

PROMISSORY ESTOPPEL: LAST HOPE FOR FADING EXCISE EXEMPTIONS?

By Mr. Tarun Jain

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.” [Section 115, Indian Evidence Act]

‘Promissory Estoppel’, as an equitable principle, has been in vogue in judicial systems for long. Intended to counter the evading tendencies and insist upon parties to perform the promises made, the principle of promissory estoppel relieves the parties aggrieved from such breach of promises. The embodiment of this equitable principle in Section 115 is a reflection of legislative despise for such inequitable conduct and its intent to enforce all such retracted promises.

The doctrine of ‘promissory estoppel’, thus, gains thrust and comes to the rescue of destitute litigants suffering from the denuding and frivolous representations made to them and suffering on such account. Does this imply that even the Government is bound to fulfill its commitments and promises made or is this principle confined only to transactions between private parties? This important question has often tested the judicial system and despite umpteen decisions to this regard, the tussle continues.

To put the topic in perspective, let us deal with real life illustrations and test our proposition. In the recent past various area-based Notifications had been issued by the Ministry of Finance whereby exemption from the payment of excise duty was granted to the assesseees upon fulfillment of the conditions specified therein. Development of identified backward areas and promotion of industrial activity therein being the underlying premise, these Notifications provided exemption for specified periods to the assesseees complying with the prescribed conditions. North-East, Uttranchal, Himachal Pradesh, Sikkim, Jammu & Kashmir were some of these areas wherefore the Notifications were issued granting the exemption of excise duty.

Lured by these promises on the part of the Central Government waiving the collection of excise duty, many industrial and production houses established/relocated their manufacturing units in these areas. The establishment or relocation, however, was not without cost. Non-availability of skilled man-power, lack of natural or industrial resources required for manufacturing processes, absence of logistics network, etc. posed considerable obstacles to the establishment of manufacturing facilities from these units, leading to increase in operational costs and delay of break-even points.

However, comforted by the Government's promise to exempt the excise duties for the specified period, the business houses continued to build their units in these areas expecting returns in the long-term vision of affairs. The losses in the initial years on account of these incorporation costs were reluctantly absorbed expecting to recover them in form of exempted excise duties.

In this scenario, can the Government rightfully have recalled its decision to exempt the areas during the continuation of the holiday period? Can the Government backtrack on its promise as evidenced in the Notifications? Can the Government, before the expiry of the exemption period, amend the Notification to levy excise duties? These are critical questions facing the Central Excise paradigm today for the Central Government has in fact, on more than one occasion, amended these exemption Notifications to levy duties of excise on some or all goods. Notification No. 18/2008-CE has amended the parent Notification No. 33/1999-CE exempting payment of excise duties in various areas of Assam. Similarly Notification No. 21/2007-CE and Notification No. 19/2008-CE have amended parent Notification No. 56/2003-CE and Notification No. 56/2002-CE which provided for exemption for areas in Sikkim and Jammu & Kashmir respectively. These amending Notifications have restricted the availability of the exemptions extended under the parent Notifications and thus varied the originally specified conditions.

The affected manufacturing units would, naturally, find these amendments prejudicial

to their operations and grossly offending the original promise. The emotional yet precarious arguments against such withdrawal of exemptions nonetheless, the thrust of the matter is whether the affected units can get their grievances redressed. Only two solutions seem probably in such a scenario; either the industrial units make representations to the Ministry and secure a withdrawal of these amending Notifications or to get their claims enforced in courts of law. Neither of the scenario inspire confidence for in the former case the attitude of the Ministry to limit the exemptions is evident in light of the amending Notifications and in the case of latter, Section 21 of the General Clauses Act, 1893 unequivocally declares that the 'power to make' includes the 'power to add to, amend, vary or rescind orders, rules or bye-laws' and thus the power to amend the parent Notifications vests unshakably in the Central Government.

Does this imply that the assesseees who have established their units in these notified areas in pursuance of the promise of the Government are left to suffer to its whims and surmises? Is there any forum where these assesseees can get their grievance addressed or is it a shut case against their face? Would the entire infrastructural developmental expenditure incurred by these units to promote the backward areas come to haunt against their profitability with no respite from the government?

Considering the categorical intent of the Central Government, as evident from the amending Notifications, and given the magnitude of powers vested therein to issue and rescind Notifications, the issue does seem to favour the revenue and against the assesseees. A solemn resolve of a legal practitioner to get these genuine grievances redressed, therefore, would require nothing short of a fire-fight and it is in this backdrop that like a silver lining in a gray cloud, the doctrine of promissory estoppel seems to show the light of the day.

The Hon'ble Supreme Court of India dealt with this "question of considerable importance in the field of public law" in the case of *Motilal Padampat Sugar Mills Ltd.* (decision dated 12.12.1978). The precise issue before the Court then was "How far and to what extent is the State bound by the doctrine of promissory estoppel". The

Court was required to assess the legality of the withdrawal of exemption by the State of Uttar Pradesh in a factual milieu wherein the Sugar Mill was assured of sales tax exemption for three years upon establishment of a 'vanaspati plant' by the Government and thereupon the Sugar Mill had borrowed money from various financial establishments and acted upon the establishment of the said plant. The Hon'ble Apex Court declared categorically that the State Government was bound by the doctrine of Promissory Estoppel and therefore the exemption promised was duly restored back to the aggrieved Sugar Mill.

The decision in *Motilal Padampat* serves a world of good in these critical times to the units suffering from the withdrawal of exemptions under the amending Notifications, however, not without a disclaimer. Since the decision in *Motilal Padampat* a lot of water has flown and the courts have not always been too impressed by the argument of the Government not being able to change the ground realities in the light of the changed economic scenarios and the demands for unbridled continuation of tax exemptions. In a number of instances the Hon'ble Supreme Court itself has declared the inapplicability of the doctrine in tax matters. While the Court approved the application of the doctrine in the case of *MRF Ltd.* (Civil Appeal No. 1610/2006), the decision in the similar circumstances in *R. C. Tobacco* (Civil Appeal No. 881-896/2004) reflects its apathetic attitude in similar situation therein.

A reasoned legal advisor would, therefore, tread the waters with caution for the availability of relief in such instances would depend upon the inviolable establishment of a number of factual foundations to impress upon the judges the quantum of losses being incurred by the aggrieved units and the responsibility of the Government thereto. In short, though the common law doctrine of Promissory Estoppel does come to the rescue of the manufacturing units ailing on account of the withdrawal/limitation of such exemption Notifications, the issues involved are a hard fought one and would require meticulous preparation and intensive work on the part of the counsels to obtain relief for their aggrieved clients.

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