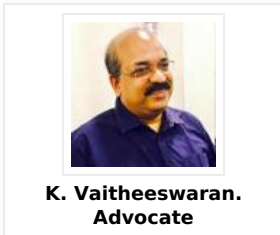


STOP ! A PROMISE IS A PROMISE

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Background

Countries around the world are keen to attract investments and a number of promises are made including tax breaks. States in the USA as well as States in India also make policy announcements and provide for investment-based tax exemption or relief schemes in order to attract investments in their State. Based on these promises when significant investments are made, the basic expectation is that the rules remain unchanged atleast for the period as announced in the original scheme.

Recent Supreme Court decision

The Supreme Court in the case of ***The State of Jharkhand and Others Vs. Brahmputra Metallics Ltd., Ranchi and Another [TS-1045-SC-2020-VAT]***, recently affirmed and examined the Doctrine of Promissory Estoppel and its development with relation to the Doctrine of Legitimate Expectations. Discussing the obligation of States and their powers the Court held that *“the state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts.”*

The State of Jharkand in its Industrial Policy 2012 notified on 16.06.2012 provided an exemption from the payment of 50 per cent of the electricity duty for a period of five years, for captive power plants established for self-consumption or captive. The exemption was envisaged to become operative from the financial year following the date of production. The policy further stipulated that notifications enforcing the terms of the industrial policy would be issued within a period of one month by the Departments of the State Government. The Government failed to comply with the time schedule prescribed by the policy and finally issued an exemption notification on 08.01.2015 but made it effective prospectively.

Writs were filed by the Petitioner and Others questioning the late issue of Notification and the prospective nature. The High Court granted relief by placing reliance of the decisions in ***State of Bihar vs. Kalyanpur Cement Ltd (2010) 3 SCC 274, Manuelsons Hotels Private Limited vs. State of Kerala (2016) 6 SCC 766*** and ***Motilal Padampat Sugar Mills Co. Ltd vs. State of UP (1979) 2 SCC 409*** which expounded on the principles of the doctrine of promissory estoppel. The High Court accepted the first claim of the respondent finding fault with the delay on the part of the Government to issue the notification. Criticising the lethargic approach of the state authorities in the issue of the Notification, the High Court held that the *“the issuance of an exemption notification being a ministerial act, the High Court held that it should not stand in the way of industrial units obtaining relief under the doctrine as a result of the unconscionable delay caused by the State Government.”* The High Court struck down the prospective effect of the Notification and held that the electricity duty deposited by the respondent for FYs 2011-12, 2012-13 and 2013-14 was directed to be adjusted against the future liability of the respondent towards electricity duty. This decision was appealed by the State in the Supreme Court.

Contentions of the State

The State contended that

- (i) The respondent did not make a claim for rebate/deduction for exemption as required by Column 6(iv) of Form-III and only towards auxiliary consumption and that in absence of the same the AO could not have granted a concession to the respondent.
- (ii) The submission that the notification under Section 9 of the Bihar Act 1948 was belatedly issued on 8 January 2015 is not available to the respondent since two of the three assessment orders were issued eleven months and twenty-three months after the issuance of the notification and no prejudice had been caused because of the belated issue of the Notification.
- (iii) In terms of the Constitution Bench in ***State of Madhya Pradesh vs Bhailal (AIR 1964 SC 1006)*** and ***Suganmal vs State of Madhya Pradesh (AIR 1965 SC 1740)*** which had held that any claim for refund could be made only within the period of limitation prescribed under the general law for the filing of suits for the recovery of amounts due and the High Court ought not to have entertained the petition under Article 226.
- (iv) In terms of the decision of the Supreme Court in ***Mafatlal Industries Ltd. vs Union of India (1997) 5 SCC 536***, adjustment which has been granted by the High Court would result in unjust enrichment to the respondent.
- (v) Since the Respondent had commercial production from 17.08.2011 and the Industrial Policy is of 2012, the doctrine of *promissory estoppel* cannot be extended “backwards in favour of the respondent”.

Contentions of the Company

The Company contended that

- (i) The act of the State Government in making the exemption notification prospective in effect from 08.01.2015 is in derogation to the promise held out by the State in its Industrial Policy 2012.
- (ii) The High Court in placing reliance on the doctrine of *promissory estoppel* has correctly relied upon the decisions of this Court in **Motilal Padampat, Kalyanpur Cement Ltd.** and **Manuelsons Hotels Pvt Ltd.**
- (iii) The benefit of a rebate/deduction could not have been claimed in the returns for FYs 2011-12, 2012-13 and 2013-14 as the exemption notification was issued only on 08.01.2015 prospectively and that the rebate/deduction was received only for the period 08.01.2015 – 31.03.2015 and for FY 2015-16.
- (iv) The decisions relied upon by the State were with reference to illegal collection of tax.

Supreme Court decision

Administrative inefficiency

The Supreme Court first commented upon the delay in issuing the notification as *acase of bureaucratic lethargy*. While acknowledging the discretionary power of the State to decide on periods and dates of exemption, the Apex Court brought to forefront the representation made by the Industrial Policy 2012 that a rebate/deduction would be granted. Noting that the State Government did intent to go forward and act in pursuance of its commitment, the Court pointed out that the State Government however has to take notice of the observations of the High Court in regard to administrative lethargy. The Supreme Court in its judgement stated "*The State government was evidently inclined to grant the exemption. This is not a case where due to an overarching requirement of public interest, the State government decided to override the representation which was contained in the Industrial Policy 2012. To the contrary, it sought to implement the representation albeit in fits and starts. Firstly, there was a delay of three years in the issuance of the notification. Secondly, by making the notification prospective, it deprived units such as the respondent of the full benefit of the exemption which was originally envisaged in terms of the Industrial Policy 2012.*"

Promissory Estoppel

The Court, to analyse the contentions relating to the Doctrine of Promissory Estoppel, looked into the origin and evolution of the doctrine. The Supreme Court referred to the earliest of the decision in **Crabb vs. Arun DC (1976) 1 Ch 179 (Court of Appeal)** and the subsequent decision in **Combe vs Combe (1951) 2 KB 215**. In the context of Indian law, the Court referred to the wide interpretation to the doctrine of Promissory Estoppel in order to remedy the injustice done to a party who has relied on a promise in the case of **Motilal Padampat** wherein it was held that "*having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to project this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice...We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so.*"

Doctrine of legitimate expectations

The Court noted that the doctrine of legitimate expectation initially developed in the context of public law as an analogy to the doctrine of promissory estoppel found in private law. The Court extracted the relevant paragraph from De Smith's Judicial Review where he notes the contrast between the public law approach of the doctrine of legitimate expectation and the private law approach of the doctrine of promissory estoppel:

"Despite dicta to the contrary.. it is not normally necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation... Private law analogies from the field of estoppel are, we have seen, of limited relevance where a public law principle requires public officials to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned."

The Court also observed that the doctrine of legitimate expectation under English Law can constitute a cause of action: "*The scope of the doctrine of legitimate expectation is wider than promissory estoppel because it not only takes into consideration a promise made by a public body but also official practice, as well. Further, under the doctrine of promissory estoppel, there may be a requirement to show a detriment suffered by a party due to the reliance placed on the promise. Although typically it is sufficient to show that the promisee has altered its position by placing reliance on the promise, the fact that no prejudice has been caused to the promisee may be relevant to hold that it would not be "inequitable" for the promisor to go back on legitimate expectation.*"

Referring to Jain and Jain's treatise, the Principles of Administrative Law, the Court observed that under Indian law, there is often a conflation or fusion between the doctrines of promissory estoppel and legitimate expectation. In **Punjab Communications Ltd. v. Union of India (1999) 4 SCC 727**, the Supreme Court has observed in relation to the doctrine of legitimate expectation:

"the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way Reliance must have been placed on the said representation and the representee must have thereby suffered detriment.

It is suggested that this formulation of the doctrine of legitimate expectation is not correct as it makes "legitimate expectation" practically synonymous with promissory estoppel. Legitimate expectation may arise from conduct of the authority; a promise is not always necessary for the purpose."

In **National Buildings Construction Corporation vs S. Raghunathan (1998) 7 SCC 66**, the Supreme Court held that the doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has, today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."

This observation however was made while discussing the ambit of the doctrine as it stood then under English Law. More recently, in **Monnet Ispat and Energy Ltd. vs. Union of India (2012) 11 SCC 1**, it was held that for the application of the principle of promissory estoppel, there has to be a promise, based on which the promisee has acted to its prejudice. Alternatively, while invoking the doctrine of legitimate expectation, "the basis of this doctrine is in reasonableness and fairness of the State action. However, it can also not be invoked where the decision of the public authority is founded in a provision of law, and is in consonance with public interest."

In **Union of India vs Lt. Col. P.K. Choudhary (2016) 4 SCC 236**, the Court held that the doctrine of legitimate expectation cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution. The relationship between this doctrine and Article 14 was discussed in the Three Member Bench decision in **Food Corporation of India vs Kamdhenu Cattle Feed Industries (1993) 1 SCC 71**, "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."

In **NOIDA Entrepreneurs Assn. vs NOIDA (2011) 6 SCC 508**, the Court elaborated on this principle as follows :-

"Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other..."

Conclusion

Applying the principles discussed above to the present case, the Court criticised the State stating that "the state having held out a solemn representation in the above terms, it would be manifestly unfair and arbitrary to deprive industrial units within the State of their legitimate entitlement." The Hon'ble Court observed that the State had no justification for the arbitrary delay in issuance of notification and held that "It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of state power. The state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest."

The Court further did not accept the argument of unjust enrichment by referring to **Indian Council for Enviro-Legal Action vs Union of India (2011) 8 SCC 161**, and observed that the doctrine would apply only with the respondent had passed on the duty to the customer and retained the refund occasioned by the 50% rebate in its own pocket. This has not been demonstrated. The Supreme Court agreed with the conclusion of the High Court that the respondent was entitled to an exemption from electricity duty and that the relief granted would stand confined to FYs 2012-2013 and 2013-2014 and disposed the appeal.

Legitimate expectation in the current context

There are number of news reports with reference to the recent arbitration award in the **Vodafone** matter and whether the Government should contest the award or not. An assessee who disputes a tax liability for various reasons and who challenges a demand and succeeds before the Hon'ble Supreme Court of India has a legitimate expectation that he would reap the benefits of his victory. It is no doubt true that Parliament is entitled to amend the law and also amend the law retrospectively. But the question is whether pursuing a tax collection for the past period based on a retrospective amendment in law is the best approach in the light of the macro view of making India a five trillion dollar economy and attracting investments from all over the world.

If manufacturing in India, is the backbone of the policy initiatives, it is of utmost importance that the law is not only simple but

any assessee has the assurance that the law would not be changed with retrospective effect. It is high time that we read the *doctrine legitimate expectation* and *promissory estoppel* into consistent rules and regulations for business and tax laws. While change is inevitable, is retrospective effect resulting in detriment should be completely avoided. The Government is fully entitled to change the law to protect its legitimate claim to revenue but it should be done only with prospective effect. Ease of doing business is just not faster clearances or reduction in number of steps or forms or use of technology. It is all that and more. Stability and consistency is even more critical for a business. The ease lies in the assessee being assured that an exemption which is granted would never be withdrawn retrospectively; a statute based on which investments are made or decisions are taken is not altered retrospectively; a decision in favour of the assessee is not nullified by a retrospective amendment causing loss and detriment to the assessee.

In tax disputes if the Revenue loses a case it does not mean that the law is screaming for an amendment with retrospective effect to protect the interest of the Revenue. The law can always be changed prospectively. The Government should not perceive itself as an opponent in an ongoing dispute and deny the victory through a retrospective amendment. The Government should be equally interested in the nation doing well and achieving its growth targets. When the economy grows, the tax revenues would naturally grow.

One cannot continue to have complex tax laws and ever changing notifications and frequent retrospective amendments to statutes including procedural requirements and at the same time wish for extraordinary growth in the economy to propel the country to great heights. India has a huge potential; a very big market; best of resources both human and technical. The world is willing to invest and participate in the growth but is always wary of business and tax laws which keep changing. Going forward, every Ministry which brings in a new law or a change to a statute or brings in new set of procedures or creates a new authority should ask the following questions before introducing the same.

- (i)** Whether the change in law or procedure is really required?
- (ii)** Whether the change is prompted by a recent decision of the Court and if so, is it only prospective?
- (iii)** Whether the change will have the 80:20 effect whereby a change to curb a bad practice by the 20 is likely to affect the law abiding 80?
- (iv)** Whether the change would improve the ease of doing business or would only result adding to the compliance burdens?
- (v)** Whether the change can affect the potential for investments in India and derail the plan of five trillion dollar economy or whether the change will only facilitate and accelerate the journey towards the goal?