CASE NO.:
Appeal (civil) 1610 of 2006

PETITIONER:
MRF Ltd., Kottayam

RESPONDENT:
Assistant Commissioner (Assessment)Sales Tax & Ors.

DATE OF JUDGMENT: 21/09/2006

BENCH:
ASHOK BHAN & MARKANDEY KATJU

JUDGMENT:
J U D G M E N T

BHAN, J.

The writ petitioner in the High Court has filed this appeal against the order passed by the Division Bench of the High Court of Kerala. The Division Bench by the impugned order has affirmed the decision of the Single Judge in dismissing the writ petition filed by the appellant herein (hereinafter referred to as the "MRF").

FACTS

MRF is a company incorporated under the Companies Act, 1956 and its registered office is at 124, Greams Road, Chennai. One of its industrial units is located at Vadavathoor near Kottayam in the State of Kerala. MRF is engaged in the manufacture of automotive tyres, tubes, compound rubber, tread rubber, flaps, pre-cured tread rubber etc. at its industrial unit at Vadavathoor.

The Government of Kerala has from time to time declared and introduced several incentives to promote industrial growth and expansion in the State of Kerala by granting exemptions, concessions or reduction in sales tax, electricity duty and electricity tariff etc. to new industries as well as to existing industrial units undertaking substantial expansion, diversification or modernization. Accordingly, the Government of Kerala has been issuing notifications from time to time to give effect to its declared policy for industrial promotion.

Acting on the incentives, concessions and benefits held out by the Government of Kerala, MRF approached the Government of Kerala with its proposal to make substantial expansion and diversification of its industrial unit at Vadavathoor. A Memorandum of Understanding was entered between MRF and the State of Kerala on 6.10.1993, which provided that the MRF had decided to make substantial investment of Rs.50 crores for expansion/diversification of its existing industrial unit at Kottayam for the manufacture of various products and that the immediate plan of MRF was to expand in the compound rubber manufacture and diversity into new products like tyres, pre-cured tread rubber, flaps etc. The said Memorandum of Understanding expressly provided that MRF shall be entitled to tax exemptions available for existing industries undertaking expansion/diversification.

On 3.11.1993 Government of Kerala issued a Notification SRO No. 1729/93 (relevant parts extracted below) in exercise of its powers under Section 10 of Kerala General Sales Tax Act. 1963 (for short "the Act") providing for tax exemption to industrial units going in for expansion/diversification/ modernization in the State of Kerala:-

"(a) SRO No. 1729/93 \026 In exercise of the powers conferred by Section 10 of the Kerala General Sales Tax Act, 1968, (Act 15 of 1963) and in supersession of the notifications mentioned in the Schedule the Government of Kerala having considered it necessary in public interest so to do hereby make the following tax exemption to industrial units and/or reduction in the rate of tax payable on the sale or purchase, as the case may be, of goods by such industrial units, subject to the conditions and restrictions specified herein namely:-
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(b) 5. In the case of Existing Medium and Large Scale Industrial Units which undertake diversification, expansion or modernization on or after the 1st April, 1993, there shall be an exemption for a period of seven years from the date on which such diversification, expansion or modernization has been completed.
(a) In respect of the tax payable under the Kerala General Sales Tax Act, 1963--
(i) On the turnover of sale of goods, manufactured in excess of full rated capacity of the unit prevailing immediately prior to such diversification, expansion or modernization, and sold by them within the State; and
(ii) On the turnover of goods taxable at the point of last purchase in the State, which are used by such units for manufacturing the goods referred to in sub clause (i) above for sale within the State or inter-State; and
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\005\005\005\005.. \005\005\005\005. \005\005\005\005 \005\005\005\005..
(c) 10. Conditions and Restrictions -
(i) \005\005\005\005.. \005\005\005\005. \005\005\005\005 \005\005\005\005..
\005\005\005\005.. \005\005\005\005. \005\005\005\005 \005\005\005\005..
(iv) In the case of Existing, Medium and Large Scale Industrial Units, other than Public Sector undertakings, which undertake expansion, modernization or diversification, the aggregate exemption in respect of sales tax, purchase tax, surcharge and central sales tax shall not exceed 100% of the additional fixed capital investment made for such expansion, modernization or diversification.
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10. (b) Eligibility certificate for medium and large scale industries assisted by the Kerala State

Industrial Development Corporation or the Kerala Financial Corporation will be issued by the Corporation which render assistance and in other cases by the Director of Industries and Commerce, on application by such units, and orders of exemption will be issued by the Secretary, Board of Revenue (Taxes), Thiruvananthapuram.
(c). Eligibility certificate and orders on exemption will be issued by the authorities mentioned in Sub-clause (b) above, if the unit is eligible for exemption or deferment of taxes and the unit satisfies the conditions for the exemptions or deferment of taxes.
(d). The eligibility certificate referred to in Sub-Clause (b) above shall contain the date of commencement of commercial production and the monetary limit of exemption the unit is eligible for. The eligibility certificate issued in respect of existing medium and large scale industrial units which undertake expansion, modernization or diversification shall also contain the date of commencement as well as the date of completion of such expansion, modernization or diversification.

(d) 11. Explanation \026 For the purposes of this notification,
(i) \005\005\005\005.. \005\005\005\005. \005\005\005\005 \005 \005\005\005..
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(ix) 'Manufacture' shall mean the use of raw materials and production of goods commercially different from the raw materials used but shall not include mere packing of goods, polishing, cleaning, grading, drying, blending or mixing different varieties of the same goods, sawing, garbling, processing one form of goods into another form of the same goods by mixing with chemicals or gas, fumigation or any other process applied for preserving the goods; in good condition or for easy transportation. The process of producing desiccated coconut out of coconut, shall be deemed to be 'manufacture' for the purpose of this notification."

With the object to ensure that the State of Kerala would get the relevant proportion of excise duty, i.e., about 40% of the excise duty paid within the State, amended SRO No. 1729/93 by issuing SRO No. 271/96 dated 13.3.1996 requiring the manufacturer claiming tax exemption under SRO No. 1729/93 to pay central excise duty in the State of Kerala on its manufactured products.

On 10.4.1996 an addendum to the Memorandum of Understanding dated 6.10.1993 was executed between MRF and Government of Kerala which specifically confirmed that MRF Limited, a tyre manufacturing company within the State is entitled to tax incentives and exemptions provided under SRO No. 1729/93 dated 3.11.1993 as amended by SRO No. 271/96 dated 13.3.1996 in respect of rubber based goods like tyres, flaps, pre-cured tread rubber etc. manufactured under diversified facilities and rubber based goods manufactured

pursuant to the expansion of the existing facility.

Pursuant to the Memorandum of Understanding entered into between MRF and the State of Kerala and the SRO No. 1729/93 the MRF invested Rs. 80 crores and carried out substantial expansion of its existing industrial unit and set up new unit for manufacture of diversified products.

In accordance with the provisions of SRO No. 1729/93 the eligibility certificate evidencing the MRF's entitlement to the exemption and benefits was to be issued by the Director of Industries and Commerce, Government of Kerala. MRF applied for the said eligibility certificate and the Director of Industries and Commerce, inspected the factory and verified the manufacturing process of goods for which expansion and diversification was undertaken by the MRF. After considering the application and all relevant facts and materials, and, on being satisfied that the MRF was entitled to the exemption, concessions and benefits under SRO No. 1729/93 issued the eligibility certificate on 10.11.1997. Eligibility certificate in Form 4 set out the details of fixed capital investment of MRF of the aggregate amount of Rs. 74,12,77,528.51. MRF commenced its production on 31.12.1996. Director of Industries and Commerce forwarded the eligibility certificate and his report to the Board of Revenue for its consideration for issuance of certificate of exemption. The Board of Revenue vide exemption order No. C 4/40588/97/Tx \026 MRF dated 30.6.1998 having found the MRF eligible for sales tax exemption under SRO No. 1729/93 granted tax exemption of 7 years in the aggregate amount of Rs. 74,12,77,529.00 specifying the period of exemption to be from 30.12.1996 to 29.12.2003.

On 15.1.1998 the Government of Kerala issued SRO No. 38/98 (read with SRO No. 491/98) amending SRO No. 1729/93 by adding new sub-clause (h) to clause 11 (ix) which provided that certain processes shall not be deemed to be manufacture for the purpose of SRO No. 1729/93. Sub-clause (h) reads as under:-

"(h) Conversion of rubber latex into centrifugal latex, raw rubber sheet, ammoniated latex, crepe rubber, crumb rubber, or any other item falling under entry 110 of the First Schedule to the Kerala General Sales Tax Act, 1963 or treating the raw rubber in any form with chemicals to form a compound of rubber by whatever name called."

By notification SRO No. 1092/99 dated 31.12.1999 the State of Kerala modified SRO No. 1729/93 so as to withdraw tax exemption with effect from 1.1.2000 but with a proviso that:-

"2. Industrial Unit which had been sanctioned exemption/deferment as per notification SRO No. 1729/93 before 1st day of January, 2000 shall continue to enjoy the concession for the full period covered by the order of exemption/deferment."

[Emphasis supplied]

(This notification has not been withdrawn or modified till date.)

Assistant Commissioner (Assessment) issued a notice on 17.1.2000 proposing to levy purchase tax on the footing that exemption under SRO No. 1729/93 dated 3.11.1993 was not available with effect from 15.1.1998 by reason of amendment by SRO No. 38/98 dated 15.1.1998 and stated:-

"Thus you have filed incorrect returns and evaded payment of tax due. You are therefore directed to show cause why action should not be initiated to assess provisionally and u/s 45A for the offence of filing incorrect returns, within 7 days of receipt of this notice. You are also given an opportunity to be heard in person on that day, or at 11 a.m. on 27.1.2000."

MRF sent its reply to the above said notice on 14.2.2000 pointing out that MRF has already completed expansion/diversification and had commenced commercial production on 30.12.1996 and was thereafter entitled to tax exemption for the full period of 7 years with effect from 31.12.1996 to 29.12.2003. The proceedings initiated by the Assistant Commissioner were dropped by Assistant Commissioner's letter/order stating that:-

"Ref: 1. This Office Notice dated 17.1.2000.
2. Reply No. M.199/SGMK/A1204/4.2.2000.

Referring to the above I am to inform that further action in this matter is dropped as the expansion has been completed on 30.12.96."

This order was never revoked or withdrawn.

Assistant Commissioner of Sales Tax, Kottayam issued another set of notices dated 19.12.2001 proposing to impose penalty under Section 45A of the Act for availing of purchase tax exemption under SRO No. 1729/93 and for not paying the purchase tax. MRF sent its reply on 10.1.2002 raising its objection regarding the jurisdiction of the Assistant Commissioner of Sales Tax to issue such notice in view of the earlier order passed by the Assistant Commissioner dropping the proceedings initiated and in view of the eligibility certificate issued by the Director of Industries and Commerce and the exemption order passed by the Board of Revenue (Taxes). The Assistant Commissioner vide order dated 17.1.2002 rejected the objections raised by the MRF.

MRF thereafter filed Writ Petition No. 3343 of 2000 in the High Court of Kerala challenging the aforesaid notices issued as being contrary to the eligibility certificate and exemption order. It was prayed in the writ petition that a writ of mandamus be issued to the respondents, restraining them from taking any proceedings against MRF contrary to the eligibility certificate dated 10.11.1997 issued by the Director of Industries and Commerce and exemption order issued by the Secretary, Board of Revenue dated 30.6.1998. The Single Judge before whom the writ petition came up for hearing dismissed the same and remanded the matter back to the Sales Tax Authorities. Being aggrieved, the MRF filed the writ appeal which has been dismissed by the order impugned in this appeal.

Mr. F.S. Nariman, learned senior counsel appearing for the appellant has submitted that the High Court has erred on facts as well as in law in dismissing the appeal filed by the appellant. It is contended by him that the Division Bench of the High Court has erroneously stated that "there is no factual foundation" for the plea of promissory estoppel. The averments of the writ petition clearly show that the plea of promissory estoppel and legitimate expectation has been specifically taken in the writ petition. Further, the finding of the High Court that "there is nothing to show that the petitioner MRF had effected huge investments" is also factually incorrect. This is evident from the MOU dated 6.10.1993 between MRF and the State Government; the addendum dated 10.4.1996 to the MOU entered into between MRF and the State Government wherein it is admitted by the State of Kerala that the goods like tyres, flaps, pre-cured tread rubber etc. were manufactured by the appellant under diversified facilities pursuant to the expansion of the existing facilities; the eligibility certificate dated 10.11.1997 as well as the exemption order dated 30.6.1988 wherein it is stated that the appellant had invested Rs. 74,12,77,529/-. That the High Court is further erred in holding that the notification being statutory and "no plea of estoppel will lie against a statutory notification". The doctrine of promissory estoppel has been repeatedly applied in the courts in India including the Supreme Court in respect to statutory notification. In support of this submission he cited case laws as well. It is further submitted that plea of promissory estoppel is in the nature of an equitable plea and must be determined in the facts and circumstances of each case. That the principle underlying legitimate expectation is based on Article 14. Any action taken by the State which goes against the rule of fairness is liable to be struck down. Any administrative or executive action of the State which is arbitrary or unjust cannot be sustained as it violates Article 14 of the Constitution of India. It is also contended that in any event the State Government did not have the power to make a retrospective amendment to SRO 1729/93 affecting the rights already accrued to the appellant under the said notification. It is further contended by him that the High Court has misconstrued and misunderstood the true purpose and meaning of the Notifications bearing No. SRO 1729/93, SRO 38/98 and SRO 1092/99. Lastly, it is contended that in any event it is well settled principle that the authorities under the Act could not sit in judgment over or ignore the order granting exemption from payment of sales tax by the highest tax authority, i.e., the Board of Revenue, especially when the order passed by the Board of Revenue granting exemption to the appellant has never been amended or withdrawn.

As against this Shri T.L.V. Iyer, learned senior counsel appearing for the State of Kerala has contended that having regards to the facts of the case, no question of promissory estoppel, legitimate expectation or violation of Article 14 of the Constitution of India can arise. SRO 1729/93 itself has specifically provided that the state will have the power to add to the negative list. The appellant was therefore well aware that the benefit of SRO 1729/93 was a precarious one liable to be cancelled or varied at any time. In addition, Section 10(3) of the Act also enables the State to withdraw or cancel any exemption though prospectively. Therefore, according to him, there has been no arbitrary action on the part of the State in issuing SRO 38/98 with prospective effect. It was well within their powers under Section 10(3) as well as under clause (g) of the negative list in SRO 1729/93. Referring to the decisions of

this Court in Kasinka Trading Vs. Union of India, 1995 (1) SCC 274 and Sales Tax Officer Vs. Shree Durga Oil Mills, 1998 (1) SCC 572 it is contended that where public interest is involved, no rule of promissory estoppel can bind the Government. That the promissory estoppel does not operate against a statute. That in view of the defeasible nature of the right granted by SRO 1729/93, no right came to vested in the appellant by reason thereof to justify the invocation of the principle of promissory estoppel; nor could they have any legitimate expectation that the exemption would be continued. That SRO 38/98 was issued in public interest. Elaborating the submission, it is contended by him that SRO 38/98 was issued to clarify the doubt which had arisen with reference to compound rubber in SRO 1729/93. A comparison of SRO 1729/93 and SRO 38/98 will show that the making of compound rubber was not "manufacture" even under SRO 1729/93; nevertheless, the state has granted the exemption till after the doubt was clarified on 15.1.1998 by SRO 38/98. Since no right could have vested in the appellant because of the precarious nature of the exemption granted by SRO 1729/93, it cannot be said that SRO 38/98 has taken away any vested right, more particularly because it is made expressly prospective. Regarding the Board of Revenue order dated 30.6.1998 it is submitted that the same has to be read in conjunction with SRO 1729/93 as amended by SRO 38/98. That the Board of revenue could not have granted a benefit which was not otherwise available to the appellant under the prevailing notifications.

According to him, so far as SRO 1092/99 is concerned, it did not confer any new right. It only preserved the existing right. By the said order what the Government did was to change the industrial policy and to do away with exemptions which were otherwise being given to new/existing industrial units, which was taken away w.e.f. 1.1.2000. At the same time, the units which had been set up pursuant to the incentives granted by the earlier notifications had to be protected and accordingly it was provided that such units will continue to enjoy the incentives for their full term.

The finding recorded by the High Court that "there is no factual foundation" for the plea of promissory estoppel are contrary to the averments made in the writ petition filed in the High Court. The averments made in the writ petition clearly show that the promissory estoppel and legitimate expectation have been specifically pleaded. Paras 3, 4, 6 and grounds (D) and (F) of the writ petition clearly demonstrate that the appellant had taken the plea of promissory estoppel against the State as well as legitimate expectation in its favour. In para 3 of the writ petition it was pleaded that the appellant acting on the promises, assurances and undertaking made by the State of Kerala had invested more than Rs. 90 crores and carried out substantial expansion of its existing industrial unit. In Ground (F) of the writ petition the appellant has clearly stated that "the respondents are barred by the rule and principle of promissory estoppel to deprive or deny exemption to the petitioner from tax on the purchase turnover or rubber used in the manufacture of compound rubber in any manner." Further, in the same paragraph it was pleaded by the appellant that "respondents are barred and precluded from taking any such proceedings by virtue of the principle of promissory estoppel as well as legitimate expectation." The finding recorded by the High Court that the appellant had not taken the plea of promissory estoppel being contrary to the facts of the case is set aside.

The finding recorded by the Division Bench that there was nothing to show that the MRF had effected huge investments is also factually incorrect. The MOU dated 6.10.1993 between MRF and the State Government and the addendum dated 10.4.1996 to the MOU dated 6.10.1993 clearly show that the appellant had made huge investment. The eligibility certificate dated 10.11.1997 issued under SRO 1729/93 by the Director of Industries and Commerce after investigation specified the details of the capital investment made by the appellant and the capacities added to the MRF to the tune of Rs. 74,12,77,529/-. The exemption Order dated 30.6.1998 also issued under SRO 1729/93 by the Board of Revenue again specifically stated the capacities added and the total amount of eligible investment made by the MRF. According to the exemption certificate the appellant had made additional fixed capital investment on expansion-cum-diversification to the tune of Rs. 74,12,77,529/- and its annual installed capacity increased manifolds. The difference of the annual installed capacity before and after expansion-cum-diversification as shown in the order granting exemption as under:

Sl.No.
Items
Before expansion-cum-diversification
After expansion-cum-diversification
1.
Compound rubber
33984 MT
77760 MT
2.
Tubes
5640 MT
11400 MT
3.
Repair materials
876 MT
1620 MT
4.
Tread rubber
5040 MT
8100 MT
5.
Tyres

636000 Nos.
6.
Flaps

780000 Nos.
7.
Precured tread rubber

10440 MT

In exemption order dated 30.6.1998 the appellant was found eligible for sales tax exemption to the tune of Rs. 74,12,77,529/- for the period of 7 years from 30.12.1996 to 29.12.2003. The finding thus recorded by the High Court that the appellant had not made any investment is erroneous in the teeth of the facts, enumerated above. The appellant had

made additional fixed capital investment on expansion-cum-diversification entitling him to seek exemption under SRO 1729/93.

On a co-joint reading of SRO 1729/93, SRO 38/98 and SRO 1092/99 the intention of the Government does not seem to take away the benefits of exemption in respect of manufactured products including compound rubber after 15.1.1998 (the date on which SRO 38/98 was issued) where commercial production had commenced prior to that date. By virtue of the certificate of eligibility and by virtue of the exemption order granted pursuant to SRO 1729/93 dated 3.11.1993, MRF Ltd. had acquired the right to avail of tax exemption for a fixed period of 7 years from 30.12.1996 to 29.12.2003, in respect of products manufactured from raw rubber, including compound rubber. In the eligibility certificate and in the exemption order the date of commencement of commercial production of all manufactured products, including compound rubber is stated to be 30.12.1996. The Government had itself recognized that the benefit of tax exemption for the fixed period of 7 years would remain available to the units which have fulfilled the prescribed conditions, and have obtained the eligibility certificate etc. and have commenced commercial production before the date of any amendment to SRO 1729/93. This had been stated by the State of Kerala in its counter affidavit before the High Court. The relevant portion of which reads:

"As per letter No. 21002/B2/GD dated 28.08.93 the Government had clarified that the eligibility of an industrial unit for exemption has to be decided with reference to the notification existing on the date of commencement of commercial production. The petitioner had commenced commercial production under the expansion/diversification and modernization programme on 30.12.1996."

In any case the doubt, if any, was set at rest by the Government itself when, in Gazette Notification SRO 1092/99 dated 31.12.1999, it was stated that the benefit of exemption under SRO 1729/93 would not be available after 1.1.2000 with a saving clause, reproduced earlier, to the effect that industrial unit which had been sanctioned exemption/deferment as per notification SRO 1729/93 before the 1st day of January, 2000 shall continue to enjoy the concession for the full period covered by the order of exemption/deferment.

The Division Bench misread SRO 1092/99. The High Court had recorded the following finding in regard to this in para 14 of the judgment, which reads:

"But it has been specifically stated that in the case of units which have already commenced commercial production or taken upon effective steps to set up industrial units prior to 1.1.2000 will be allowed benefit of exemption or deferment granted as per notification SRO 1729/93. Petitioner therefore would get only the benefits available under SRO 1729/93

and nothing more and nothing less. Ext. P-5 in our view would not come to the rescue of the petitioner even by the application of clause 2 of SRO 1092/99. We reiterate the order passed by the Board of Revenue cannot override the statutory notification issued by the Government."

The observations made by the High Court that clause (2) of SRO 1092/99 would not come to the rescue of the appellant is wrong. It is clearly stated in clause (2) of SRO 1092/99 that the industrial unit which had commenced production before the 1st day of January, 2000 shall continue to enjoy the concession for the full period covered by the order of exemption/deferment. SRO 1092/99 has not been withdrawn or modified till this date.

In any case MRF's accrued right to exemption was not taken away or in any way affected by the amending notification SRO 38/98; which merely applied to those units which were established or expanded after 15.1.1998. If ann industrial unit had been set up prior to 15.1.1998 and had also commenced commercial production prior to 15.1.1998 then the amending notification SRO 38/98 would have no retrospective application at all. The notification SRO 38/98 is prospective in operation which is evident by its mere reading as it specifically mentioned therein that:

"notification shall be deemed to have come into force with effect from the 1st day of January, 1998."

The provisions of the Act or notification are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect. This Court in S.L. Srinivasa Jute Twine Mills (P) Ltd. Vs. Union of India & Anr., 2006 (2) SCC 740, has held that it is a settled principle of interpretation that:

"retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication; there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary."

In the aforesaid case, the Employees Provident Fund Act (as amended in 1988) provided that the Act would not apply "to a newly set up establishment for a period of three years from the date on which such establishment is set up." Section 16 (1)(d) was deleted by the Amending Act w.e.f. 22.9.1997 and the question was whether the initial exemption from application of the Act would continue for the full period of three years from the date of its establishment, even beyond 22.9.1997. Rejecting the contention, as pointed out earlier, it was held that retrospective operation is not taken to be intended unless that intention of the Legislature is projected

by express words or necessary implication. Setting aside the order of the High Court it was held:

"18. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. (See Keshvan Madhavan Memon v. State of Bombay, 1951 SCR 228). But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis'. In the words of Lord Blansburg,

"provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment." (See Delhi Cloth & General Mills Co. Ltd. v. CIT, AIR 1927 PC 242 at p. 244).

"Every statute, it has been said", observed Lopes, L.J.,

"which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect." (See Amireddi Raja Gopala Rao v. Amireddi Sitharamamma, 1965 (3) SCR 122).

As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. (See Reid v. Reid (1886) 31 Ch D 402). In other words close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament. (See Union of India v. Raghubir Singh, 1989 (2) SCC 754). The above position has been highlighted in Principles of Statutory Interpretation by Justice G.P. Singh. (10th Edition, 2006 at pp 474 and 475).

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20. Above being the legal position, the judgments of the High Court are indefensible and are set aside. The appellants shall be entitled to the protection as had accrued to

them prior to the amendment in 1997 for the period of 3 years starting from the date the establishment was set up irrespective of repeal of the provision for such infancy protection."

The view that SRO 38/98 did not affect MRF's pre-existing and accrued right to enjoy tax exemption from the full period of 7 years w.e.f. 30.12.1996 to 29.12.2003 was accepted and recognized by the assessing authority himself which can be seen from the order of the assessing authority dated 1.3.2000 whereby the proposal to deny tax exemption was "dropped as the expansion has been completed on 30.12.1996". This order was passed in respect of notice dated 17.1.2000 issued to the appellant whereby the proposal to continue tax was dropped. This order has been reproduced in the earlier part of the judgment.

High Court in its judgment has recorded a finding that the notifications being statutory "no plea of estoppel will lie against a statutory notification". This finding of the High Court is erroneous. The doctrine of promissory estoppel has been repeatedly applied by this Court to statutory notifications. Reference may be made to Pournami Oil Mills Vs. State of Kerala, 1986 (Supp.) SCC 728. In the said case the Government of Kerala by an order dated 11.4.1979 invited small scale units to set up their industries in the State of Kerala and with a view to boost industrialization, exemption from sales tax and purchase tax was extended as a concession for a period of five years, which was to run from the date of commencement of production. By a subsequent notification dated 29.9.1980, published on Gazette on 21.10.1980, the State of Kerala withdrew the exemption relating to the purchase tax and confined the exemption from sales tax to the limit specified in the proviso of the said notification. While quashing the subsequent notification, it was observed:

"If in response to such an order and in consideration of the concession made available, promoters of any small-scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of M.P. Sugar Mills v. State of U.P.. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in Bakul Cashew Co. v. Sales Tax Officer, Quilon, 1986 (2) SCC 365. In Bakul Company's (supra) case this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for

raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in M.P. Sugar Mills' case, 1979 (2) SCC 409. In our view, to the facts of the present case, the ratio of M.P. Sugar Mills' case directly applies and the plea of estoppel is unanswerable.

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\005Such exemption would continue for the full period of five years from the date they started production. New industries set up after 21.10.1980 obviously would not be entitled to that benefit as they had noticed of the curtailment in the exemption before they came to set up their industries."

[Emphasis supplied]

This decision was followed by a three-Judge Bench in the case of State of Bihar Vs. Usha Martin Industries Ltd., 1987 (Supp.) SCC 710 where it was stated that the matter stands concluded by the decision in Pournami Oils Mill's case (supra). In Shri Bakul Oil Industries Vs. State of Gujarat, AIR 1987 SC 142, it was observed in para 11:

" \005..The exemption granted by the Government, as already stated, was only by way of concession for encouraging entrepreneurs to start industries in rural and undeveloped areas and as such it was always open to the State Government to withdraw or revoke the concession. We must, however, observe that the power of revocation or withdrawal would be subject to one limitation viz. the power cannot be exercised in violation of the rule of Promissory Estoppel. In other words, the Government can withdraw an exemption granted by it earlier if such withdrawal could be done without offending the rule of Promissory Estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail the benefit of exemption, it may then follow that the new industry can legitimately raise a grievance that the exemption could not be withdrawn except by means of legislation

having regard to the fact that Promissory Estoppel cannot be claimed against a statute\005".

Answering the question as to whether the Board is restrained from withdrawing the rebate prematurely before the completion of three/five years period by virtue of doctrine of promissory estoppel, this Court in Pawan Alloys & Casting Pvt. Ltd. Vs. U.P. State Electricity Board, 1997 (7) SCC 251, held:

"10. It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as 'State' within the meaning of the said Article, can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise.

Xxx xxxx

24. \005..We, therefore, agree with the finding of the High Court on Issue No. 1 that by these notifications the Board had clearly held out a promise to these new industries and as these new industries had admittedly got established in the region where the Board was operating, acting on such promise, the same in equity would bind the Board. Such a promise was not contrary to any statutory provision but on the contrary was in compliance with the directions issued under Section 78A of the Act. These new industries which got attracted to this region relying upon the promise had altered their position irretrievably. They had spent "large amounts of money for establishing the infrastructure, had entered into agreements with the Board for supply of electricity and, therefore, had necessarily altered their position relying on these representations thinking that they would be assured of at least three years' period guaranteeing rebate of 10% on the total bill of electricity to be consumed by them as infancy benefit so that they could effectively compete with the old industries operating in the field and their products could effectively compete with their products. On these

well-established facts the Board can certainly be pinned down to its promise on the doctrine of promissory estoppel."

[Emphasis supplied]

In a recent judgment in the case of Mahabir Vegetable Oils (P) Ltd. Vs. State of Haryana, 2006 (3) SCC 620, this Court in para 25 observed that "it is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field." This was in connection with a statutory notification under the Haryana General sales Tax Act.

In Kasinka Trading's case (supra) and Rom Industries Vs. State of Jammu & Kashmir, 2005 (7) SCC 348, on which reliance has been placed by the learned counsel for the respondent do not disturb the settled position in law that where a right has already accrued, for instance, the right to exemption of tax for a fixed period and the conditions for that exemption have been fulfilled, then the withdrawal of the exemption during that fixed period cannot effect the already accrued right. Of course, overriding public interest would prevail over a plea based on promissory estoppel, but in the present case there is not even a whisper of any overriding public interest or equity. Notification SRO 38/98 was an amendment and not a clarification of SRO 1729/93 and was expressly made prospective w.e.f. 15.1.1998.

Besides, a plea of promissory estoppel is in the nature of an equitable plea and must be determined in the facts and circumstances of each case where it is raised. In the case of Rom Industries (supra) the deciding factor was that the exemption notification in question had been itself held to be unconstitutional in an earlier case as violative of Articles 301 and 304 of the Constitution of India and, therefore, could not form the basis of any right. The observation made in para 8 of that judgment have to be read in that context. Besides, the State Government in that case had no option except to withdraw the notification. It is so observed in that judgment in para 9:

"\005The State Government, in view of the decision of this Court had no other option but to place edible oils in the Negative List. The questions whether Shree Mahavir Oil Mills, 1996 (11) SCC 39 has been rightly decided or not and whether it is in conflict with the principles enunciated in Video Electronics, 1990 (3) SCC 87, are moot. But while the decision stands, the State Government is bound to comply with it."

In Kasinka Tading 's case (supra), the notification in question was a customs exemption Notification for a fixed period. The judgments in Pournami Oils Mills's case (supra) and Shri Bakul Oil Industries's case (supra) were distinguished in the said case on the ground that the notifications in those cases were incentive notifications. It was observed in para 27:

" Again in Bakul Oil Industries (supra) it was the incentive to set up industries in a conforming area that the exemption had been granted and the Court held that the Government could withdraw an exemption granted by it earlier only if such withdrawal could be made without offending the rule of promissory estoppel and without depriving an industry entitled to claim exemption for the entire specified period for which exemption had been promised to it at the time of giving incentive. Both these cases therefore cannot advance the case of the appellant and are distinguishable on facts because the exemption notification under Section 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the "public interest" so demanded. Thus, in the facts and circumstances of these cases, the appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the and Act."

[Emphasis supplied]

The decision in Kasinka Trading (supra) has been distinguished in the later decision by this Court in State of Punjab Vs. Nestle India Ltd., 2004 (6) SCC 465, on the ground of the inherent nature of an exemption notification issued under Section 25 of the Customs Act. Even in respect of a notification under Section 25 of the Customs Act this Court has taken the view that the withdrawal even of such a notification must not be "arbitrary" or "unreasonable" (see Dai-Ichi Karkaria Ltd. Vs. Union of India, 2000 (4) SCC 57).

The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been re-stated by this Court in Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer, 2005 (1) SCC 625. It was observed in paras 8 & 9:

" A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past

practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision maker should justify the denial of such expectation by showing some overriding public interest. (See Union of India and Ors. v. Hindustan Development Corporation and Ors. (AIR 1994 SC 988).

9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if

so, does it really satisfy the test of reasonableness."

[Emphasis supplied]

MRF made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years. It was granted the eligibility certificate. The exemption order had also been passed. It is not open to or permissible for the State Government to seek to deprive MRF of the benefit of tax exemption in respect of its substantial investment in expansion in respect of compound rubber when the State Government had enjoyed the benefit from the investment made by the MRF in the form of industrial development in the State, contribution to labour and employment and also a huge benefit to the State exchequer in the form of the State's share, i.e. 40% of the Central Excise duty paid on compound rubber of Rs. 177 crores within the State of Kerala. The impugned action on the part of the State Government is highly unfair, unreasonable, arbitrary and, therefore, the same is violative of Article 14 of the Constitution of India. The action of the State cannot be permitted to operate if it is arbitrary or unreasonable. This Court in E.P. Royappa Vs. State of Tamil Nadu, 1974 (4) SCC 3, observed that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Equity that arises in favour of a party as a result of a representation made by the State is founded on the basic concept of "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15.1.1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years, in our opinion, is highly arbitrary, unjust and unreasonable and deserves to be quashed. In any event the State Government has no power to make a retrospective amendment to SRO 1729/93 affecting rights already accrued to MRF thereunder.

Section 10 of the Act provides the power to the Government to grant exemption and reduction in rate of tax. Section 10 reads:

"10. Power of Government to grant exemption and reduction in rate of tax.--(1) The Government may, if they consider it necessary in the public interest, by notification in the Gazette, make an exemption or reduction in rate, either prospectively or retrospectively in respect of any tax payable under this Act,

(i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers, or

(ii) by any specified class of persons in regard to the whole or any part of their turnover.

(2) Any exemption from tax, or reduction in the rate of tax, notified under Sub-section (1),--

(a) may extend to the whole State or to any specified area or areas therein,

(b) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may by notification in the Gazette, cancel or vary any notification issued under Sub-section (1).

Under Section 10(1) of the Act the State Government has the power to make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under this Act. However, the power of Government under Section 10(3) by notification in the Gazette to cancel or vary any notification issued under Section 10(3) cannot be exercised retrospectively. This is the view taken by the Kerala High Court in M.M. Nagalingam Nadar Sons Vs. State of Kerala, 1993 (91) STC 61, where the learned Single Judge of the High Court has stated as under:

" Power is thus given under sub-section (1) to make an exemption or reduction in rate either prospectively or retrospectively in respect of any tax payable under the Act. Sub-section (3) enables the Government to cancel or vary any such notification issued under sub-section (1). Significantly, sub-section (3) is silent about retorpsectivity for any notification issued under it. Thus while sub-section (1) authorizes the grant of an exemption or reduction in rate with retrospective effect in respect of any tax payable under the Act, sub-section (3) does not provide for any cancellation or variation retrospectively. In issuing notifications under Section 10, the Government is exercising only delegated powers. While the legislature has plenary powers to Legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only those powers which are specifically conferred. Therefore, if it is intended to confer on the Government a power to cancel/withdraw/vary an exemption or reduction in rate of tax, with retrospective effect, such a power has to be specifically conferred, and in the absence of any such specific conferment of power in sub-section (3) of Section 10, the Government cannot issue notifications there under affecting a vested right or imposing an obligation to act retrospectively. I have already mentioned that this provision is significantly silent on such a power. Equally, the Government has also no power to levy a tax with retrospective effect. The retrospective cancellation/ withdrawal of an exemption or a reduction in rate tantamounts to levy of a tax, or tax at a higher rate from a date in the past, for which the Government has no power under sub-section (3)."

[Emphasis supplied]

This judgment of the learned Single Judge was approved by a Division Bench of the Kerala High Court in Dy. Commissioner (Law), Board of Revenue (Taxes) Vs. MRF Ltd., 1998 (109) STC 306, by observing thus:

"We are in full agreement with the view taken by the learned Single Judge in M.M. Nagalingam Nadar Sons vs. State of Kerala, 1993 (91) STC 61 (Ker) that Government has no power under Section 10(3) of the Act to issue a notification with retrospective effect."

Before this Court the State of Kerala did not dispute the above finding (See 2000(9) SCC 286) where the State's appeal was dismissed. That Section 10(3) of the Keral General Sales Tax Act did not confer the power to withdraw an exemption with retrospective effect was not challenged by the State Government and accordingly the finding regarding the meaning and effect of Section 10(3) of the Act has become final. In any event, the appeal preferred by the State of Kerala was dismissed and the judgment of the High Court has therefore become final. Accordingly, it was held that Section 10(3) does not confer the power to withdraw an exemption with retrospective effect. Effect of this is that the amendment notification SRO 38/98 has to be read so as not to take away or disturb any manufacturer's pre-existing accrued right of exemption for a period of 7 years. If SRO 38/98 is construed as now contended by the respondent, then the inevitable consequence would be that SRO 38/98 would itself be rendered ultra vires Section 10(3) of the Act, and therefore, illegal, bad in law and null and void.

We do not agree with the submission made by the learned counsel for the respondent/State that subsequent notification was classificatory in nature. That it only removed the doubt which had arisen with reference to "compound rubber" in the SRO 1729/93. Making of "compound rubber" had been accepted to be "manufacture" in the Memorandum of Undertaking entered between MRF and the Government on 6.10.1993 and the addendum dated 10.4.1996 to the Memorandum of Undertaking dated 6.10.1993. It is further recognized in the eligibility certificate issued by the Director of Industries and Commerce after investigation and due verification and the exemption certificate issued by the Board of Revenue.

For the reasons stated above, the appeal is accepted, order of the High Court is set aside. Writ of mandamus is issued restraining the respondents from taking any proceedings against MRF Ltd. contrary to or inconsistent with the eligibility certificate dated 10.1.1997 and the exemption order dated 10.6.1998. Parties shall bear their own costs.