him and he would then examine whether any turnover of sales and purchases has not been brought to tax or has been brought to tax at a lower rate or has been incorrectly classified or any claim is incorrectly granted or the liability of tax is understated. Another ground which empowers the Commissioner to invoke the power conferred on him is when it is noticed by him that the order passed by the subordinate officer is erroneous, insofar as it is prejudicial to the interest of revenue. The assessment orders in case of the petitioner unit were passed by the Assistant Commissioner of Sales Tax and the impugned order has been passed by the Deputy Commissioner. The contention of the petitioner that the order could not have been passed by the Deputy Commissioner since he is not an authority higher in rank to that of the Assistant Commissioner is just referred to be rejected. The submission of the learned counsel is that the contingency to exercise the said power under Section 25 has not arisen in case of the petitioner and according to him the provision of clause (a) of Section (1) of Section 25 is not attracted at all as when the assessment order is passed the entitlement certificate itself did not survive and was cancelled, in view of the petitioner unit reaching the financial limit and

Clause-(b) is also not attracted since the said order cannot be set to be erroneous since it is based on the law which was in existence and based on the assessment order passed from time to time. We do not see any force in the said submission advanced by the learned counsel for the petitioner. The Deputy Commissioner of Sales Tax is an authority higher in rank than the Assistant Commissioner of Sales Tax and the authority has examined the objection raised to the exercise of the power and even during the pendency of the proceeding the petitioner had approached the High Court of Judicature at Bombay by filing a Writ Petition for quashing and setting aside the gist of the order proposed to be passed in review proceeding which came to be disposed of. The authority exercising the powers of review has clearly recorded a finding that the dealer has been granted the deferral benefits on the basis of eligible investment at the rate of 78.32% in case of utility vehicles and at the rate of 100% in case of Scorpio vehicles assuming that the dealer has maintained separate accounts of sales and purchases and is able to identify the sales and purchases pertaining to the eligible investment however at the time of visit to the manufacturing facility of the dealer, the press shop, paint shop and assembly shop was found to be common. The Scorpio was found to be a basically utility vehicle and it was found to be an expansion unit in

continuation in light of the two eligibility certificates issued for expansion in succession. On a conclusion being derived that there are no separate account of sales and purchases not only pertaining to the investment of the eligible two unit but also vehicles in production capacity, it was found that the case of the dealer not covered by Clause (a) of Section (1A) of Section 93 of MVAT Act as amended by the Maharashtra Act No.22 of 2009 but was found to be covered by Clause (b)(1) on the basis of the increase in production capacity and therefore the provisions of sub-section (2) and Section (3) were attracted. By virtue of the said provision the benefits if any availed by an eligible unit in contravention to sub-section (1) shall be deemed to have been withdrawn and the unit is held liable to pay tax including penalty and interest, if any, in respect of the turnover of sales and purchases in excess of the turnover arrived at sub-section (1) and the benefit so availed are to be recovered as arrears of tax.

38. Reliance place by learned counsel for the petitioner Shri.Joshi of *Vadilal Chemicals Ltd V/s. State of Andhra Pradesh and Ors*¹²., reveals a complete and distinct set of facts involved. In the said case before the Hon'ble Apex Court the tax holiday for

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specific period on products manufacturing in new unit came to be granted and the final eligibility certificate was granted by the departmental industries. In light of the procedure evolved for availing the benefits which included a State level and District level committee which was to scrutinized and sanctioned the claims. The appellant set up a small industry unit and a final eligibility certificate was issued by the Commissioner of Industries with the sanction accorded by the State level/District level committee. About four years after the period of exemption expired, show cause notices were issued by the Deputy Commissioner under Section 9(2) of the Central Sales Tax Act and Section 20(2) of the Andhra Pradesh General Sales Tax Act, 1957 to revise the assessment on the ground that the exemption has been wrongly granted. The objection raised was that the Deputy Commissioner has no jurisdiction to issue the notices. On a Writ Petition being filed, the Deputy Commissioner passed orders confirming the demand holding that the process of refilling anhydrous ammonia into cylinders did not amount to a manufacturing activity and High court dismissed the Writ Petition. In this contingency the Hon'ble Apex Court held that the Industries and Commerce Department had granted common holiday in the year 1993 on products manufactured in Industrial Units. However, the interpretation put by the Deputy Commissioner on the word

“manufacture” was wholly incorrect. The Apex Court further held that the under the incentive scheme there was only one method of verifying the eligibility for various incentives including the Sales Tax exemption and the department of Industries and Commerce having applied its mind and having granted final eligibility certificate, the commercial Tax Department could not go behind it, especially when the commissioner granted the eligibility under the Government order. It was thus held that the Deputy Commissioner cannot assume that the exemption was wrongly granted and it could not be cancelled.

Another judgment relied by Shri.Joshi in case of *Birla Jute and Industries Ltd. V/s. State of M.P. and Anr.*¹³ where the Hon'ble Apex Court held that there was no justification for reviewing the certificate granted after long time and after its benefit has been availed is also not applicable since perusal of the facts of the case would reveal that the eligibility certificate issued to the appellant for raw material for entry tax sought to be reviewed after the expiry of the period specified in the certificate on the ground that the items in addition to raw materials were also included for claiming exemption. In the peculiar facts and circumstances of that case the Hon'ble Apex Court has observed that there was no

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justification for reviewing the said certificate after the term had expired and long after the benefit thereunder was availed by the appellant. However, in the present facts and circumstance the review is in exercise of statutory power conferred on the authority and specifically when the statute contained a provision for recovery of the said amount.

39. In this backdrop since the revenue was found to be at stake, the petitioner was issued with a show cause notice enlisting the details of the figures of assessment and the cumulative quantum of benefits was directed to be worked out later on but the assessee was held liable for the amount to be recovered to the tune of Rs.193,14,59,638/- (One Hundred Ninety Three Crores Fourteen Lakhs Fifty Nine Thousand Six Hundred Thirty Eight) on re-computation. By the said impugned order the assessment orders passed on 29.03.2011 by the Assistant Commissioner of Sales Tax in case of the petitioner unit for utility division and Scorpio division stands reviewed and the Assistant Commissioner of Sales Tax has been directed to recover the said sum from the petitioner. The power of review has been exercised as against Section 25(1)(a) where the turnover on sales or purchases has been brought to tax at a lower rate. Though the petitioner has argued that the entitlement

certificate issued to it stands automatically cancelled, since Clause (a) of Section 90 provides for deemed automatic cancellation of certificate of entitlement on occurrence of either the reaching of the monetary ceiling or the time frame, whichever occurs earlier. However, this is ancillary provision to clarify the intention of the scheme and Section 93 in fact provides for mechanism of actual grant of benefits under the scheme. Since, it was found that the benefits are not correctly granted under Section 93 then the provisions of section 90(a) would not obstruct/curtail the grants of actual benefits under Section 93. Section 93 which contains a non-obstante clause is deemed to be in operation since April 2005. By calculating the benefits availed by the petitioner from the said date when Section 93 is deemed to have been brought into force, which contemplates separate accounts of sales and purchases and though the petitioner is manufacturing two different models, that its Balero utility vehicle and Scorpio are distinct and separate and there is no difficulty in identification of sales however the same is not in respect of purchases and though it was attempted to submit to the Reviewing Authority that separate purchase orders were placed for raw materials required for utility vehicles as well as the Scorpio the authority specifically observed that no specific material was shown to infer that the steel required for body of the utility vehicles and

Scorpio vehicles is different and not capable of being interchanged. The authority has also observed that no concrete material has been brought on record to show that there are no purchases which are not vehicle specific and cannot be interchanged. The Reviewing Authority was not convinced with a mere averment that there are separate accounts of purchases in absence of any specific material brought on record and Reviewing Authority has also found fault with the finding recorded by the Assessing Officer on the basis of the existing material that there are separate account of purchases. The finding reached by the Assessing Officer after due inquiry is found to be erroneous. The Reviewing Authority was satisfied that the essence of inquiry in the review proceedings is not about the parts used in the assembly of utility vehicle or Scorpio but from what material these parts are produced and whether the basic raw material is interchangeable or not. It is further observed by the authority that if vehicle specific steel is ordered, then, it is not capable of being used for different model or vehicle and if it is not the case then the steel ordered for production of utility vehicle can be and may be used for Scorpio or vice versa. The accounting software used for the entire business of the petitioner does not show any inter division transfer of the goods within Scorpio and utility division vehicles. It was thus found by the Reviewing Authority that

the Assessing officer had committed an error and since the provision of law which has been brought by amendment Act 2009 is to be implemented with retrospective effect, the Deputy Commissioner of Sales Tax has exercised the power of review and passed the impugned order. The exercise of the said power is in the larger interest of the revenue and hence cannot be said to be without jurisdiction or *mala-fide*.

40. We do not find merit in the said submission advanced by the learned counsel for the petitioner and we are of the clear opinion that this does not amount to only change in the view/opinion and it is not only a case of reopening of the assessment on account of change of opinion.

41. As a result of the aforesaid discussion, there is no merit in the contention of the petitioner. Rule is discharged. The Writ Petition is dismissed without any order as to costs.

(SMT.BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI,J.)

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Santosh
Kamble

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