

Promises to keep and - not for the State

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Hon'ble Prime Minister of India during his visit to Nainital in March 2002 announced that a special package of incentives would be given to promote Industrial Development in Uttaranchal to offset the constraints that hampered this process. The package was formally declared on 7th January 2003.

Under the Central Excise regime as it existed prior to 01.07.2017, the units located in the states of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim were eligible to avail exemption from payment of Central Excise duty in terms of area based exemption notifications. While ab-initio exemption was available to the units located in the States of Uttarakhand and Himachal Pradesh, the units located in other areas were required to pay Central Excise duty and avail exemption by way of refund of cash component of such duty paid.

Under GST regime there is no such exemption and the existing units which were availing exemption from payment of Central Excise duty prior to 01.07.2017 are required to pay CGST&SGST/IGST like a normal unit. Thus, at present, no exemption is available to these units by way of either ab-initio exemption or by way of refund.

In order to obviate the hardships faced by such units, Central Government decided to provide budgetary support to the eligible units which were operating under erstwhile Area Based Exemption Schemes, for the residual period for which the units would have operated under the schemes, by way of refund of the Goods and Services tax, limited to its share of CGST and/or IGST retained after devolution of taxes to the states. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry which is the administrative department for the scheme, has issued a [notification](#) dated 05.10.2017 regarding

"Scheme of budgetary support under Goods and Service Tax Regime to the units located in States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim."

The Scheme provided for refund/reimbursement of the Central share of CGST and IGST to the affected eligible industrial units for the residual period in the North Eastern and the Himalayan States. The Central share was determined at 58% of CGST and 29% of IGST.

The new scheme was introduced as a measure of goodwill, only to the units which were eligible for availing benefits under the earlier excise duty exemption/refund schemes but has otherwise no relation to the erstwhile schemes. The scheme of budgetary support has come into operation w.e.f. 01.07.2017 for an eligible unit and shall remain in operation for residual period in respect of specified goods.

Based on the area based exemption, several industrial units were established in the Himalayan and North-Eastern States, but with the advent of GST, they all lost the advantage and some of them approached their High Courts with no success and finally reached the Supreme Court, which gave its verdict this week.

Parties are aggrieved by the decision of the Central Government in restricting the refund only to 58% of CGST and 29% of IGST and not providing 100% refund of CGST as they believe that the Union was bound to give 100% tax exemption till completion of 10 years' period from the date of commencement of their commercial production.

Promises ---- to keep? : It is clear that an unequivocal promise was given to the entities that, in the event they establish a new industrial unit or go for a substantial expansion of their existing industrial units in the States of Uttarakhand and Himachal Pradesh and some other states, they would be entitled to 100% tax exemption. But GST put an end to this benefit. So, the question is whether **doctrine of promissory estoppel** could operate against a statute.

The Supreme Court had consistently held that it is presumed that the legislature knows the needs of its people and will balance the present advantages against possible future disadvantages.Â The Court had held that the plea of promissory estoppel would not be available against the exercise of the legislative functions of the State. Equally, it cannot be invoked for preventing the government from discharging its functions under the law.

Though there were differences in views in the judgements of the Supreme Court, a common thread in all the judgments was that all of them consistently held that there can be no estoppel against the legislature in the exercise of its legislative functions. The Court approved the view in American Jurisprudence that the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. The analysis of all the judgments of the Court on the issue would reveal that it is a consistent view of the Court, that there can be no promissory estoppel against the legislature in the exercise of its legislative functions.

It has been consistently held that where the change of policy is in the larger public interest, the State cannot be prevented from withdrawing an incentive which it had granted through an earlier notification.Â

So, the Supreme Court in its order dated 17th October 2022 - [2022-TIOL-84-SC-GST](#) held:

even on the ground of change of policy, which is in public interest or in view of the change in the statutory regime itself on account of the GST Act being introduced as in the instant case, it will not be correct to hold the Union bound by the representation made by it in 2003. Further, this would be contrary to the statutory provisions as enacted under Section 174(2)(c) of the CGST Act.

There is another reason which, according to the Supreme Court, could disentitle the relief as was claimed by the appellants before the High Courts. The appellants, in effect, are seeking a writ of mandamus against the Union of India to reimburse 100% of CGST for the remainder of the period instead of only 58%.

In order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

Thus unless the appellants show any statutory duty cast upon the respondent-Union of India to grant them 100% refund, a writ of mandamus as sought could not be issued.Â

The Supreme Court holds that a writ of mandamus can be issued

where the Authority has failed to exercise the discretion vested in it or has exercised such a discretion malafidely or on an irrelevant consideration.

Undoubtedly, in the present case, the Apex Court noted that there is no duty cast on the Union to refund 100% of CGST. As such, the Court found that the relief as sought cannot be granted.

Though the Supreme Court held that the appellants' claim based on promissory estoppel is without substance, the Court found that this is not a case wherein it can be said that the appellants' claim is wholly without any substance. So, the Court observed,

The appellants have established their industrial units based on the industrial policy as reflected in the said O.M. of 2003. The policy of the year 2003, in question, was based on the statement made by the Hon'ble Prime Minister during his visit to Uttarakhand. As such, the policy was framed to bring into effect the statement made by the highest executive functionary of the country. Relying on the said policy, the appellants have established their units. Though the appellants may not have a claim in law, we find that they do have a legitimate expectation that their claim deserves due consideration.

The Supreme Court noted that the GST Council is a constitutional body. It has powers to make recommendations on wide-ranging issues concerning GST, including grant of exemptions from the GST. It also has power to make recommendations with regard to special provisions governing North Eastern and Himalayan States.

Taking into consideration that the units like the appellants have been established in the Himalayan and North-Eastern States based on the said O.M. of 2003 and that lakhs of persons are employed in such industries, the Supreme Court is of the view that it will be appropriate that such States should also consider to correspondingly reimburse such units out of the share of revenue received by them through devolution from the Central Government. The Supreme Court further found that it will also be appropriate that the GST Council considers making appropriate recommendations to the States in that regard.

And the Supreme Court concluded,

We, therefore, permit the appellants to make representations to the respective State Governments as well as to the GST Council. We also request the State Governments and the GST Council to consider such representations, if made, in accordance with what has been observed herein above in an expeditious manner.

In the result, the appeals are dismissed.

Power to recommend : The Apex Court has noted the huge power the GST Council is in possession of - the power to recommend! And in the *Mohit Minerals* case - [2022-TIOL-49-SC-GST-LB](#), the Supreme Court had held that **the recommendations of the GST Council are not binding on the Union and States** .

I was just wondering - even I have a lot of power to recommend. Every citizen has the power to recommend to the government on the rates of GST, who should be India's friends, how to stunt the ugly growth of the dollar, who should become judges of the Supreme Court, who should play for India in cricket and so on. Like the GST Council's, my recommendations are also not binding on the government.

The Supreme Court has also permitted the appellants to make representations to their States and the GST Council. Just like, we all have the power to recommend, don't we have the power to make representations to the government, which we all do all the time? Maybe the GST Council does not have the power to make a representation, unlike the normal taxpayer.

Special Status for Andhra Pradesh: When Andhra Pradesh was bifurcated into Telangana and the residuary state of Andhra Pradesh, it was believed that the new Andhra Pradesh will get a special category status with those excise exemptions like the area based incentive. The *Andhra Pradesh Reorganisation Act, 2014*, stipulated that:

The Central Government shall take appropriate fiscal measures, including offer of tax incentives, to the successor States, to promote industrialisation and economic growth in both the States.

Nobody knows what these measures are but people in Andhra Pradesh feel that great injustice has been done to them in not keeping up the promise, GST notwithstanding.

Until Next week