Lesson 9
Promissory Estoppel in Fiscal Laws, Tax Planning and Tax Management

LESSON OUTLINE

- Meaning of Doctrine of Promissory Estopple
- Requirements of Promissory Estopple
- Promissory Estoppel in Fiscal Laws
- Limitation of the Doctrine
- Tax Planning
- Tax Planning under Excise law
- Tax planning under Customs Act
- Lesson Round Up
- Self Test Questions

LEARNING OBJECTIVES

This lesson is divided into two parts i.e. promissory estoppel in fiscal laws and tax planning and management with respect to indirect taxes. '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. Here, we will discuss the applicability of Doctrine of promissory estoppel.

Tax planning in indirect taxes is thrust area in the business world. Indirect taxes constitute major portion of cost and therefore it is necessary that tax is managed properly. Indirect taxes are ruled by complex regulations and are often changing. By successfully managing indirect tax requirements of a business, the business’s profitability can be protected and also cash flow needs could be met in a better manner. Professionals like Company Secretaries can provide their services in managing the tax compliances and thereby assist in reducing the administration cost.

After completion of this lesson, the students will understand:

- What is promissory estoppels
- Applicability of doctrine of promissory estoppel under Indirect taxes
- Tax planning under indirect taxes

Indirect taxes include customs duties, excise laws and taxes on consumption, such as Value Added Tax (VAT) and Goods and Services Tax (GST). These taxes apply to every stage of the supply chain. Managing these taxes to reduce costs and avoid errors that lead to penalties and business disruption is crucial to maintain profits.

MEANING OF DOCTRINE OF PROMISSORY ESTOPPEL

Promissory estoppel is a common law doctrine used by courts to enforce promises that have been made and subsequently relied upon. Promissory estoppel usually comes into play when there is no formal contract, but the parties involved have nevertheless acted as if there was one. Courts use the doctrine in these circumstances to impose a contract or the agreement, usually in the interest of fairness.

In common language, "promissory" means "related to a promise," and "estoppel" is a legal term that essentially means an enforced bar or ban. Judges use this doctrine to ban a person from going back on a promise. Seen from a different angle, the doctrine is a tool to enforce promises, effectively requiring both parties to do the things they said they would be doing.

The doctrine of Promissory Estoppel has its genesis in the law of equity and is being closely related to various schemes for allowing tax concessions to certain new industrial units set up within specified time or in specified places, it has become very relevant in fiscal legislations particularly in Sales-tax, Excise and Custom duty disputes. The doctrine is not limited in its application only to defence but also in a cause of action. This concept and its applicability have often been agitated before the court in the context of sales tax exemption. The gist of equity lies in the fact that one party has by his conduct or representation led the other to alter his position. If injustice can be avoided only by enforcement of the promise, it is a case of estoppel.

The doctrine of estoppel has its origin in principles of Equity. It was defined under Section 115 of the Evidence Act, 1872 as follows;

"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."

In ***Delhi Cloth and General Mills Ltd.*** v. ***Union of India,*** it was held that:

“All that is now required is that the party asserting the estoppel must have acted upon the assurance given to him. Must have relied upon the representation made to him. It means, the party has changed or altered his position by relying on the assurance or representation by the other party. The alteration of position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel.

The estoppel operates as a legal protection to the person who acts in good faith on the basis of express or implied conduct of others and suffers damage.

The Doctrine of Promissory Estoppel is an equitable doctrine evolved to avoid injustice and it neither falls in the sphere of contract nor estoppel. This principle is commonly invoked in common law in case of breach of contract or against a Government. The doctrine is popularly called as Promissory Estoppel, Equitable Estoppel, Quasi Estoppel or New Estoppel. It can be said that if the Government of India makes a promise to any person and the promise is not inconsistent with the law of the land and is not against public interest, then afterwards it cannot refuse to abide by its promise.

An example of promissory estoppel is where ‘A’ promises ‘B’ that he would not enforce his legal rights and B acted and relied on it without giving any consideration, equity would not allow A to renege on his promise to B.

REQUIREMENTS OF PROMISSORY ESTOPPEL

(1) There is a pre-existing contractual relationship.

(2) One party to that contract makes a clear promise that they will not fully enforce their legal rights (under that contract).

(3) The promisor intends that promise be relied upon and promisee does in fact rely upon it.

(4) It would be inequitable for promisor to go back on (resile from) their promise.

Promissory estoppel is not limited only to cases where there is some contractual relationship or other pre-existing legal relationship between the parties. The principle can be applied even when the promise is intended to create legal relations or affect a legal relationship which will arise in future.

Promise need not be expressed; it can be implied from circumstances.

DOCTRINE OF PROMISSORY ESTOPPEL AND FISCAL LAWS

The doctrine of promissory estoppel has great significance in taxing statutes. It marches with the hypotheses that a promise given by the state is binding on the government in the following circumstances:

1. Where there is a clear and unequivocal promise knowing and intending that it would be acted upon by the promisee; and
2. By acting upon the promise by the promisee, it would be inequitable to allow the promisor to go back on the promise.

This is raised in tax matters, especially in Sales tax where the Government provides exemption from tax by means of tax holiday for a certain period say 5 years and withdraws the exemption before the expiry of 5 years.

The plea of promissory estoppel is on the ground that certain units have been established expecting the tax benefits and the withdrawal before the expiry has caused damage to them. Here, the units might be hit hard. They can go to the court of law against the Govt. under Doctrine of Estoppel. The doctrine was first introduced in *Hughes* v. *Metropolitan Rly. Co.,* 1877, Appeal case 439. Lord Cairns stated the doctrine in the following words :

"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results .... afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties".

The doctrine of promissory estoppel is also known as ***equitable estoppel or quasi estoppel.***

Courts on Promissory Estoppel

The courts while recognizing the principle of promissory estoppel as an instrument of equity remedy have consistently held that the 'promissory estoppel plea' fails where 'public interest' intervenes. That means, though a concession is extended for a fixed period by a notification or otherwise the same can be withdrawn in public interest in *Sales Tax Officer & Another* v. *M/s. Shree Durga Oil Mills* (1997) 7 SCALE, 726, the honourable Supreme Court held that a notification granting exemption of taxes can be withdrawn at any point of time. There can not be estoppel against any statute. Where it is in public interest, the court will not interfere because public interest must override any consideration of private loss or gain.

A leading authority on this subject is of the Supreme Court in *Motilal Padampat Sugar Mills Co Ltd*. v *State of Uttar Pradesh* (118 I.T.R. 326).

It was held that the government is susceptible to the operation of the doctrine in whatever area or field the promise is made: Contractual, administrative or statutory.

"The law may, therefore, now be taken to be settled as a result of this decision, that where the government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."

In *Sree Sales Corporation & Another* v. *U.O.I.* (1997) 3 SCC 398, it was held that where there was supervening public interest, the Govt. is free to change its stand and withdraw the exemption already granted. Recently, in *Sharma Transport* v. *Govt. of A.P. & Others* (2002) S.C., the Supreme Court observed “one such reason for changing its policy decision can be resource crunch and the loss of public revenue. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bold expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered his position relying on the assurance of the Govt. would not be sufficient to press into aid the doctrine. ‘Doctrine of promissory estoppel’ has been evolved by Courts on the principles of equity, to avoid injustice.

In the above case, the appellants were operators of tourist buses originating from the State of Karnataka and running their buses in adjacent states including the state of A.P.

The vehicles of the appellants were covered by tourist vehicle permits by virtue of which, their vehicles were authorised to ply in certain contiguous states also.

The Central Government formulated policies in the matter of concessions to be extended to tourist vehicles. Based on the directive of the Central Govt. an order was issued on 1st July, 1995 conferring the benefits of a concessional rate of tax to tourist operators. But on 5th June 2000, the State Govt. issued a notification under A.P. Motor Vehicles Taxation Act, 1963 cancelling the earlier order of 1995. The operators after losing the High Court of A.P. filed an appeal before the Supreme Court. The Contentions before the apex Court were — that the directives of the Central Govt. were binding on the State Govt. and that the withdrawal of tax concession is illegal. They also contended that under doctrine of promissory estoppel, a concession extended by the Govt. could not be withdrawn.

But the Supreme Court rejects the pleas and dismissed the appeal stating that the state of A.P. is justified in withdrawing the benefits in public interest. Also held that the doctrine of promissory estoppel is not applicable in the case.

Thus we can conclude that the doctrine of promissory estoppel is a valid proposition but it will be disallowed by courts when the withdrawal of tax benefit by the Govt. is to save the larger interests of the public.

As can be seen from the analysis of the cases above, the concept of Promissory Estoppel has assumed considerable significance in sales tax law. Many a time the State Governments with a view to giving a spur to industrial development in the State give sales tax exemptions. Subsequently, State Governments may either withdraw the exemption notification or introduce certain restrictive covenants. This becomes necessary in view of the loss of the revenue to the State Government, as a result of the sales tax exemption granted earlier. In such a situation, whether the State has to be held bound to the representation made earlier to the trade or not depends upon whether the exemption was for a particular period or whether the industry has altered its position in the light of the notification etc. It is once again reiterated that if a State Government issues a general exemption notification with no reference to any period of time such exemption may be amended or varied at any time. There would be no question of any promissory estoppel in such cases. But where the State Government hold out that exemption from sales tax would accrue for a given period of time of three years or five years than promissory estoppel would be applied.

CASE STUDIES

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 assessees 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 assessees 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 in 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 byelaws' and thus the power to amend the parent Notifications vests unshakably in the Central Government.

Does this imply that the assessees 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 assessees 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 assessees. 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.

LIMITATION OF THE DOCTRINE

1. Since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. But it is only if the court is satisfied, on proper and adequate material placed by the government, that overriding public interest requires that the government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to

enforce the promise against the government.

2. No representation can be enforced which is prohibited by law in the sense that the person or the authority making the representation or promise must have the power to carry out the promise.

If the power is there, then subject to the preconditions and limitations noted earlier, it must be exercised.

Thus, if the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute. But if the statute confers power on the Government to grant the exemption, the Government can legitimately be held bound by its promise to exempt the promisee from payment of any tax.

TAX PLANNING

Tax planning exercise needs to be undertaken with great amount of care and discretion. It should neither border on evasion nor should it merely be a device to circumvent the letter of law. In this context the Supreme Court's Judgements in *Mc Dowel and Company Ltd.* v. *Commercial Tax Officer* 1985, 5, ECC 259 was also studied in full text. This judgment signaled a departure from the West Minster Principle upon which most of the tax planning used to be founded and which for long had the judicial blessing. But the winds have changed since and in England the West Minster Principle has been given a go by. The Mc Dowel's judgement is a vindication of judicial attitude currently prevailing in England on the use of certain devices to avoid proper incidence of tax.

A trader or a Business entity need not be complacent in regard to payment of indirect taxes, for the simple reason that these are passed on to the consumers. It would only be a reiteration to say that tax planning is as much relevant and important in indirect taxes as it is in direct taxes.

The approach of tax planning has been to give a very rudimentary idea of tax planning vis-à-vis indirect taxes. No attempt has been made to repeat and elaborate discussions on various case laws concerning Excise, Customs and Sales Tax. The presentation is only skeletal and indicative of the broad contours of tax planning.

CUSTOMS ACT AND TAX PLANNING

Customs Act concerns Import and Export of Goods and restrictions and regulations relating thereto. Every importer or exporter and every buyer from such importer for instance, are interested in customs duty planning. For an importer, the tax planning centers round the classification of import goods and valuation of those goods. Improper classification of goods may lead to higher incidence of Customs Duty. On the other hand, even a proper and appropriate classification may not be a ground for feeling relaxed. Because even after correct classification, the valuation of Import of goods may be high pitched with the result the absolute incidence of customs duty would be much more than what it ought to have been. Importers therefore have to pay special attention to problems of classification and valuation of imported goods.

As regards valuation under the Customs law, besides the statutory provisions there are Customs Valuation Rules also. Apart from these, a good amount of case law has developed on what items are to be added to the value of the goods and what items going to reduce the value of goods. A proper tax planning exercise would have to take into consideration these aspects.

(a) Customs Act and Classification of goods

Classification of imported goods is very significant because a wrong classification may lead to a very high incidence of Customs Duty. The importer has therefore to be fully convergent with principles of classification of goods.

Since the subject of taxation is "goods", the concept underlying the levy is required to be understood. It is not the personal opinion of an individual Officer or for that matter of the assessee with regard to the classification of the "goods", that governs the issue. There are certain well defined criteria laid down by judicial decisions, which are required to be kept in mind. We saw what happened in the fountain pens case. In the case of *V.V. Iyer* v. *Jasjit Singh* (AIR 1973 SC 194), the appellant, who carried on business of importing plantation and agricultural machinery and implements had imported certain parts of agricultural machinery known as express Battery Sprayers which were classified under SL. No: 74 (x) of Part V of the Import Tariff Schedule which related to "sprayers (other than power driven) and parts". The appellant's contention was that he held an import licence for import of goods falling under serial No. 74(vi) of the said part of the said Schedule which related to "Parts of power driven agricultural machinery", the goods imported (liquid containers) were parts of sprayers and the said serial no. 74(vi), permitted all kinds of spare parts of power driven agricultural machinery. The sprayers imported, according to the appellant, function normally with the help of power driven pumps and functionally, therefore, what the appellant imported were, correctly falling within serial No. 74(vi). As discussed earlier, the Supreme Court, however, did not interfere with the conclusions arrived at by the customs authorities.

In doing so, the Supreme Court was reiterating its earlier decisions in *Collector of Customs, Madras* v. *K. Ganga Shetty* [AIR (1963) SC 1319], and *A.V. Venkateswaran* v. *A.S. Wadhwani,* (AIR (1961) SC 1506), In Ganga Shetty's case, the respondent had imported from Australia a quantity of oats which was described in the indent, contract and shipping documents as "standard feed -oats". The commodity imported consisted of oats in whole grain. The question related to the proper classification of goods. The controversy centered round the point whether the "feed - oats" fell within S.No. 42 or S.No. 32 of the relevant Import Trade Control Schedule. During the relevant period S.No. 42 read:

"Fodder, bran and pollards, for the import of which a Special import licence was necessary" while item 32 read:

"Grain, not elsewhere specified, including broken grain but excluding flour -

(a) oats;

(b) others;

for which a licence was required.

The customs department held that the goods fell under S. No. 32 and established a case of importation without a valid licence. The contention of the importer was that the "feed oats" fell under the item relating to "fodder" because he had imported the goods solely for feeding race horse, at Bangalore and in South India, oats was not used as human food but only as a feed for horses and in any case, he was misled regarding the correct classification by an affirmative answer he had received from the Deputy Chief Controller of Imports, Madras to whom he had made a reference as to whether the goods could be imported under O.G.L. In the High Court, the decision was in favour of the respondent on the ground that in the Court's view, that "oats" fell under item 42 relating to "fodder" and that the decision of lower authorities was always open for judicial review.

In appeal the Supreme Court however, held that the High Court was not right in interfering with the decision of the Customs authorities since their decision to treat it as falling under item 32 "could not be said to be a view on which no reasonable interpretation could be entertained". In other words, the Supreme Court felt that the 'conclusion or decision of the customs authorities was rationally supportable".

In *Ramavtar Budriprasad* v. *Assistant Sales Tax Officer* [AIR (1961) SC 1325], the question before the Supreme Court was whether "betal leaves" could fall within the category of "vegetables" for purposes of assessment to sales tax and the court held that the latter could not include within its scope the former, since both were two distinct and separate commodities. The Court held that since the said expressions were not defined by the statute (C.P. and Berar Sales Tax Act 1947 as amended by the C.P. and Berar Act of 1948), and being a word of "every day" use, it must be construed in its proper sense, meaning "that sense in which people conversant with the subject matter with which the statute is dealing would attribute to it.

In *Commissioner of Sales Tax, Madhya Pradesh* v. *Jaswant Singh*, the Supreme Court further explained the basis for classification of goods. The question before the Court was whether "charcoal" was included in "coal" for assessment of sales tax. It was held that the Sales Tax Act being one levying a tax on goods must, in the absence of a technical term or a term of science or art, be presumed "to have used an ordinary term as coal according to the meaning ascribed to it in "common parlance". Viewed from this point, the Court held that both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as "ordinarily understood" and would therefore include charcoal in the term "coal".

In *Annapurna Carbon Industries* v. *State of Andhra Pradesh* [AIR (1975) SC 1418] the Supreme Court laid down the test of "predominant" or "ordinary purpose" as deciding factors for determination of classification of goods. It was not the exceptional use or extraordinary use to which the goods could be put to but how predominantly it was used. The Supreme Court further laid down that the fact that the article could be put to any other use also would not detract from the position explained and that the test of general or predominant user was the true test in such matters.

From the above discussion it is clear that while classifying goods for duty purposes due regard should be had to the above principles and it is open for the importer to help the correct classification by establishing how the commodity was popularly known in the particular trade or business in connection with which the goods imported would be used.

In *Commissioner of Sales Tax Madhya Pradesh* v. *Bhaket Rai* (19 Sales Tax Cases, 285) the Madhya Pradesh High Court, considered the question whether coconuts, groundnut kernel and jira were oil seeds attracting duty under the relevant tariff item (Item 3 of Part II of Schedule I) of the Madhya Pradesh General Sales Tax Act, 1958. The Sales Tax Tribunal had taken the view that these articles were oil seeds in as much as they were seeds and oil could be extracted from them. On reference the High Court took the view that the term oil "seeds" not having been defined by the statute, should be construed in that sense which "people conversant with the subject matter with which the statute was dealing would attribute to it." Those articles, in the opinion of the Court, were not known as "oil seeds" in common parlance used principally for the extraction of oil and therefore, could not attract the tax.

The Punjab High Court in *Kanpur Textile Finishing Mills* case [AIR (1956) Punjab 130] laid down that:

When dealing with a particular business or transaction words are presumed to have been used with the particular meaning with which they are used and understood in the particular business."

In *National Hurricane Works* v. *Union of India* [AIR (1967) Delhi 156], the Delhi High Court dealing with the Import Tariff laid down that if a particular term or word has not been defined in the tariff, then one has to go by the ordinary meaning of the term and that if an item falls specifically under one entry, it cannot by the "process of stretching be brought to fall under another entry".

It is a settled legal position that if words or expressions used in the tariff are not defined in the body of the statute or the tariff then, regard shall be had to technical opinions, dictionaries and treatises on the subject, including ISI standards.

The basic principle underlying adjudication is to act judicially and not arbitrarily.

The Supreme Court has catagorically laid down in *G. Nageshwara* v. *A.P.S.R.T. Corporation* (AIR) (1959) SC 308, that rules of natural justice require that quasi judicial authorities empowered to decide any dispute must decide the cases without any bias on the principle that "justice should not only be done, but also should manifestly and undoubtedly be seen to be done."

In *Shri Baidyanath Ayurvad Bhawan Ltd.* v. *Asstt. Collector of Central Excise,* Allahabad, the Allahabad High Court was perturbed that even though the collector (appeals) had directed de-novo adjudication of the case, a personal hearing was not granted by the Adjudicating authority (even though a specific request in this behalf had been made by the petitioner) on the ground that the Petitioner had filed some papers on the date of hearing which could not take place on account of pre-occupation of the authorities. The Court held that filing of papers cannot be equated with personal hearing, and on this count alone, the order of the adjudicating authority passed on de-novo consideration of the matter was liable to be quashed.[1986(25) ELT-II(ALL)].

In *Banwarilal Roy's* case [AIR (1948) Calcutta 776] the Calcutta High Court laid down that: "a judicial or quasi-judicial act on the other hand implies more than mere application of the mind or the formation of the opinion. It is a reference to the mode or manner in which that opinion is formed. It implies a 'proposal', an 'opposition' and the 'decision' on the issue."

In *Soorajmal* v. *Assistant Collector of Customs* [AIR (1952) Calcutta 103] the Calcutta High Court laid down that:

"It is the duty of the customs authorities to 'adjudge' (i.e. decree judicially) the penalty. In other words, to act judicially or quasi-judicially. The fundamental rules of judicial procedure or the principles of natural justice require that a proper hearing and opportunity be given to the person before the rights of such a person are affected by any decision or adjudication. Where the customs authorities impose extra duty, acting in a high handed and an arbitrary manner, arrive at their decisions on extraneous and irrelevant considerations without giving proper opportunity to the petitioner to put his case before the customs authorities and later on demand the extra duty, there has been a denial of natural justice and violation of the fundamental principles of judicial procedure and a writ of certiorari does lie even though there may be an alternative remedy open to the petitioner by way of an appeal".

The Calcutta High Court while observing as above relied on the Supreme Court decision in *Province of Bombay* v. *Khushaldas Advani* [AIR (1950) S.C. 222] and came to the aforesaid conclusion.

Classification of goods is an intricate but well defined exercise. Reading and interpreting a tariff entry cannot be done in any casual or non challant manner. Words and expressions found in a tariff have to be properly understood and harmonized. They cannot be taken out and read in vaccum, so to say, nor can entries be read, out of context.

In *Ex-QUIZ TI* v. *State of Tamil Nadu* [1986 (25) ELT 6 (MAD)] the Madras High Court observed:"....the Supreme Court held that in determining connotation of words and expressions describing an article or commodity.... which is taxed...... if there is one principle fairly well settled, it is that the words or expressions must be construed in the sense in which they are understood in that trade by the dealer and the consumer and that it is they who are concerned with it, and it is the sense in which they understand it that constitutes the definite index of the legislative intention when the statute was enacted".

In *Madanvathi's case* [AIR (1960) Mysore 299, 301] the Mysore High Court (as it then was) pointed out that:

"the first and foremost rule of interpretation is the rule of grammatical interpretation,, the legislature must be deemed to have intended what it has said. It is no part of the duty of the court to presume that the legislature meant something other than what it said. If the words of the section are plain and unambiguous then there is no question of interpretation or construction. The duty of the Court is to implement these provisions".

In *Indye Chemicals* v. *Collector of Central Excise Ahmedabad* -1986 (25) ELT 318 (Tribunal), it has been reiterated that Exemption notifications are to be construed strictly and in accordance with the plain meaning of the words used therein and if there is any doubt, the benefit of that doubt should go to the assessee so that the tax burden is reduced.

In *Goolabchand's case* [AIR (1951) MB 11 (FB)] I it has been laid down that:

"If a plain word carried a plain sense in the English language, however strict the law may interpret it, it will not ignore the ordinary meaning which it carries".

Crawford an authority on statutory construction has stated that:

"Where a word used by the legislature has fixed technical meaning; it is to be taken in that sense. The technical words and phrases of the law are presumed to have been used in their proper technical signification when used in statutes......."

Maxwel in his interpretation of statutes has stated that:

"the first and foremost elementary principle is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one otherwise in their ordinary meaning".

In *United States* v. *Brown* [333 US (8)], it has been laid down : "no rule of construction necessitates acceptance of an interpretation of a statute resulting in absurd consequences".

In *Robertson* v. *Day* (5AC 62, 69) the privy Council has said:

"It is a legitimate rule of construction to construe words......with reference to the words found in immediate connection with them".

In *Commissioner of Income Tax, Bombay* v. *Reid* (AIR (1931) Bombay 333 it has been laid down that:

"In construing a taxing Act, the Court is not justified in straining the language in order to hold a subject liable to tax".

The Supreme Court in *Sales Tax Commissioner* v. *Modi Sugar Mills* [AIR (1901) SC 4047] laid down that:

"In interpreting a taxing statute equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed, it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiencies."

The CEGAT, in *Venus Engineering Pvt. Ltd.* v. *Collector of Central Excise, Baroda* [1986 (25) ELT 553 (TRIBUNAL)] observed that it is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument, more so when these are not dealing with any cognate subject. The subject of the Factories Act is far from being cognate with the subject of the Central Excise Act - one deals with taxes and the other with places where goods are manufactured. In the circumstances, the word "worker" in the Central Excise Act must be given the same meaning which it receives in ordinary parlance or is understood in the sense in which people conversant with the subject matter understand it and not that attributable to it under the Factory Act.

In the matter of availment of exemptions, it has been laid down by the Kerala High Court in the case of *Rice and Oil Mills* [1981 ELT (KER) 59] that denial of an exemption notification would tantamount to violation of fundamental right. It is also a settled legal position that in the matter of exemption notifications, the authorities cannot abridge, alter, amend or nullify the scope of a valid notification. Benefits flowing out of a valid notification cannot also be denied. An importer who does not have sufficient finances to clear the goods or if he does not require all the goods imported for consumption at one time, may file a Bill of Entry for warehousing under the warehousing provisions, so that appropriate duty may be paid at the time of actual clearance of the goods from the warehouse.

When a set of articles are imported as a project or a single unit and the amount is charged for the same as a whole , the articles in the set attracting highest rate will be applied to the whole lot. This is irrespective of the rates the individual articles attract.

For this, if possible, the exporter shall specify the articles severally in the set and specify the price individually in the invoice. As a result a lot of duty can be saved.

If accessories and spares are brought with the main articles which are compulsory and charges separately, the rate applicable to the main article is applied to the accessories also. Example: a car is imported with accessories .BCD on car, say 90% and on accessories it is 10%. If accessories price can be shown separately in the invoice, there would be a saving in terms of duty.

(b) Customs Act and Exemption Notifications

It has already been seen that under the Customs Act (Section 25 of the Act) power has been conferred on the Central Government to exempt certain goods from the levy of customs duty. An importer has to necessarily keep a proper track of exemption notifications. The exemptions notifications may either be without any reference to any given time period or may be with reference to a particular period. In the former case, the exemption notification can be withdrawn at any time by Central Government. It is therefore necessary to envisage this eventually while negotiating contracts for sale of goods after their import into India, because Customs Duty liability will increase the cost of import which should normally be reflected in selling price. Even if the imported goods are not to be sold but are to be captively consumed, the levy of import duty by withdrawing the exemption granted earlier would have the effect of increasing the cost of production. If the imported goods are Plant and Machinery even then its effect would be to increase the cost of project. Even in a case where exemption has been given for a given period of time, the Central Government may withdraw the exemption notification before the expiry of the given period of time. To take an example, an exemption notification issued on 1.10.96 effective up to 1.10.99, may be withdrawn by the Government before 1.10.99, with the result an importer who placed an order for import of goods in the hope that they are exempted from duty may be faced with the shocking problem to pay the duty because the exemption notification has been withdrawn before 1.10.99. Now the question is, whether such a withdrawal of exemption before the expiry of normal period up to which it must have run can be challenged on the ground of promissory estoppel. The Judicial view seems to be that promissory estoppel cannot be pleaded against the Government, because withdrawal of the exemption notification under Section 25 is in public interest and such a withdrawal is a legislative function. These aspects must be borne in mind whenever any goods are imported on the basis of an exemption notification.

(c) Customs Act and Input Tax Credit:

Yet another aspect of interest in customs law is that the countervailing duties payable on the import of certain goods have to be properly accounted for in the documents. Suitable endorsement of the intention to avail CENVAT credit must be made on the Bill of entry. This is because the same Bill of entry may not be used for claiming any duty drawback on exports. This is because CENVAT credit can be availed in respect of countervailing duties also. If the importer is a canalising Agency and the goods are supplied by the canalising Agency to the Manufacturer, such a manufacturer must impress upon the canalising agency for issue of a certificate in respect of countervailing duties paid on the goods. Only on the basis of such a certificate the manufacturer would be able to get CENVAT credit.

Under the GST regime most of the goods are under GST. Where tax on goods and services is integrated and IGST is payable on imports, every supplier of imported goods is entitled to take input tax credit on whole of IGST which he can use for payment of IGST, CGST & SGST

(d) Customs Act and Duty drawback

As regards exports are concerned a matter of subtle importance is the claims for duty drawback on the export of goods. The interesting question that has been agitated more than once before various judicial forums is, when does export takes place, whether on the export goods passing into the control of Customs Department or when the export goods reach the buyer located beyond the territorial waters of India. Judicial decision on this point are quite encouraging. The view is that once the export goods pass into the control of the Customs Department so as to be out of the control of the exporter any longer, the export is supposed to be complete. This issue is very important because there may be two eventualities.

After the export goods passes into the control of Customs Department and the goods have been boarded on the ship or have been kept for boarding on the ship, there may be a loss or destruction due to fire or action of the sea or due to any other cause. Secondly, though the goods are safely boarded on the ship, but before they cross the territorial waters of India, there may be loss or damage to the goods on board or the whole ship may be lost. In such situations, it is proper to cite judicial rulings wherein some of the High Courts declared that export is complete when the export goods pass to the customs control notwithstanding the fact that thereafter they get lost or destroyed before crossing the territorial waters of India.

(e) Customs Act and Record Keeping

Last but not the least is the proper documentation and record keeping. The maintenance of correct and proper records would avoid any penal action being taken by the excise department for non-compliance with any particular rule or notification. In this context, it is necessary to be conversant with various regulations rules and the forms prescribed under the customs laws. These have been adequately explained in the preceding study lessons. A tax planner would therefore labour to keep track of various amendments brought about to various rules forms etc. so that the records and registers are at all times in consonance with the statutory requirements.

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(f) Deposit of goods in a warehouse

As per section 61 of the Act, the imported goods can be deposited in a warehouse for warehouse for a maximum period of one year subject to extension in some cases. Thus, removal of goods should be planned properly and the goods shall be moved within the prescribed period, else there will be necessary penalties resulting in sheer loss of money.

Every effort must be made to see that the goods are cleared from the warehouse in time before the goods get destroyed or damaged beyond repair. No remission is granted on such goods deposited in a warehouse where the importer failed to clear within the stipulated time.

For example, In DECORATIVE LAMINATES (I) PVT. LTD. 2010 (H.C)]

The goods were deposited in a warehouse and due to lack of demand, extension was sought and granted. Even the extended period was over by 31st Dec 2001. Still the goods were not removed. In the meantime the goods were destroyed in the warehouse. Then the importer applied for remission under Section 23 of the Act. Department rejected on the ground that remission cannot be granted on goods stored in the warehouse beyond the permissible period.

The High Court held that no remission under Section 23 of the Customs Act can be allowed for warehoused goods if they are lost or destroyed in the warehouse after the expiry of warehousing period. Further held that the benefit of remission under Section 23 is available only to proper removals.

GST LAWS AND TAX PLANNING

A proper tax planning exercise has to be done so as to ensure due compliance with the statutory provisions and also to reduce the incidence of duty to the minimum. In fact a proper tax planning GST Law demands:

(i) An in-depth knowledge of substantial provisions;

(ii) A thorough knowledge of procedural formalities;

(iii) A continuous follow-up of various Exemptions Notifications;

(iv) Procedural compliances and filing of returns in time

(v) Ability to reason out and argue one's point of view.

At the outset it is a wiser part of discretion to avoid basing tax planning on very tenuous reasoning and controversial interpretations. At the same time when the rulings of the Courts carry considerable conviction it would not be advisable to ignore them. Wherever the planning is done on premises which may not find a favour with the Courts or the legislature ultimately, it is desirable to make suitable provisions in the accounts to meet the duty liability that may arise in future for past transactions. Alternatively, while entering into contract of sale of goods, a manufacturer may do well to provide in the contract note that, should additional demand of duty be made by the Government on him, the same would be recovered from the purchaser (this is however subject to the advisability of including such term from a purely commercially strategic point of view).

Some broad areas of tax planning with reference to GST Laws are discussed herein below:

(a) Classification of goods and services

Indirect taxes are levied on goods ***and services*** either at ad valorem rate mostly. Irrespective of the type of tax, the rate and the amount of tax would in almost all cases inter alia depend on classification of the goods/ services. As wrong classification would lead to many complications, it is better to get the classification decided by the department.

(b) Valuation

Valuation is a very important aspect of a Tax Law. A supplier should be quite conversant with the relevant provisions in this regard under the Acts and the Rules. As on 1.7.2017, the new laws have been enacted and effected, the new provisions seek to tax the goods and services based on “transaction value” as the base for taxation has been supply and the scope of supply shall be studied meticulously for taxability and value of goods and services.

Procedural Aspects: The new set of laws are more of IT based than manual. Maintenance of electronic records filing of returns monthly, annually within the stipulated time has assumed a lot of importance under the new system of taxation. Even claiming of input tax credit is linked to filing of returns which should be taken care of properly.

Nature of supply, Place of supply and time of supply of goods and services are equally important under new generation laws of GST because if GST is paid by mistake for interstate supply where it happened to be intrastate supply, or vice versa , will not be adjusted for the other. You have to pay GST separately with interest if any and claim refund of GST paid by mistake. Such mistake proves expensive, affecting the cash flow and working capital position of the company.

LESSON ROUND UP

- In common language, “Promissory” means “related to a promise”, and “estoppel” is a legal term that essentially means an enforced bar or ban. Judges use the doctrine to ban one person from going back on promise.
- The Doctrine of Promissory Estoppel marches with hypothesis that a promise given by the State is binding on the Government in the prescribed circumstances.
- The Doctrine of Estoppel can be revoked by the government if it is in the public interest and it cannot be enforced when it is prohibited by law.
- Tax can be planned in the Excise and Custom in the certain provisions such as: classification of goods, Exemption Notification by proper utilization of Cenvat Credit, duty-drawback, valuation of goods, export concessions, etc.

SELF-TEST QUESTIONS

1. What is the relevance of 'Doctrine of Promissory Estoppel' in the fiscal laws?
2. What are the relevant areas in which tax planning could be done with regard to levy of duties of Customs?
3. What is the scope of tax planning with regard to levies of the GST?

SUGGESTED READINGS

(1) Customs Law Manual — *Taxmann*

(2) Excise Law Times — Centax Publications, New Delhi