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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 66 OF 2026

(Arising out of Special Leave Petition (C) No. 7013 of 2019)

IFGL REFRACTORIES LTD. ...APPELLANT

VERSUS

ORISSA STATE FINANCIAL CORPORATION & ORS. ...RESPONDENTS

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts:-

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1. Leave Granted.

2. This appeal arises from the judgment and order dated 07.12.2018 passed by the High Court of Orissa in the W.P. (C) No. 17398 of 2008 by which the High Court rejected the writ petition filed by the appellant company and thereby, denied the sanctioned incentives of capital investment subsidy and DG Set subsidy under industrial policy of 1989 in favour of industrial setup namely, Magneco Metrel Plant (“**MM Plant Unit**”) as claimed by the appellant company on the ground that the incentive of subsidy under industrial policy of 1989 could have been granted only once.

A. PARTIES TO THE APPEAL

3. The appellant is a company registered under the provisions of the Companies Act, 1956, having its registered office at Sector A, Shed Nos. 7 and 8, Kalunga Industrial Estate, Sundergarh (Orissa) and is engaged in the manufacturing, processing, trading, and selling of specialized refractory products and equipment for the iron and steel industry, such as magnesia carbon and high-alumina bricks, castables, and moulding systems, etc. The appellant company was amalgamated with one Indo Flogates Limited (“**Indo Flogates**”) with effect from 01.04.1999. Upon amalgamation, all the properties, rights, and powers of Indo Flogates, including the rights, title, interest, and subsidies in one of the units of Indo Flogates namely, MM Plant unit came to be transferred in favour of the appellant company.

4. The respondent no. 1 is the Orissa State Financial Corporation (OSFC). The OSFC is a statutory corporation established under the State Financial Corporations Act, 1951 with an object to lend and advance financial assistance to the small & medium scale industries and to recover its dues. Under the industrial policy of 1989, applications for subsidies in case of small scale industries were required to be submitted to the respondent no. 1 directly, whereas in case of medium / large scale industries applications were to be submitted to the respondent no. 1 through the respondent no. 2 authority. In the said policy, the main function of the respondent no. 1 was to act as a disbursing agency for all subsidies granted therein to all industrial units. Further, the respondent no. 1 is also one of the members of the state level committee and the respondent no. 4 sub-committee respectively for sanctioning the investment subsidies.

5. The respondent no. 2 is the Director of Industries, Cuttack (DIC). Respondent no. 2 is established as an administrative and executive wing of the Industries Department, Government of Odisha. The main functions of respondent no. 2 are to implement the industrial policies, process the incentive proposals at departmental level, and participate in state and district level committees for grant and sanction of incentives.

6. The respondent no. 3 is the Industrial Promotion and Investment Corporation of Orissa Limited (IPICOL). Respondent no. 3 authority is established as a nodal agency of the State of Orissa for investment promotion and single-window facilitation to promote medium and large-scale industries in the state by providing necessary support services.

7. Lastly, the respondent no. 4 is the Sub-Committee of the State Level Committee (SLC). The state level committee is the body that sanctions the investment subsidy on application forwarded to them by the forwarding agencies like the respondent nos. 1 to 3 respectively. As per Clause 6 of the Orissa Capital Investment Subsidy Rules, 1989 ("**1989 Rules**"), the state level committee is vested with the authority to assess the merits of each case relating to state investment subsidy, determine eligibility, and sanction the quantum of subsidy admissible to industrial units. Further, the state level committee is also empowered to delegate any of its powers and functions to the respondent no. 4 sub-committee.

B. FACTUAL MATRIX

8. In the year 1989, the Government of Orissa came out with the industrial policy of 1989, which came into force with effect from 01.12.1989, with the twin objectives of fostering the establishment of new industrial enterprises and extending institutional support to the existing industrial undertakings. Under the said policy framework, a comprehensive scheme of incentives was envisaged, including, *inter alia*, capital investment subsidies, sales tax concessions, exemption from electricity duty, and subsidies towards technical know-how fees, etc. all intended to stimulate industrial growth within the State.

9. Clause 3 of the industrial policy of 1989 delineates the classification of areas for the purpose of extending incentives. Under this clause, the State of Orissa, having regard to the varying degrees of industrial backwardness and the existence of

non-industrial regions, was bifurcated into three distinct zones, namely Zone A, Zone B, and Zone C respectively. Indo Flogates and the appellant company are located within Zone C, which comprises, *inter alia*, the districts of Cuttack, Puri, Sundargarh, and Sambalpur respectively. Clause 4 of the said industrial policy pertains to the eligibility criteria and stipulates that, subject to the fulfilment of the conditions prescribed therein, new industrial units shall be entitled to all incentives envisaged under the policy.

10. Clause 5 of the industrial policy of 1989 talks about capital investment subsidy. Clause 5.1 therein states that new industrial units as well as expansion/ modernisation/diversification projects as defined in the policy, shall be allowed capital investment subsidy including central investment subsidy, if any, made available by the Government of India. The capital investment subsidy for Zone C is fixed at 10% (ten percent) of the fixed capital investment subject to the limit of Rs. 10,00,000/-.

11. Clause 11.4 of the industrial policy of 1989 provides that new generating sets of the capacity of 10KW (ten kilowatts) and above installed by any industrial unit for its industrial use and new captive power plants would be eligible for capital investment subsidy of 15% (fifteen percent) of its costs subject to a maximum limit of Rs. 5,00,000/- and that this subsidy would be in addition to the capital investment subsidy available to the industrial unit. The relevant clauses of the industrial policy of 1989 including its preamble read thus:

"1. PREAMBLE

The Industrial Policies of the State announced in 1980 and 1986 have led to a remarkable upsurge in the industrial climate of the State. There has been very encouraging response from entrepreneurs both outside and inside the State. <u>In the light of experience gained from implementation of the 1986 Policy and keeping in view the need to maintain and enhance the tempo of industrialization in the State, State Government have decided to further liberalize the package of incentives announced in the 1986 Policy with the twin objective of encouraging new industries and providing support to industries which have come up in the State during the last few years.</u> Accordingly, it has been decided to operate, in public interest, a new Industrial Policy as outlined hereunder:-

2. DEFINITION

2.1 "Effective Date" means the date of issue of the policy on and from which, the provisions thereof shall operative.

2.2 "<u>Expansion / modernisation / diversification" of an existing industrial unit means additional investment of more than 25% of the underpreciated [sic] book value of fixed capital investment of an existing unit in acquisition of fixed capital investment of expanding / modernising / diversifying the production of the said unit and resulting in increased production over and above the existing installed capacity of the unit</u>.

2.3 "<u>Fixed Capital Investment" means investment on land, building, plant and machinery and other equipments of permanent nature</u>.

Explanation:- The calculation of fixed capital investment shall be made according to the principles outlined by Government of India for administration of Central Investment Subsidy as is or, was in force.

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2.5 "<u>Industrial Unit" means, any industrial undertaking detailed in annexure-1 to this Policy and excluded undertakings excepted therein</u>.

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2.7 "<u>New Industrial Unit" means an industrial unit where fixed capital investment has been made only on or after the effective date</u>.

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3. CLASSIFICATION OF AREA

For the purpose of incentives, depending upon industrial backwardness of different areas and non-industry areas, the State is divided into the following three Zones -

Zone 'A' - Phulbani, Bolangir and Kalahandi districts including growth centres established in these districts.

Zone 'B' - Keonjhar, Mayurbhanj, Dhenkanal, Koraput, Balasore, and Ganjam districts including growth centres established in these district and districts covered under Zone 'C'.

Zone 'C' - Cuttack, Puri, Sundargarh and Sambalpur districts excluding growth centres.

4. ***ELIGIBILITY FOR INCENTIVES***

4.1 <u>Subject to general conditions and specific conditions for any incentive if any, stipulated in this Policy and provisions of Annexure-1, new industrial units shall be eligible for all incentives provided in this Policy</u>. Provided that incentives on Sales Tax shall be available to new industrial units only under Part-I of the incentives on Sales Tax and not under any other part.

4.2 The incentives on Sales Tax comprises more than one part and each part is mutually exclusive. An industrial unit eligible for the incentive under one part shall not be eligible for incentive under any other *part. The types of industrial units covered under different parts have been mentioned under each part.*

4.3 The incentives of 1986 Policy and 1980 Policy shall continue to be available to industrial units, Hotels, Cinema Halls etc. eligible under the said Policies except to the extent abridged / modified / enlarged in this Policy.

4.4 <u>Expansion / modernisation and diversification will be eligible for specific incentives as mentioned against the concerned incentive. Any number of expansion / modernisation / diversification can be taken up by an industrial unit but the concerned specific incentive shall be allowed only once.</u>

4.5 Industrial Units of Public Sector Undertakings will not be eligible for any incentive unless the State Government on special consideration, make all or any to these incentives, applicable to any such undertaking.

5. ***CAPITAL INVESTMENT SUBSIDY***

5.1 <u>New Industrial Units as well as expansion / modernisation / diversification projects as defined earlier, shall be allowed Capital Investment Subsidy including Central Investment Subsidy, if any made available by Government of India in the following manner :-</u> Zone 'A' 25 percent of the fixed capital investment subject to the limit of Rs. 25,00,000/-. Zone 'B' 15 percent of the fixed capital investment subject to the limit of Rs. 15,00,000/-. <u>Zone 'C' 10 percent of the fixed capital investment subject to the limit of Rs. 10,00,000/-.</u> Provided that if Central Investment Subsidy for any district / area is allowed by Government of India at a higher rate than above, the higher rate will be applicable [...]

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11.4 CAPTIVE POWER PLANTS AND GENERATING SETS

11.4.1 A captive power plant is a power generation plant with an installed capacity of not less than 1 MW set up either by one industrial unit for its own industrial use or by a group of industrial units for their own industrial use, provided that surplus if any, is supplied to OSEB grid.

11.4.2 New captive power plants with a total installed capacity upto 60 MVW will be completely exempted from payment of electricity duty in respect of power generated by them for a period of 10 years from the date of commissioning. This exemption will be 75% for new captive power plants upto a capacity of 120 MVA and 50% for installed capacity beyond 120 MVA.

11.4.3 While computing the capacity of captive power plants, all such plants set up by an industrial unit or units will be taken into consideration to arrive at the capacity of the plant and based on the said capacity, exemption of electricity duty as mentioned above will be allowed.

11.4.4 <u>New generating sets of the capacity of 10 KW and above installed by any industrial unit for its industrial use and, new captive power plants will be eligible for capital investment subsidy of 15% of its cost subject to a maximum limit of Rs.5 lakh. This will be in addition to capital investment subsidy available to the industrial unit</u>.

11.4.5 New generating sets up to 1 MVA capacity installed by new and existing industrial units will be exempted from electricity duty for a period of 10 years [...]"

(Emphasis Supplied)

12. In addition to the industrial policy of 1989, the Government of Orissa also introduced the 1989 Rules to regulate the procedure of sanction, disbursement, and reimbursement of the capital investment subsidy under the industrial policy of 1989.

13. Upon the introduction of industrial policy of 1989, Indo Flogates, on 18.05.1989, purportedly set up the subject new industrial unit i.e., MM Plant unit, in the Kalunga Industrial Estate, Rourkela, Dist. Sundargarh, with a separate registration bearing Industrial License No. 341(89)DLR for the manufacturing and processing of stool inserts, stool coatings, and basic gunning mix which also falls under Zone 'C' as abovementioned. Thereafter, on 01.02.1992, Indo Flogates made its first capital investment towards the purchase of the land and shed for the establishment of the MM Plant unit. On 21.11.1992, the said MM Plant commenced its commercial production.

14. Thereafter, considering various incentives available to a new industrial unit under the industrial policy of 1989, Indo Flogates on 23.08.1993 submitted an application to the respondent no. 3 for availing assistance towards the subsidies for the Diesel Generator Set ("**DG Set**") set up by them in MM Plant unit under Clause 11.4.4 of the industrial policy of 1989 *inter alia* stating the following:

    (a) That, Indo Flogates in technical collaboration with Magneco / Metrel of USA had completed the establishment of the MM Plant unit for manufacturing stool inserts, stool coatings, and basic gunning mix;
    (b) That, the commercial production in the said MM Plant unit had also begun; and
    (c) That, in view of the frequent power cuts and power supply being erratic in the area, Indo Flogates had procured DG Sets in the project cost for which they want to avail the assistance of subsidy for DG Set.

15. Similarly, on 29.09.1993, Indo Flogates submitted another application to the respondent no. 3 for availing assistance towards capital investment subsidies under Clause 5.1 of the industrial policy of 1989 *inter alia* stating as following:

(a) That, MM Plant unit had been set up separately in Orissa for which a separate registration is allotted by the Government of India;
(b) That, new sheds had been acquired from Odisha Industrial Infrastructure Development Corporation (IDCO) and a separate electrical connection was taken from Orissa State Electricity Board (OSEB);
(c) That, for the reasons above stated, the MM Plant unit had fulfilled the criteria of a new industrial unit and that the same is entitled to fresh capital investment subsidy under industrial policy of 1989.

16. On 05.11.1998, the respondent no. 2 sent a letter to the appellant company and informed that on examination of its applications, the respondent no. 2 had been pleased to treat MM Plant unit as a separate new industrial unit under medium scale sector of Indo Flogates. In the said letter, the respondent no. 2 further acknowledged that the date of commencement of commercial production of MM Plant unit manufacturing stool inserts, stool coatings, and basic ginning mix as determined in the production certificate issued by the office of respondent no. 2 was 21.11.1992.

17. Thereafter, on 24.12.1999, the applications of Indo Flogates were placed before the respondent no. 4 in the 28^{th} Meeting of the sub-

committee of state level committee. In the said meeting, it was observed by the respondent no. 2 that the appellant company had not only submitted the applications for grant of subsidies within the time limit of 6 (six) months from the date of commercial production but had also failed to file any application for condonation of delay.

18. Thereafter, on 09.06.2000, the respondent no. 2 informed the appellant company that their applications had been recommended to the State Government.

19. While the above matters stood still, Indo Flogates amalgamated into the appellant company. Thus, on 03.08.2000, the High Court sanctioned the proposed scheme of amalgamation of Indo Flogates with the appellant company with effect from 01.04.1999, and, thus, all property, rights, power of Indo Flogates in its assets came to be transferred in favour of the appellant company.

20. Upon amalgamation, the appellant company sent a letter dated 15.12.2000 to the respondent no. 3 *inter alia* requesting for the expeditious disposal of the grant and disbursement of technical know-how subsidy of Rs. 5,00,000/-; capital investment subsidy of Rs. 10,00,000/-; and DG Set subsidy of Rs. 1,16,000/- in respect of the alleged new industrial unit i.e., MM Plant unit, set up by the erstwhile Indo Flogates. In the said letter dated 15.12.2000, the appellant company also informed the respondent no. 3 that applications for the abovementioned subsidy were pending for more than 8 (eight) years due to the lackadaisical approach of the office of respondent no. 2 and

requested the respondent no. 3 for its intervention in the matter so as to expedite the sanction and disbursement process.

21. As there was no response at the end of respondent no. 3 to the letter dated 25.12.2000, the appellant company sent a follow-up letter dated 17.01.2001 to the respondent no. 3, *inter alia*, seeking an update on the progress in the matter. Thereafter, the appellant company again addressed a letter dated 22.05.2001 to the respondent no. 3, *inter alia*, drawing attention to the fact that the aforesaid subsidies relating to Indo Flogates had been pending with respondent no. 2 since the amalgamation of Indo Flogates with the appellant company; that the said subsidies pertained to a new industrial unit which had commenced commercial production as far back as on 22.11.1992; that the respondent no. 3 issued the certificate of commencement of production only after 6 (six) years of actual production; and that even after this inordinate delay in issuing the commencement certificate, the applications of the appellant company were being shuttled from one office to another without any good reasons or cogent action. At this juncture, while awaiting necessary action at the end of the authorities, the appellant company also expressed its willingness to assist by providing any further information and/or documents to the respondent no. 3 as may be required.

22. Following the above and aggrieved by the perfunctory attitude of the respondents, the appellant company sent another letter on 13.11.2001 to the Secretary of Industries Department *inter alia* requesting for ascribing the approval to the said applications of the appellant company for the grant of the subsidies. In

meantime, the respondent No. 2 *vide* its letter dated 26.11.2001 condoned the delay in the submission of the applications for the grant of subsidies.

23. On 27.11.2001, the appellant company further wrote another letter to the respondent no. 2 requesting to issue eligibility certificate under the industrial policy of 1989. The appellant company again *vide* its letter dated 27.09.2002 wrote to the respondent no. 2 *inter alia* requesting to intervene in the matter, especially considering the fact that 2 (two) years had passed by since the delay was condoned by the respondent no. 2.

24. Finally, on 10.04.2003, the respondent no. 1 conveyed the decision of the respondent no. 4 to the appellant company of sanctioning the amount of Rs. 1,14,750/- towards DG Set subsidy *inter alia* stating as follows:

> *"Sub: <u>15% Capital Investment Subsidy</u>*
> *Ref: Your application for Capital Investment Subsidy*
>
> *Dear Sir,*
>
> *<u>We are pleased to inform you that the Sub-committee of the State Level Committee in its 3rd meeting held on 20.02.03 has sanctioned a subsidy of Rs. 1,14,750/- (Rupees One Lac Fourteen Thousand Seven Hundred Fifty Only) to your unit at I.E. Kalunga</u> […]"*

(Emphasis Supplied)

25. On 19.04.2003, the respondent no. 1 also conveyed the decision of the respondent no. 4 to the appellant company of sanctioning

of the amount of Rs. 10,00,000/- towards capital investment subsidy *inter alia* stating as follows:

> *"Sub: 10% Capital Investment Subsidy*
> *Ref: Your application for Capital Investment Subsidy*
>
> *Dear Sir,*
> *We are pleased to inform you that the Sub-committee of the State Level Committee in its 3rd meeting held on 20.02.03 has sanctioned a subsidy of Rs. 10,00,000/- (Rupees Ten Lac Only) to your unit at I.E. Kalunga […]"*

(Emphasis Supplied)

26. Following the sanction of subsidies, the appellant company sent a letter dated 15.05.2003 to the respondent no. 1 enclosing the necessary documents as requested in the letters dated 10.04.2003 and 19.04.2003 respectively and enclosing the certified copy of order of High court dated 03.08.2000 *inter alia* reinforming the respondents that Indo Flogates had amalgamated with the appellant company with effect from 01.04.1999 in terms of the order passed by the High Court on 03.08.2000 by virtue of which all assets, liabilities, rights, benefits, etc including entitlement to abovementioned subsidies of Indo Flogates got transferred to and vested in the appellant company. The relevant communication is as under:

> *"The Deputy Manager (Subsidy)*
> *Orissa State Financial Corporation*
> *O.M.P. Square*
> *Cuttack 3*
>
> *Dear Sir,*

Re: Your Sanction Letter dated 15th April, 2003 bearing No. OSFC/32.20 addressed to Indo Flogates Ltd regarding sanction of DG Set Subsidy of Rs. 114.750/-

Reference above, kindly be informed that Indo Flogates Ltd has, on and from 1st April, 1999, amalgamated with this Company in terms of an Order passed by the Hon'ble High Court of Orissa on 3rd August, 2000. By virtue of said Order of the Hon'ble Court, all assets, liabilities, rights, benefits etc including entitlement to above subsidy of said Company have got transferred to and/or vested in this Company on and from 1st April, 1999. We enclose herewith a certified true copy of said Order of the Hon'ble Court and draw your attention specifically to Paragraphs 1 and 2 on Page 2 thereof.

As desired, we are now sending herewith the following :

1. Advance Stamped Money Receipt, in triplicate, in the prescribed proforma.
2. Agreement duly executed on Non-judicial Stamp Paper of Rs. 10/-.
3. Certified true copy of an extract of Minutes of meeting of the Board of Directors of the Company held on Friday, 25th April, 2003 [...]"

(Emphasis Supplied)

27. Between 12.05.2003 and 05.03.2007, the appellant company addressed as many as 5 (five) letters to the respondent nos. 1 and 2 respectively seeking the disbursal of sanctioned subsidy amounts. In the letter dated 12.05.2003, the appellant company again brought to the attention of the respondent no. 1 that pursuant to the amalgamation between Indo Flogates and the appellant company with effect from 01.04.1999, all assets, liabilities, rights, benefits, etc including the entitlement to the capital investment subsidy and DG Set subsidy had come to be

transferred in favour of the appellant company. In various letters between this period, the appellant company requested the respondent nos. 1 and 2 respectively to consider changing the name of the beneficiary of these subsidies in the record from the erstwhile Indo Flogates to the name of the appellant company i.e., IFGL Refractories Ltd.

28. Pursuant to the above, the respondent no. 1 *vide* letter dated 24.03.2007 communicated to the appellant company that the sanctioned amount may be processed for disbursement on the receipt of the same from the respondent no. 2 authority.

29. Thereafter, on 23.08.2007, the respondent no. 2 sent a letter to the joint director of industries, Cuttack and informed that the fact of amalgamation of the appellant company and Indo Flogates was already conveyed to the director and the Joint Director of Industries, Cuttack *vide* internal office letters dated 27.09.2003 and 11.08.2006 respectively, thereafter which, the personnel from the respondent no. 1 authority had visited the site of the appellant company wherein it was found that the appellant company was managing the continuity of production of MM Plant unit. In such circumstances, the respondent no. 2 recommended the respondent no. 1 to consider releasing the 10% (ten percent) capital investment subsidy amounting to Rs. 10,00,000/- and 15% (fifteen percent) DG Set subsidy amounting to Rs. 1,14,750/- sanctioned in favour of Indo Flogates for the MM Plant unit in favour of the appellant company. The relevant correspondence is as under:

> *"To,*
> *Shri T.K. Chatopadhyaya,*

Joint Director of Industries (SS)
Orissa, Cuttack.

Sub: Issue of Production Continuity Certificate of M/s. lndo Flogates Ltd. Rourkela

Ref: Your Letter No. 4SSl-23/07-8252/ Ind dtd. 17.07.07.
Sir,
<u>In inviting the reference to your above letter on the noted subject, I am to say that M/s. Indo Flogates Ltd. I.E. Kalunga, Dist Sundargarh has been amalgamated with M/s IFGL Refractories Ltd. I.E. Kalunga with effect from 1.4.1999 in pursuance to the order passed by Hon'ble High Court of Orissa on 3.8.2000. The matter was already informed to the Director of Industries, Orissa, Cuttack vide this office Letter No. 3354 dtd. 27.9.2003 and to Joint Director of Industries (SS) Orissa, Cuttack vide this office Letter No. 3317 dtd. 11.8.2006</u>. However, as desired by you in your letter under reference the undersigned along with Sri S. Dash Asst. Manager (Finance) O.S.F.C. Rourkela have jointly visited M/s. IFGL Refractories Ltd. Sector B, Kalunga lndl. Estate on 21.8.07 and found that it is having continuity of its production. The production continuity certificate jointly signed is enclosed separately for you kind reference.

<u>Under the above circumstances, I would request that 10% CIS amounting to Rs. 10.00 Lakhs sanctioned in favour of M/s. Indo Flogates Ltd. (MM Plant Division) by the OSFC Head Office, Cuttack and 15% CIS on D.G. Set amount to Rs. 1,14,750/- by OSFC Head Office, Cuttack may be released</u>."

(Emphasis Supplied)

30. Since no payments were yet released by the respondents despite recommendations in the letters dated 24.03.2007 and 23.08.2007 respectively, the appellant company sent a letter dated 06.08.2008 *inter alia* informing the respondent no. 1 that

no payments had been made as of that time and further requesting to inform the status of disbursement.

31. In the meantime, the respondent nos. 2 and 3 respectively prepared an agenda note with the objective of placing the matter of claim of subsidy in favour of Indo Flogates in the 35th Meeting of sub-committee of state level committee. This agenda note *inter alia* stated as follows:

1. That, subsidy to the tune of Rs. 11,14,750/- (Rs. 10,00,000/- towards capital investment subsidy and Rs. 1,14,750/- towards DG Set subsidy) had been sanctioned in the 32nd meeting of sub-committee of state level committee held on 20.02.2003 for MM Plant unit in favour of Indo Flogates under industrial policy of 1989;
2. That, the unit had amalgamated with the appellant company with effect from 01.04.1999 by the order of High court dated 03.08.2000;
3. That, the decision of amalgamation was neither recorded in the proceedings nor any documents were produced before the state level committee by either the unit or the authorities below i.e., the respondent no. 3;
4. That, as per an executive instruction dated 28.10.1994, the capital investment subsidy claims including claims for additional subsidy on account of expansion / modernisation / diversification were limited to the overall financial limits prescribed under previous industrial policies;
5. That, earlier Indo Flogates had been sanctioned a collective subsidy of Rs. 15,00,000/- which was disbursed to them under industrial policies of 1980 and 1986;

6. That, earlier the appellant company had also been sanctioned a collective subsidy of Rs. 20,00,000/- which was disbursed to them under the industrial policy of 1989.
7. That, since both Indo Flogates and the appellant company had availed the maximum limit of their respective subsidies, thus further subsidies could not be disbursed in view of the executive instruction dated 28.10.1994 as abovementioned.

32. Following the result of above agenda note, the respondent no. 1 sent a letter dated 04.10.2008 ("**Rejection Letter**") and informed the appellant company that proposal for disbursement of capital investment subsidy and DG Set subsidy sanctioned by the 32nd sub-committee on 20.02.2003 in favour of erstwhile Indo Flogates was placed before the 35th sub-committee on 20.02.2008 and that after a detailed discussion the committee rejected the disbursement of capital investment subsidy and DG Set subsidy in favour of the appellant company on the ground that both Indo Flogates and the appellant company had availed their maximum limit under the capital investment subsidy and as such Indo Flogates was not entitled for disbursement of the amount sanctioned in the 32nd sub-committee for Rs. 10,00,000/- towards normal capital investment subsidy and Rs. 1,14,740/- towards DG Set subsidy respectively. The relevant extract is as under:

"To,
The Company Secretary
IFGL Refractories Ltd.
Sector 'B' Kalunga Industrial Estate
PO- Kalunga
Dist: Sundergarh-770031

Sub: Disbursement of Subsidy
Ref: Your Letter No. Nil dt. 6.8.08

Sir,

In inviting a reference to the above, we are to inform you that the proposal for disbursement of Capital Investment Subsidy and subsidy on D.G. set sanctioned by the 32nd Sub-Committee of SLC held on 20.2.03 in favour of M/s. Indo Flogates Ltd., i.E., Kalunga, Rourkela was placed in to 35th Sub-Committee held on dt. 20.2.08. After detailed discussion, the Committee observed that both the units (M/s. I.F.G.L Refractories Ltd. and M/s. Indo Flogates Ltd) have availed the maximum limit under CIS Rule and as such M/s. Indo Flogates Ltd. is not entitled for disbursement of the amount sanctioned in the 32nd Sub-Committee held on dt. 20.02.2003 for a total sum of Rs. 11,14,750/- (Rs. 10,00,000/- Normal CIS + Rs. 1,14,740/- DG. set subsidy). Hence the same has been rejected by the Sub-Committee."

(Emphasis Supplied)

33. After rejecting the subsidy benefits accrued in favour of Indo Flogates to the appellant company, the Industries Department, Government of Orissa *vide* notification dated 30.10.2008 amended the industrial policy of 1989 and the earlier Clause 4.4 as abovementioned and inserted new wordings to Clause 4.4 stating that the capital investment subsidy, including any additional subsidy on account of expansion / modernisation / diversification, shall in all cases remain subject to the overall financial limit prescribed *inter alia* under the industrial policy of 1989. Accordingly, where an eligible unit had already availed capital investment subsidy under a previous industrial policy during its operational period, its entitlement to any further or additional subsidy under the industrial policy of 1989 shall be

limited to the differential amount between the subsidy actually availed under the earlier industrial policies and the maximum capital investment subsidy permissible under the industrial policy of 1989. The said amended Clause 4.4 reads as under:

> *"4.4 "Capital Investment Subsidy claim including claims for additional subsidy on account of E/M/D shall be limited to the overall financial limit prescribed under this IPR. <u>In other words, if the eligible unit has availed of capital investment subsidy under the previous IPR during its operational period, its claim for additional subsidy would be limited to the differential amount between actual subsidy availed of during the operational period of the previous IPR and the maximum CIS prescribed under</u>* this IPR"."
>
> (Emphasis Supplied)

34. Aggrieved by the rejection of disbursement of subsidies, the appellant company filed a Writ Petition No. 17398 of 2008 before the High Court *inter alia* challenging the decision of the respondent no. 1 rejecting the disbursal of subsidies with the prayers to quash the rejection letter dated 04.10.2008 wherein the disbursal of capital incentive subsidy and DG Set subsidy had been rejected and for a direction to the respondents herein to disburse the subsidy amounting to a total of Rs. 11,14,750/-. In its reply before the High Court, the respondent no. 1 submitted that capital investment subsidy and DG Set subsidy respectively were sanctioned in favour of the unit because neither the Indo Flogates nor the appellant company had submitted any document of amalgamation at the time of sanction. The respondents also argued that since both Indo Flogates and the appellant company had availed the maximum capital investment

subsidies, Indo Flogates was not entitled for disbursement of total amount of Rs. 11,14,750/-

35. Proceeding on the aforesaid premise, the High Court *vide* its impugned judgment and order dated 07.12.2018 dismissed the appeal filed by the appellant company and denied the appellant company the benefits of capital investment subsidy and DG Set subsidy sanctioned in favour of MM Plant unit of Indo Flogates under the industrial policy of 1989 *inter alia* taking the view that although a new industrial unit is entitled to seek the benefit of subsidies yet nonetheless the interpretation put forward by the Committee that only once benefit would be granted to the company was correct. The relevant portion of the impugned order is as under:

> *"4. In view of the above, <u>the subsidy which was entitled to the petitioner by the merger of company was rejected by the Committee vide decision dated 04.10.2008</u>, wherein the reasons have been given, which read as under:*
>
> > *"After detailed discussion, the Committee observed that both the units (M/s. I.F.G.L. Refractories Ltd. and M/s. Indo Flogates Ltd.) have availed the maximum limit under CIS Rule and as such M/s. Indo Flogates Ltd. is not entitled for disbursement of the amount sanctioned in the 32nd Sub-committee held on dt. 20.02.2003 for a total sum of Rs.11,14,750/- (Rs.10,00,000/- normal CIS + Rs.1,14,750/- D.G. set subsidy). Hence the same has been rejected by the Sub-Committee."*
>
> *5. <u>In our considered opinion, it is true that a newly set up Industrial Unit is entitled to get the benefit but nonetheless the interpretation put forward by the</u>*

Committee that only once benefit will be granted to the company is correct. Hence, the prayer made in this writ petition cannot be granted.

6. In that view of the matter, no interference is called for this writ petition. Even otherwise, we do not find any good ground to entertain the writ petition at this stage. According, the writ petition stands dismissed."

(Emphasis Supplied)

36. In such circumstances referred to as above, the appellant company is here before us with the present appeal.

C. SUBMISSIONS ON BEHALF OF THE APPELLANT

37. Mr. Nakul Dewan, the learned senior counsel appearing for the appellant company, submitted that the industrial policy of 1989 came into force with effect from 01.12.1989 with twin objectives of encouraging new industries and providing support to the then existing units. On this note, he argued that Clause 2.7 of the industrial policy of 1989 defines *"new industrial unit"* in relation to the question whether a company has made an investment in an industrial unit after effective date of industrial policy of 1989 i.e. after 01.12.1989. Therefore, a new industrial unit in terms of Clause 2.7 would exist even in a situation where a company that existed prior to the industrial policy of 1989 only invested in a particular industrial unit after the effective date of the industrial policy of 1989.

38. The learned counsel also argued that Clause 2.2 of the industrial policy of 1989 defines *"expansion/modernisation/diversification"*

of an existing industrial unit to mean an additional investment of more than 25% (twenty – five percent) of the undepreciated book value of fixed capital investment of an existing unit in acquisition of fixed capital investment of expanding/modernising/diversifying the production of the said unit and resulting in increased production over and above the existing installed capacity. The learned counsel further submitted that as per Clause 4.1 of industrial policy of 1989 states that all new industrial units as defined under Clause 2.7, would be eligible for *"all incentives"* provided under the industrial policy of 1989 whereas as per Clause 4.4 the incentives of subsidy under the industrial policy of 1989 were allowed *"only once"* with respect to expansion / modernisation / diversification of an existing industrial unit as defined under Clause 2.2.

39. The learned counsel further submitted that the respondents are also estopped from rejecting the appellant's request to disburse the subsidies especially after classifying the MM Plant unit as a new industrial unit *vide* letter dated 05.11.1998; sanctioning the subsidies in favour of MM Plant unit considering it to be a new industrial unit *vide* letters dated 10.04.2003 and 19.04.2003 respectively; and acknowledging the sanctioning of the subsidies *vide* letter dated 24.03.2007.

40. In other words, the learned counsel submitted that, having classified the MM Plant unit as a new industrial unit and having sanctioned the subsidies in its favour, the respondents are estopped from rejecting the appellant company's claim for disbursal thereof as the appellant company had a legitimate expectation that the subsidy would be disbursed post-sanctioning for the reasons above stated.

41. The learned counsel also submitted that the MM Plant unit is a new industrial unit under the industrial policy of 1989 as the same had also been classified by the respondents in 1998, and there is no prescribed limit on the benefits available to it. This is because Clause 4.1 of the industrial policy of 1989 states that all new industrial units would be eligible for all incentives provided in the industrial policy of 1989, which is different from the treatment of existing industrial units, whereunder Clause 4.4 of the industrial policy of 1989, incentives were allowed only once in case of expansion / modernisation / diversification. He argued that since the respondents had classified the MM Plant unit as a new industrial unit, the High Court was incorrect in holding that the benefits under the industrial policy of 1989 could have been granted only once.

42. Lastly, the learned counsel argued that the respondents in their counter affidavit before the High Court and further in the course of hearing before this Court had alleged the non-disclosure of the amalgamation between Indo Flogates and the appellant company as the basis for the rejection of the disbursal of subsidies. Refuting this, the learned counsel submitted that the respondents had always been aware of the amalgamation even prior to sanctioning of the subsidies as the appellant company, after the amalgamation scheme was sanctioned by the High Court by an order dated 03.08.2000, had informed the respondents *vide* letter dated 22.05.2001 that an amalgamation had taken place between Indo Flogates and the appellant company and it is only after this the respondents had sanctioned the subsidies for MM Plant unit *vide* letters dated 10.04.2003

and 19.04.2003 respectively. Even otherwise, the counsel submitted that the amalgamation between Indo Flogates and the appellant company could not have been a basis for denying the subsidies, as in every case of amalgamation, the successor-in-interest becomes entitled to the rights and liabilities and assets of the transferor company subject to the terms and conditions set out in the scheme of amalgamation. In this case, the scheme of amalgamation clearly stated that all rights of Indo Flogates would vest in the appellant company without any further act or deed. Thus, given that the MM Plant unit was recognized as a new industrial unit before the amalgamation, the entitlement of Indo Flogates to obtain subsidies would accrue to the appellant.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

43. Mr. Soumyajit Pani, the learned counsel appearing for the respondent no. 1, submitted that the High court was right in dismissing the writ petition of the appellant company. He argued that pursuant to the 32nd state level meeting, the capital investment subsidy was sanctioned in favor of the Indo Flogates as no documents regarding amalgamation between Indo Flogates and the appellant company were ever submitted to the respondents.

44. He submitted that after receiving the letter dated 12.05.2003 from the appellant company and getting the information regarding the amalgamation of Indo Flogates with the appellant company, the issue as regards to the grant of subsidies was scrutinized afresh more particularly the eligibility of the appellant company to avail subsidy and it was after due

deliberations that the sub-committee of the state level committee in its 35th meeting held on 20.02.2008 decided to reject the grant of subsidies sanctioned in favour of Indo Flogates to be disbursed in favor of the appellant company. In the said 35th meeting, the sub-committee of the state level committee had noticed that at the time of sanction of the subsidy for the MM Plant unit of Indo Flogates Ltd in 2003, the very existence of Indo Flogates was not there as it was already amalgamated with the appellant company, and since both Info Flogates and the appellant company had already availed the individual overall maximum limit of subsidies i.e. Rs.15,00,000/- and Rs. 20,00,000/- respectively, the sub-committee of the state level committee decided not to release any subsidy in favour of the appellant company.

45. Mr. Gaurav Khanna, the learned counsel appearing for the respondent nos. 2 and 4 respectively, submitted that as per Clause 5.1 of the industrial policy of 1989 the incentive of capital investment subsidy was available in cases of both new industrial unit as well as expansion / modernisation / diversification project in Zone C at 10% (ten percent) of the fixed capital investment subject to the limit of Rs. 10,00,000/. He further submitted that Clause 11.4.4 of the industrial policy of 1989 provided for subsidy for DG Set, 15% (fifteen percent) of the investment in DG Set subject to a maximum of Rs. 5,00,000/-. Thus, the maximum limit of subsidy that could have been available to the appellant company was Rs. 10,00,000/- towards capital investment subsidy and Rs. 5,00,000/- towards the DG Set subsidy, aggregating to Rs. 15,00,000/-. While referring to Clause 2.7 of the industrial policy of 1989, the counsel submitted

that a new industrial unit has been defined as an industrial undertaking where fixed capital investment has been made only on or after the effective date i.e. 1.12.1989. Whereas expansion / modernisation / diversification under Clause 2.2 has been defined as additional investment of more than 25% (twenty – five percent) of the undepreciated book value of an existing unit in acquisition of fixed capital investment of expanding / modernising / diversifying the production of the said unit and resulting in increased production over and above the existing installed capacity of the unit. Further, with respect to expansion / modernisation / diversification, Clause 4.4 further provides that any number of expansion / modernisation / diversification can be taken up by an industrial unit but the concerned specific incentive shall be allowed only once. In short, the counsel tried to argue that the MM Plant unit is not a new industrial unit rather it is an expansion of the existing unit i.e., the expansion of Indo Flogates.

46. The learned counsel further submitted that Clause 20.1 of the industrial policy of 1989 empowers the State Government to issue operational guidelines / instructions for the administration of incentives contained in the industrial policy of 1989. Thus, in exercise of its power under Clause 20.1, the Industries Department, Government of Orissa, had issued the operational guidelines / instructions *vide* letter dated 28.10.1994 ("**Instruction Letter**"), to the respondent no. 3, clarifying that capital investment subsidy claims including claims for additional subsidy on account of expansion / modernisation / diversification shall be limited to the overall financial limits prescribed under different industrial policies and earlier also this

procedure was followed and the same should continue to be followed in future. On this note, the learned counsel argued that it is clear from the instruction letter dated 28.10.1994 that capital investment subsidy claim, including claim for additional subsidy in case of expansion, was subject to overall financial limits prescribed under different IPRs, therefore, the same should also apply in case of claim of a new industrial unit for capital investment subsidy as also in case of claim for additional subsidy in case of expansion / modernisation / diversification.

47. The learned counsel laying much stress on the instruction letter dated 28.10.1994, referred to as above, submitted that both Indo Flogates and the appellant company were already being granted to the extent of overall maximum limit of subsidy of Rs. 15,00,000/- and Rs. 20,00,000/- collectively under the previous industrial policies i.e., industrial policy of 1980 and 1986 respectively and, therefore, the subsidies sanctioned for MM Plant unit in favour of Indo Flogates could not have been disbursed in favour of later transferee i.e. the appellant company for being excessive of overall maximum limit of subsidy that can be granted as per the instruction letter dated 28.10.1994.

48. The learned counsel in the last submitted that Indo Flogates had preferred the applications for sanction of capital investment subsidy and DG Set subsidy on 29.09.1993 and 23.08.1993 respectively under the industrial policy of 1989 for manufacturing of stool insert, stool coatings and gunning mix. It was submitted that in the said applications there was no mention of the existing unit or previous investments i.e., about the earlier investment and subsidies granted while establishing Indo Flogates and carrying out expansions therein, and that the

applications of Indo Flogates simply stated that the project had been set up separately in the State with a separate registration with the Government of India and with new and separate electrical connection taken from the Orissa State Electricity Board (OSEB). On the basis of the above, it was argued that it fulfils the criteria of a new unit for subsidy under IPR, 1989. Therefore, on the basis of the applications, the respondent no. 2 *vide* letter dated 05.11.1998 had communicated to Indo Flogates that on further examination of matter, it had decided to treat MM Plant unit of Indo Flogates for manufacture of stool insert, stool coatings and gunning mix as a separate new industrial unit.

E. <u>ISSUES FOR DETERMINATION</u>

49. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the questions that fall for our consideration are as follows:

(I). Whether the MM Plant unit set up by Indo Flogates could be termed as a new industrial unit in accordance with the terms of industrial policy of 1989?

(II). If the answer to the issue no. (I), is in the affirmative then, whether the respondents were justified in rejecting the capital investment subsidy and DG Set subsidy respectively for the MM Plant unit on the ground that both Indo Flogates and the appellant company had already exhausted the overall subsidy limit under the previous industrial policies?

(III). Whether the respondents are estopped from refusing to disburse the capital investment subsidy and DG Set subsidy respectively for the MM Plant unit to the appellant company?

F. ANALYSIS

(I). **Whether the MM Plant unit set up by Indo Flogates could be termed as a new industrial unit in accordance with the terms of industrial policy of 1989?**

50. At the threshold, it is necessary to delineate the contours of the expression *"new industrial unit"*. The entire case of the appellant company proceeds on the premise that the MM Plant unit should be regarded as a *"new industrial unit"* under the industrial policy of 1989, the position which, according to the appellant company, stood accepted by the respondents when they had earlier accorded sanction in favour of the MM Plant as though it were a new industrial unit. The respondents, *per contra*, contend that the MM Plant unit is not a new industrial unit but merely an expansion of the already existing unit, namely Indo Flogates unit, and that, consequently, no further subsidy can be extended to the appellant company in respect of the MM Plant unit, since such subsidy can be availed only once as per Clause 4.4 of industrial policy of 1989. It is further the case of the respondents that, even while accepting the MM Plant qualifies as a new industrial unit, no additional subsidy can be granted in view of the overall maximum limit imposed by the instruction letter dated 28.10.1994.

51. Before delving into what *"new industrial unit"* means, we are of the view that it is necessary to first understand the definition of *"industrial unit"* as defined under the industrial policy of 1989. In this respect, Clause 2.5 of the industrial policy of 1989 states that an industrial unit *<u>means</u>* any *"industrial undertaking"* detailed in Annexure-1 of the policy. Annexure-1 of the policy *inter alia* states that an industrial unit will mean *"manufacturing / processing industry"* belonging to categories as mentioned therein including but not limited to industries listed in the First Schedule of the Industries (Development & Regulation) Act, 1951. Item 1 to First Schedule deals with *"Metallurgical Industries"*. It is not in dispute that MM Plant unit falls within the ambit of an industrial unit as defined in the policy. Even otherwise, the MM Plant unit is engaged in the manufacturing and processing of stool inserts, stool coatings, and basic gunning mix, which would fall within the purview of metallurgical industries.

52. Further, from a plain construction of the definition of industrial unit as discussed above, it becomes axiomatic that the terms *"industrial unit"* and *"industrial undertaking"* respectively have been treated as analogous for the purposes of the industrial policy of 1989. Though we are not concerned with the industrial policies of years 1992, 1996, 2001, 2007, 2015, and 2022 respectively, as were issued in the State of Orissa from time to time, it is noteworthy that even in these policies, the intention of policy makers seems to be to define *"industrial unit"* analogous to *"industrial undertaking"*. This is because all these successive policies employ the phrase *"industrial unit means any industrial undertaking"* while defining what an industrial unit is.

53. From the above discussion, one thing is clear that the MM Plant unit can be said to be an industrial unit. However, the moot question that begs for an answer is as to what exactly the phrase *"new industrial unit"* in the industrial policy of 1989 entails. Clause 2.7 of the industrial policy of 1989 defines new industrial unit to mean an *industrial unit* where the *fixed capital investment* has been made only *on or after the effective date*. In this respect, the phrase *"fixed capital investment"* has been defined under Clause 2.3 to mean an investment in land, building, plant, and machinery, and other equipment of a permanent nature. Further, the *"effective date"* is also defined in Clause 2.1 to mean the date of issue and operation of the policy, which is 01.12.1989. In view of the definitions mentioned above, it is clear that if an industrial unit makes any investments in fixed capital on or after 01.12.1989 for the manufacturing and processing of items as mentioned in Annexure-1, then such an industrial unit can be said to be a new industrial unit.

54. At this juncture, it is relevant to state that this Court had an occasion to deliberate upon the phrase *"newly established industrial undertaking"* as provided in Section 15C of the Income Tax Act, 1922 ("**IT Act, 1922**") in the case of ***Textile Machinery Corpn. Ltd. v. CIT, West Bengal***, reported in **(1977) 2 SCC 368**. In this case, the assessee company was a heavy engineering concern engaged in the manufacture of boilers, machinery parts, wagons, and allied products. For the assessment years 1958–59 and 1959–60, the assessee company claimed exemption under Section 15C in respect of the profits and gains derived from its steel foundry division and, for the latter year, from its jute mill division as well. The Income tax Officer rejected the claim,

holding that the steel foundry division merely began producing castings which were earlier purchased from the market and that such castings were used exclusively within the assessee company's existing divisions. He further held that the expansion was a normal incident of the assessee company's established business and did not amount to the setting up of a new industrial undertaking within the meaning of Section 15C. In relation to the jute mill division, the Income tax Officer recorded that raw materials were supplied by the boiler division and, after machining and forging, returned to that division; that this activity resembled job work; that sales to outside parties were negligible; and that the jute mill division constituted no more than an expansion of the assessee company's existing divisions. Accordingly, the relief under Section 15C was denied. The Appellate Assistant Commissioner affirmed this view, holding that the assessee company had merely reconstructed parts of its business and that no independent industrial undertaking had come into existence.

55. The Income Tax Appellate Tribunal (ITAT), however, took the contrary view, saying that both the steel foundry division and the jute mill division constituted new industrial undertakings. The ITAT reasoned that new machinery had been installed, housed in separate buildings; that separate industrial licences had been obtained for the relevant manufacturing activities; and that the existing business of the assessee company involved manufacturing boilers and wagons, for which spare parts, forgings, and castings were being purchased from outside. The manufacture of such spare parts by the new divisions, according to the ITAT, could not be said to be formed out of the existing

business, even though the major part of the output was utilised internally, as the element of profit was nevertheless present.

56. Upon reference, the High Court held that, for the purposes of Section 15C, the industrial undertaking must be such that a definite quantum of capital is employed therein. In other words, the undertaking must bear a degree of financial and functional separateness and must not be so integrally connected with the general capital structure of the assessee company as to render the capital employed incapable of distinct identification. The High Court clarified that such employment of capital need not necessarily arise from the raising of fresh capital, however, there must be a demonstrable and identifiable deployment of capital in that undertaking. The underlying rationale was that Section 15C contemplated a distinct industrial undertaking, one not formed by the splitting up or reconstruction of an existing business, and that the statutory exemption was intended to encourage even existing companies to establish such new undertakings.

57. When the matter came up before this Court, it was noted that Section 15C provided for exemption from tax in respect of a newly established industrial undertaking and that, under sub-section (2)(i) of Section 15C, such exemption was not available where the undertaking is formed by the reconstruction of a business already in existence, or by the transfer to a new business of building, machinery, or plant previously used in any other business. While construing the expression *new industrial undertaking* in this context, this Court held that the undertaking must not, in substance, be the same old existing undertaking; that there must be a fresh and substantial investment of new

capital; and the mere fact that a person, by setting up a new industrial undertaking, expands his existing business does not, by itself, disentitle him from the benefit of exemption, for every new creation in business necessarily involves some measure of expansion or advancement of the pre-existing enterprise.

58. This Court further held that the real test is not whether the new undertaking represents an expansion of the existing business, but whether it is, in truth, a new and identifiable undertaking, separate and distinct from the existing one. To qualify as such, there must be the emergence of a physically separate industrial unit capable of functioning on its own as a viable entity. If an industrial undertaking manufactures articles which are themselves identifiable, marketable units, and if that undertaking can meaningfully exist even upon the cessation of the older business, it must be regarded as a new and separate industrial undertaking.

59. It was clarified that the new undertaking may also produce the same commodities as the earlier undertaking, or it may produce different marketable products, including those which may serve as inputs for the old business. What is material is that the new undertaking should constituted an integrated unit by itself; that new plant and machinery are installed for the purpose of producing either the same or distinct commodities; and, lastly, where the new industrial undertaking is a separate and independent production unit capable of yielding commercially tangible products and capable of being carried on without losing its identity through complete absorption into the old business it cannot be treated as an undertaking formed by reconstruction of

the earlier business. The relevant observations made by this Court are as under:

> *"17. <u>Again, the new undertaking must not be substantially the same old existing business. The third excluded category mentioned above is significant. Even if a new business is carried on but by piercing the veil of the new business it is found that there is employment of the assets of the old business, the benefit will be not available. From this it clearly follows that substantial investment of new capital is imperative. The words "the capital employed" in the principal clause of Section 15-C are significant, for fresh capital must be employed in the new undertaking claiming exemption. There must be a new undertaking where substantial investment of fresh capital must be made in order to enable earning of profits attributable to that new capital</u>.*
>
> *18. The assessee continues to be the same for the purpose of assessment. It has its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he has been manufacturing or producing in its existing business. <u>Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15-C</u> [...] <u>The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit under Section 15-C. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business.</u> No particular decision in one case can lay down an inexorable test to determine*

whether a given case comes under Section 15-C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved. This has not happened here in the case of the two undertakings which are separate and distinct.

19. It is clear that the principal business of the assessee is heavy engineering in the course of which it manufactures boilers, wagons, etc. If an industrial undertaking produces certain machines or parts which are, by themselves, identifiable units being marketable commodities and the undertaking can exist even after the cessation of the principal business of the assessee, it cannot be anything but a new and separate industrial undertaking to qualify for appropriate exemption under Section 15-C. The principal business of the assessee can be carried on even if the said two additional undertakings cease to function. Again, the converse is also true. The fact that the articles produced by the two undertakings are used by the Boiler Division of the assessee will not weigh against holding that these are new and separate undertakings. On the other hand the fact that a portion of the articles produced in these two new industrial undertakings had been sold in the open market to others is a circumstance in favour of the assessee that the new industrial units can function on their own. Use of the articles by the assessee is not decisive to deny the benefit of Section 15-C.

20. Section 15-C partially exempts from tax a new industrial unit which is separate physically from the old one, the capital of which and the profits thereon are ascertainable. There is no difficulty to hold that Section 15-C is applicable to an absolutely new undertaking for the first time started by an assessee. The cases which *gave rise to controversy are those where the old business is being carried on by the assessee and a new activity is launched by him by establishing new plants and machinery by investing substantial funds. The new activity may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. These products may be consumed by the assessee in his old business or may be sold in the open market [...] Such a new industrially recognisable unit of an assessee cannot be said to be reconstruction of his old business since there is no transfer of any assets of the old business to the new undertaking which takes place when there is reconstruction of the old business. For the purpose of Section 15-C the industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of Section 15-C the new undertaking must be formed by reconstruction of the old business. Now in the instant case there is no formation of any industrial undertaking out of the existing business since that can take place only when the assets of the old business are transferred substantially to the new undertaking. There is no such transfer of assets in the two cases with which we are concerned."*

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26. If any undertaking is not formed by reconstruction of the old business that undertaking will not be denied the benefit of Section 15- C simply because it goes to expand the general business of the assessee on some directions. As in the instant case, once the new industrial undertakings are separate and independent production units in the sense that the commodities produced or the results achieved are commercially tangible products and the undertakings can be carried on separately without complete absorption and losing their identity in the old

<u>business, they are not to be treated as being formed by reconstruction of the old business</u>."

(Emphasis Supplied)

60. Similarly, in the case of ***Commissioner of Income-Tax v. Indian Aluminium Co. Ltd.***, reported in **(1973) 88 ITR 257**, the assessee-company was a manufacturer of aluminium ingots from ores. In the previous years, the assessee company had four manufacturing units at Belur, Kalwa, Alupuram, and Hirakud respectively. In the relevant accounting year, one more was added at Muri. Further, there were additional extensions to the existing factories at Belur and Alupuram. In connection with the relevant assessment year, the assessee company had claimed the incentive of exemption from tax under Section 15C before the Income tax Officer in respect of fresh capital outlay at Muri as well as additional investment in the form of extension to the existing factory premises, installation of new plants and machineries, etc., at Alupuram and Belur. The Income tax Officer discussed the grant of relief under Section 15C in respect of the unit at Hirakud but did not deal with the other three units in dispute. The Income tax Officer also declined to grant any relief to the assessee company in respect of all the said four units. In the appeal before the Appellate Assistant Commissioner, the assessee company claimed relief under Section 15C in respect of only three units at Alupuram, Belur and Muri.

61. However, the Commissioner disallowed the relief under Section 15C in respect of Alupuram and Belur units. Further, with respect to the unit at Muri the Commissioner found that the assessee company already had a manufacturing unit at Muri

which was only expanded in the accounting year. In short, the Commissioner affirmed the order of the Income tax Officer. Aggrieved, the assessee company appealed before the ITAT wherein the tribunal came to the conclusion that all the said three units were new undertakings and, therefore, the assessee company was entitled to exemption from tax under Section 15C.

62. While affirming the decision of the ITAT, the Calcutta High Court held that for the purpose of seeking or availing the benefit of Section 15C, the *sine qua non* was that the assessee company had established or commenced a new industrial undertaking, which might either take the shape of reconstitution, reformation, reincorporation, on the one hand, or a new production unit or separate business, on the other. It was observed that the separate business need not be a different kind of business. The commodity which the original produced, manufactured or sold might be a relevant factor in finding out whether the subsequent business was an extended business or an independent new business. The relevant observations are as under:

> *"11. Section 15C provides that the assessee should not be taxed in respect of the profits or gains derived from its subsequent industrial undertaking as do not exceed 6% per annum on the capital employed by it in such undertaking. <u>But it is obvious from this section that the "industrial undertaking" in clause 15C must refer to some new undertaking or undertaking which amounts to additions, alterations, extensions, expansions or new units. It pre-supposes that the assessee has got an existing business of its own.</u> But, apart from its original business, the assessee, for commercial expediency, might decide to cause expansion of its business. <u>This expansion may take place in various ways. The original business</u>*

might be carried on in the assessee's plot of land or over the assessee's building or buildings. Several floors may be raised on the land or the existing building of the original business of the assessee. It may purchase new plants or machineries or even replace the old machines by modern plants as a result of which the assessee might get a good return for the capital invested in such extension or improvement. Again, the expansion, in a wide sense, may also include new production unit, manufacturing, producing or even selling products which may or may not be entirely different from the nature of the original business. All these questions arise because the assessee happens to be the owner, proprietor or controlling authority of both its original business and its expanded business. Thus, we shall have to find out to what extent or limit the principle of expansion should be applied to the exemption clause under section 15C(2)(i).

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13. […] There is no doubt that if the subsequent industrial undertaking of the assessee- company in which the capital has been invested by it and the profits of which do not exceed 6% per annum of the capital employed by the assessee-company is a newly established independent industrial undertaking the assessee shall be entitled to get the relief. But the difficulty arises when the subsequent industrial undertaking is not a separate independent undertaking but an expansion or mere addition to the original business of the assessee-company. If the assessee's original business remains intact and retains its original character and the assessee establishes separate independent undertakings whether of the same or different nature in respect of the same or different commodity the subsequent undertakings cannot be called "reconstruction" within the meaning of section 15C(2)(i). The newness of subsequent industrial undertaking does not necessarily exclude all cases of expansion or extension of the original business. To *illustrate, where the original business is only extended or expanded or developed by the assessee in the same building or enclosure with a proportionately smaller capital or where the transactions of the original business and the extended business are of such a nature that they are dependent on one another or where the requirements of the original business are subserved substantially by the product of subsequent undertakings, it may be said that such expansions cannot have the benefit of exemption under section 15C. But where the assessee invests large sums of money and establishes new production units of similar or different nature as a result of which the original business of the assessee does not intrinsically alter its original character or continues to produce, manufacture or carry on the original activity in the same way even after the establishment of subsequent undertakings, the latter may be called extensions of such a nature which may be called a kind of new industrial undertaking which is entitled to get tax relief. relief. Thus whether the term "reconstruction" would include the case of substantial extensions or expansions of the assessee's original business so as to invoke the benefit or mischief under section 15C would depend upon the facts of each case. Exemption under section 15C would only be available to those industrial undertakings which are not established by division or reorientation of the assessee's original business or which has not been formed by the transfer to it of building, machinery or plant used in the assessee's original business. The emphasis should be laid on the words "is formed by" and not the form of subsequent undertaking. To obtain relief under section 15C, the subsequent undertaking must not be formed or constituted by remodelling or reconstituting the earlier business. It is significant that, apart from the head-note, the words "new business" have only been specifically mentioned in the case of transfer of building, machinery or plant used in the original business. Thus the new, separate or independent character of subsequent business is relevant but not important elements in* *construing the word "reconstruction". Even any enlargement or expanded unit may be called "new industrial undertaking" in the sense that the subsequent unit was not originally existing but the new undertaking must be understood in the context of the word "reconstruction". The legal meaning of the term "reconstruction" is, in my opinion, a mixed question of fact and law. It will be incorrect to say that "reconstruction" must include or exclude all kinds of expansions, irrespective of the nature constitution or character of the subsequent undertaking. All the facts relating to the original business and the subsequent undertaking, as found by the Tribunal, have to be examined before a decision is made on the question whether an assessee is entitled to get relief under section 15C Where, therefore, the activities or the business of the subsequent undertaking show substantial expansions they may be called industrial undertakings which are not formed by the reconstruction of the assessee's original business […]"*

(Emphasis Supplied)

63. The above view taken by the Calcutta High Court in ***Indian Aluminium*** *(supra)* came to be affirmed by this Court in the matter concerning ***CIT v. Indian Aluminium Co. Ltd.***, reported in **(1977) 4 SCC 598 (1)**.

64. Moreover, in the case of ***Bajaj Tempo Ltd., Bombay v. CIT***, reported in **(1992) 3 SCC 78**, this Court while dealing with the question whether the assessee company that had been found by the ITAT found to be a new company could be denied exemption from tax under Section 15C of the IT Act, 1922. This Court *inter alia* observed that the objective behind exemption from tax under Section 15C, read as a whole, promoted and encouraged industrialisation by permitting an assessee company setting up

a new industrial undertaking to claim benefit of not paying tax on the capital employed to certain extent and that a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. Noting above, this Court held that even if the alleged new industrial undertaking was established by transfer of building, plant or machinery of any existing unit still if it is not formed as a result of such transfer the assessee could not have been denied the benefit. In short, this Court took the view that such new undertaking should not be a continuation of the old but emergence of a new unit in itself. The relevant observation is as under:

> *"5. <u>The section, read as a whole, was a provision, directed towards encouraging industrialisation by permitting an assessee setting up a new undertaking to claim benefit of not paying tax to the extent of six per cent in a year on the capital employed</u>. But the legislature took care to restrict such benefit only to those undertakings which were new in form and substance, by providing that the undertaking should not be, 'formed' in any manner provided in clause (i) of sub-section (2) of Section 15-C. Each of these requirements, namely, formation of the undertaking by splitting up or reconstruction of an existing business or transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section (1). Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it […]*
>
> *xxx xxx xxx*

9. *Initial exercise, therefore, should be to find out if the undertaking was new. Once this test is satisfied then clause (i) should be applied reasonably and liberally in keeping with spirit of Section 15-C(1) of the Act. While doing so various situations may arise for instance the formation may be without anything to do with any earlier business. That is the undertaking may be formed without splitting up or reconstructing any existing business or without transfer of any building material or plant of any previous business. Such an undertaking undoubtedly would be eligible to benefit without any difficulty. On the other extreme may be an undertaking new in its form but not in substance. It may be new in name only. Such an undertaking would obviously not be entitled to the benefit. In between the two there may be various other situations. The difficulty arises in such cases. For instance a new company may be formed, as was in this case a fact which could not be disputed, even by the Income Tax Officer. But tools and implements worth Rs 3,500 were transferred to it of previous firm. Technically speaking it was transfer of material used in previous business. One could say as was vehemently urged by the learned counsel for the department that where the language of statute was clear there was no scope for interpretation. If the submission of the learned counsel is accepted then once it is found that the material used in the undertaking was of a previous business there was an end of inquiry and the assessee was precluded from claiming any benefit. Words of a statute are undoubtedly the best guide. But if their meaning gets clouded then courts are required to clear the haze. Sub-section (2) advances the objective of sub-section (1) by including in it every undertaking except if it is covered by clause (i) for which it is necessary that it should not be formed by transfer of building or machinery. The restriction or denial of benefit arises not by transfer of building or material to the new company but that it should not be formed by such transfer. This is the key to the interpretation. The formation should not be by such transfer. The emphasis*

is on formation not on use. Therefore it is not transfer of building or material but the one which can be held to have resulted in formation of the undertaking [...]"

(Emphasis Supplied)

65. Further, the Calcutta High Court in the case of ***Commissioner of Income-Tax v. Orient Paper Mills Ltd.***, reported in **(1974) 94 ITR 73**, was confronted with the question whether the electrolysis plant set up by the assessee company was a new industrial undertaking within the meaning of Section 15C of the IT Act, 1922. In this case, the assessee company owned a paper mill. It manufactured and sold paper in the market. In the preceding year to the relevant assessment year it had set up an electrolysis plant unit for the purpose of manufacturing caustic soda which is an essential chemical for use in the process of manufacture of paper. The assessee company obtained a separate licence for the manufacture of caustic soda and the plant unit was housed in a separate building. In assessing the company for the relevant year the Income tax Officer held that the plant was ancillary to the main manufacturing unit and was not, therefore, a new industrial undertaking as contemplated under Section 15C.

66. In appeal, the Appellate Assistant Commissioner observed that the business of manufacture of caustic soda was merely a process of reconstruction of the existing business of manufacture of paper. The Appellate Assistant Commissioner observed that no sale had taken place of the caustic soda to the outside market. The Appellate Assistant Commissioner observed further that the business of the appellant was manufacture of paper. Caustic

soda being an essential chemical for manufacture of paper, the assessee company had set up plant unit for manufacture of caustic soda so as to avoid purchasing the same from outside. Therefore, the Appellate Assistant Commissioner came to the conclusion that the plant was set up for manufacturing caustic soda for being used in the manufacture of paper which was the existing business of the appellant itself. The Appellate Assistant Commissioner was of the opinion that as long as caustic soda was not manufactured for the purpose of selling it in the market and introducing a separate business thereby, the mere fact that the plant was housed in a separate building and that an industrial licence had to be obtained for the manufacture of this chemical were not sufficient considerations for holding that caustic soda plant was a new industrial undertaking as contemplated under Section 15C of the IT Act, 1922. Pursuant to this, a further appeal was made to the ITAT. The ITAT noted that the assessee had produced before it the computation showing the profit of the plant out of which exemption was being claimed on the capital employed. The ITAT was of the opinion that, *prima facie*, the computation appeared to be in order and, therefore, directed the Income tax Officer to grant exemption to the assessee company and accordingly allowed the appeal of the assessee company.

67. In appeal before the Calcutta High Court, it was observed that the expressions "new industrial undertaking" in terms of Section 15C(2)(i) must be understood in broad commercial sense from a commonsense point of view. The court stated that in order to appreciate the meaning of these expressions one should bear in mind the purpose of Section 15C i.e., to encourage setting up of

new industries in various areas of the country. On this note, the High court observed that it was the case of the assessee company from the beginning that intended to produce raw materials of a type which was capable of being available in the market independently and which was also capable of being sold in the market and the assessee company had set up a new and separate unit for the same in a separate building and had obtained a separate licence for it. The High court observed that the setting up of a factory or a plant for the manufacture of caustic soda was not an essential or an integral part for the setting up of the plant and machinery for paper manufacture. Furthermore, it was observed that the plant had been set up for production of raw material. This raw material has an independent market both to be purchased and to be sold apart from the production of paper. The court had pointed out that if the undertaking of assessee company were not to held as a new industrial undertaking simply because the assessee company was using this in the manufacturing process then it would lead to strange results that should otherwise be avoided. The relevant observation is as under:

> *"8. <u>The expressions "new industrial undertaking" and "splitting up or reconstruction of business already in existence" must be understood in broad commercial sense from a commonsense point of view. In order to appreciate the meaning of these expressions one should bear in mind industries</u>. The other conditions in clause (iv) of sub-section (2) of section 15C are also significant. Reconstruction of the business or splitting up of the business already in existence must be in relation to the new industrial undertaking. Further, the new industrial undertaking must not be by transferring building, plant or machinery of the existing business. Sub-section (1)*

requires separate capital but not new or different capital. But whether a new industrial undertaking is entitled to exemption under section 15C of the Act must depend upon the facts and circumstances of each case. We have set out the essential facts of this case. <u>It was the case of an assessee beginning to produce raw materials of a type which was capable of being available in the market independently and which was also capable of being sold in the market and the assessee has set up a new and separate unit for the same in a separate building and has obtained a separate licence for it. It must be noted that setting up of a factory or a plant for the manufacture of caustic soda was not an essential or ingredient part for the setting up of the plant and machinery for paper manufacture. It is true that caustic soda is essential for the manufacture of paper but setting up of a plant for the manufacture of caustic soda is not an essential ingredient for paper manufacture. Furthermore, it is to be noted that this plant has been set up for production of raw material. Thirdly, it has to be noted that this raw material has an independent market both to be purchased and to be sold apart from the production of paper. It was pointed out that if it was not held as a new industrial undertaking simply because the assessee was using this in the manufacturing process then it would lead to a strange result. If the assessee had set up this under taking for production of caustic soda and had sold its produce in the market and had purchased this caustic soda from the market then this new venture of selling caustic soda would be entitled to exemption under section 15C but would lose such exemption simply because the assessee was using the same for its own products. Such an anomalous result, if possible, should be avoided</u>. Furthermore, it appears to us that the expressions "splitting up or reconstruction of business already in existence" should be given their ordinary commercial meaning. <u>Judged from that point of view it appears to us that, as a new plant was set up in a new building not by re-fitting any existing plant or machinery for production of</u>

a raw material which can be continued irrespective of paper manufacturing business, the assessee in this case was entitled to the benefit of section 15C of the Act.”

(Emphasis Supplied)

68. The above view taken in ***Orient Paper*** *(supra)* also came to be affirmed by this Court in ***CIT v. Orient Paper Mills Ltd.***, reported in **(2015) 17 SCC 305**, wherein this Court found the appeal to be covered by the view taken by this Court in ***Textile Machinery*** *(supra)* and ***Indian Aluminium*** *(supra)* respectively, and thus, dismissed the same. The relevant observation is as under:

> *“Admittedly, the appeal is concluded by the view taken by this Court in Textile Machinery Corpn. Ltd. v. CIT and CIT v. Indian Aluminium Co. Ltd. In accordance with that view, the appeal fails and is dismissed. There is no order as to costs.”*

69. Further, the High Court of Gujarat in the case of ***Gujarat Alkalies and Chemical Ltd. v. CIT***, reported in **2012 SCC OnLine Guj 1628**, wherein one of us, J.B. Pardiwala, J, authored the judgment, dealt with Section 80-I of the Income Tax Act, 1961 (“**IT Act, 1961**”), a provision which is *pari materia* to Section 15C of IT Act, 1922. In this case, the assessee company was a public limited company engaged in the business of manufacturing caustic soda primarily and other chemicals. After some time, the assessee company acquired a new industrial licence and a new letter of intent for substantial expansion of the production capacity of caustic soda from the existing 37425 M. Tonnes to 70425 M. Tonnes for which twelve new cells were installed.

Further, the assessee company had incurred an expenditure of Rs. 7.5 crore towards new machinery and plant added to the existing plant. In this backdrop, the assessee company had claimed that this new unit being a new industrial undertaking was entitled to relief as provided under Section 80-I of the Act. This claim of the assessee company came to be rejected by the Income tax Officer holding that this was a case of substantial expansion and not that of establishment of new industrial undertaking. When the matter was carried in appeal, the Commissioner of Income tax (Appeals) also concurred with the decision of the Income tax Officer. Thereafter, the assessee company carried the matter in appeal before the ITAT and the ITAT also affirmed the order of the Commissioner of Income- tax (Appeals). The ITAT held that since it was expansion of the same manufacturing unit, the assessee company would not be entitled to the benefits of Section 80-I of the IT Act, 1961.

70. When the matter came before the High court, it observed that the only ground which weighed with the Commissioner of Income-tax (Appeals) and the ITAT respectively was that the assessee company had not been able to lead any evidence to show that the new unit was capable of independently producing the goods without the aid of the existing plant and machinery of the old unit. The High court further observed that for the purpose of section 80-I of the IT Act, 1961, the industrial unit set up must be new in the sense that new plant and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of the exemption under Section 80-I, the new undertaking must be formed by reconstruction of the old business. Considering the fact that

substantial capital was employed to establish the new industrial unit and that such expansion had resulted in increase in the production by two fold, the High court held that there was no formation of any industrial undertaking out of the existing business since that could take place only when the assets of the old business are transferred substantially to the new undertaking. The court observed that just because the new undertaking was dependent to a certain extent on the existing undertaking the same by itself should not deprive the new undertaking of the status of integrated unit by itself. Thus, the High court held the alleged unit to be a new industrial undertaking in this case and granted incentive of exemption under Section 80-I. The relevant observation is as under:

> *"20. It appears that the only ground which weighed with the Commissioner of Income-tax (Appeals) and the Tribunal is that the assessee has not been able to lead any evidence to show that the new unit is capable of independently producing the goods without the aid of the existing plant and machinery of the old unit. It also appears that the authorities relied on the judgment of the Bombay High Court in the case of Associated Cement Companies Ltd. (1979) 118 ITR 406 (Bom), wherein the hon'ble Bombay High Court has taken the view that the establishment of a new industrial unit as a part of an already existing industrial establishment may result in an expansion of the industry or the factory, but if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and is itself independently of the old unit capable of production of goods then only it could be classified as a newly established industrial undertaking. In the present case, it is undisputed that the company has a separate industrial licence for the industrial undertaking and spent over Rs. 7.5 crores for putting up plant and machinery necessary*

<u>for the purpose. It is also undisputed that the production capacity of the undertaking of caustic soda has increased from 37245 M. Tonnes to 70425 M. Tonnes. Thus, what has been ignored by the authorities is two things : (i) the capital employed ; and (2) the substantial expansion of industrial undertaking, by which the production became almost double the original capacity</u> [...]

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25. We are not able to understand the logic of the argument that the test would be as to whether a new industrial undertaking can function independently of the existing industrial undertaking. If this argument of the Revenue is accepted, it will amount to adding a new clause in section 80-I of the Act. Assuming for the moment that the new unit is not capable of independently producing the goods without taking the assistance of the existing plant and machinery of the old unit is no ground to reject the claim under section 80-I of the Act. It all depends upon the mechanism and technology. As held by the Supreme Court in Textile Machinery Corporation (1977) 107 ITR 195 (SC), such a new industrially recognizable unit of an assessee cannot be said to be reconstruction of his old business since there is no transfer of any assets of the old business to the new undertaking which takes place when there is reconstruction of the old business. <u>For the purpose of section 80-I of the Act, the industrial units set up must be new in the sense that new plant and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of section 80-I, the new undertaking must be formed by reconstruction of the old business. In the present case, there is no formation of any industrial undertaking out of the existing business since that can take place only when the assets of the old business are transferred substantially to the new undertaking. Just because the new undertaking is dependent to a certain extent on the</u>

existing undertaking should not deprive the new undertaking of the status of integrated unit by itself […]

26. We are of the view that so far as the fifth test is concerned, i .e., a separate and distinct identity, only because to a certain extent the new undertaking is dependent on the existing unit, will not deprive the new undertaking the status of a separate and distinct identity. It all depends on the nature of the technology and the mechanism of production. We cannot ignore the fact that new machinery and new plant have been installed at an investment of Rs. 7 crores sometime in the year 1982-83, i.e., almost three decades back and also the fact that the production has gone from 34000 M. Tonnes to almost 75000 M. Tonnes.

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41. In the present case also, it is not the case of the Revenue that the new unit by itself is not capable of production of goods but the case of the Revenue is that it takes help of the old existing unit. We are of the view that, that itself should not be the reason to reject the claim under section 80-I of the Act. Thus, whether an undertaking is a "new industrial undertaking" entitled to the exemption under section 80-I of the Act depends on the facts of each case. No hard and fast rule can be laid down. Use by the assessee of the old undertaking for the purpose of production in its new undertaking is not a decisive test in construing section 80-I of the Act. The new undertaking must not be substantially the same old business. Substantial investment of new capital is imperative and in the present case, there has been a huge substantial investment of around Rs. 7 crores almost three decades ago. The words "the capital employed" in the principal clause of section 80-I of the Act are significant, for fresh capital must be employed in the new undertaking claiming exemption. Manufacture or production of articles yielding additional profit

> *attributable to the new outlay of capital in a separate and distinct unit is essential to earn the benefit of section 80-I. The fact that an assessee by establishment of a new industrial undertaking expands his existing business which he certainly does, would not on that score deprive him of the benefit under section 80-I. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is a new identifiable endeavour where substantial investment of fresh capital is made to enable earning of profit attributable to that new capital."*
>
> (Emphasis Supplied)

71. Recently, this Court in the case of ***CIT v. Sociedade de Fomento Industrial (P) Ltd.***, reported in **2022 SCC OnLine SC 623**, reiterated the tests applied in ***Textile Merchants*** *(supra)* above and affirmed the decision of the High court as well as that of the ITAT that had held that the new unit established by the assessee company was fully independent unit and that the setting up of the same resulted in the increase in production capacity in comparison to the old existing unit. While affirming the said decision, this Court highlighted the following tests laid in ***Textile Merchants*** *(supra)*:

> *"(i)Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter;*
>
> *(ii) The fact that an assessee by establishment of a new industrial undertaking expands his existing business which he certainly does would not on that score, deprive him of the benefit. Every new creation in business is some kind of expansion and advancement;*

(iii) <u>The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business</u>;

(iv) <u>In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit</u>;

(v) The <u>new unit may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business</u>.

(vi) The <u>products produced by the new unit may be consumed by the assessee in his old business or may be sold in the open market</u>. One thing is certain that the new undertaking must be an integrated unit by itself wherein articles are produced.

(vii) The <u>industrial unit set up must be new in the sense that new plant and machinery are erected for producing either the same commodities or some distinct commodities</u>.

(viii) In order to deny the benefit the new undertaking must be formed by reconstruction of the old unit which can take place only when the assets of more than 20 percent value of new unit are transferred to the new unit from the old unit."

(Emphasis Supplied)

72. To limit our reference to a multitude of other precedents, we consider it sufficient to observe that the tests delineated above for determining what constitutes a new industrial undertaking

have been consistently applied by this Court as well as by various High Courts in a wide array of cases. These decisions have considered not only claims for income tax exemptions available to new industrial undertakings but also to disputes relating to incentives such as sales tax exemptions, electricity duty concessions, and similar fiscal benefits, many of which also form part of the incentive framework under the industrial policy of 1989.

73. Adverting now to the facts of the present case, it is evident that the expression *“new industrial unit”* in Clause 2.7 of industrial policy of 1989 is defined solely with reference to the timing of the investment made in a particular fixed capital. In essence, where any fixed capital investment is made after the effective date, i.e., 01.12.1989, the unit in which such investment is made is to be treated as a new industrial unit. This would imply that if a company already in existence prior to the effective date makes a post effective date investment in fixed capital for setting up another unit, the latter would qualify as a new industrial unit. If our inquiry were to conclude at this point, there would be little doubt that the MM Plant unit satisfies the definition of a new industrial unit, as the fixed capital investment in its establishment was made after the effective date. However, in our considered view, a further inquiry becomes necessary i.e., whether the unit so invested in is genuinely a new industrial unit or merely an expansion of the existing unit masquerading as a new one. For such determination, reliance can be placed on various tests prescribed by the courts as mentioned above particularly in ***Textile Machinery*** *(supra)* and ***Indian***

Aluminium *(supra)* and later affirmed in ***Bajaj Tempo*** *(supra)*, ***Orient Papers*** *(supra)*, and ***Gujarat Alkalies*** *(supra)*.

74. The higher threshold laid down in the various decisions above to determine the newness of industrial unit, assume even greater relevance for consideration and application to the facts of the present case as those tests were evolved in the context of Section 15C of the IT Act, 1922 (later Section 80-I of the IT Act, 1961), the underlying objective of which was to foster industrial development by encouraging the deployment of fresh capital through the establishment of new industrial undertakings. In a similar vein, the promotion of industrialization in the State of Orissa by facilitating the setting up of new industrial units through incentives such as capital investment subsidy, tax exemptions, and related fiscal benefits, constitutes the ultimate object of the industrial policy of 1989 as well.

75. Having said that, we are of the opinion that an enquiry undertaken beyond the limited requirement of Clause 2.7 of the industrial policy of 1989 would also reveal that the MM Plant unit is, in fact, a new industrial unit and not merely an expansion of the existing Indo Flogates unit. This is because, *first*, the documents produced by the respondent authorities indicate that the date of investment by Indo Flogates in the fixed capital for the MM Plant unit stands recorded as 01.02.1992 i.e., well after the effective date of the industrial policy of 1989. The date of commencement of commercial production is similarly recorded as 21.11.1992. *Second*, Indo Flogates was granted a new and independent industrial licence by the State of Orissa, and a separate electricity connection was sanctioned by the Orissa

State Electricity Board. *Third*, the documents placed on record also reveal that Indo Flogates made a fresh outlay of capital investment in fixed assets such as land, sheds, a diesel generator set, and plant and machinery, clearly indicating the creation of a distinct industrial unit.

76. For fixed capital, Indo Flogates had acquired land and two sheds being shed nos. 19 and 22 respectively from the Odisha Industrial Infrastructure Development Corporation (IDCO) in the Kalunga Industrial Estate for Rs. 11,73,000/- and Rs. 55,05,000/- respectively, and had further invested Rs. 75,24,000/- towards plant and machinery, aggregating to a substantial investment of Rs. 1,42,02,000/-. It is also significant to note that the location of the MM Plant unit in shed nos. 19 and 22 respectively of the Kalunga Industrial Estate was entirely separate from that of the erstwhile Indo Flogates unit, which operated from shed nos. 7 and 8 respectively. This clearly indicates that the MM Plant unit had a new physical emergence as an independent industrial unit capable of existing as a viable unit on its own. We say so because, even if the Indo Flogates unit had ceased to operate, the MM Plant unit would still have been able to function independently as a viable industrial unit. *Fourthly*, the manufacturing outputs of the MM Plant unit and the Indo Flogates unit were distinct. Prior to amalgamation, Indo Flogates was engaged in the production of slide gates and slide gate valves, whereas the MM Plant unit had been established for the manufacture of special refractory products such as stool inserts, stool coatings, and basic gunning mix. In fact, the project cost for establishing the MM Plant unit had been separately appraised and financed by the IDBI Bank. In our view, therefore,

the MM Plant unit constituted an identifiable undertaking, separate and distinct from the existing business of Indo Flogates.

77. Even assuming that the products manufactured by the MM Plant unit could have been utilised in the operations of the Indo Flogates unit, it nonetheless remains a well-settled principle that a new industrial unit does not lose its character merely because it produces the same or similar commodities as the old unit, or even products which may serve as inputs for the existing unit. The rationale underlying this principle is rooted in the expertise of an industrialist or a company. An industrialist or company already experienced and well-versed in the manufacture and trade of a particular commodity would ordinarily seek to develop the industry in which it possesses skill and familiarity. In doing so, such an entity may understandably choose to set up a new industrial unit for the further development of its existing industry, without being compelled to expose its capital to the risks associated with an industry engaged in an entirely unfamiliar commodity.

78. Furthermore, as briefly noted earlier, the objectives underlying the introduction of the industrial policy of 1989 were grounded in public interest and in the broader framework of liberalizing the package of incentives so as to encourage the establishment of new industrial units in the backward areas of the State of Orissa, while simultaneously providing support to existing industries. To fulfil the objective of promoting new industries in the State, the Government of Orissa resolved to extend subsidy-based incentives to all such units that were established through investment in fixed capital made after the effective date, i.e.,

01.12.1989. In this regard, Clause 4.1 of the industrial policy of 1989 expressly provides that, subject to certain stipulated conditions, a new industrial unit shall be eligible to seek all incentives contemplated under the policy. Capital investment subsidy and DG Set subsidy are among the incentives available to new industries under Clause 4.1. Clause 5.1 further stipulates that capital investment subsidy shall be mandatorily granted to new industrial units on the basis of their fixed capital investment in the scheduled zones, and at the percentage rates specified therein. The MM Plant unit of Indo Flogates was situated in Zone "C", where the subsidy admissible was equivalent to 10% (ten percent) of the fixed capital investment, subject to a maximum ceiling of Rs. 10,00,000/-. Additionally, under Clause 11.4.4, an industrial unit is entitled to capital investment subsidy for the establishment of new generating sets at the rate of 15% (fifteen percent) of the cost of installation, subject to a maximum of Rs. 5,00,000/-.

79. Having discussed the meaning of a new industrial unit under industrial policy of 1989, a discussion on the expansion of existing industrial unit is also required. Expansion, among other two i.e., modernisation and diversification, of an existing industrial unit has been defined under Clause 2.2 of the industrial policy of 1989 to mean an additional investment (ought to be more than 25% (twenty – five percent) of undepreciated value of fixed capital investment of existing unit) in acquisition of fixed capital investment of expanding the production of said existing unit and resulting in the increased production over and above the capacity of existing unit. This means in order to fall within the phrase *"expansion of an existing unit"* under Clause

2.2 of the industrial policy of 1989, four essentials at the least are required: (i) There must be an additional investment; (ii) such additional investment must exceed 25% (twenty – five percent) of undepreciated value of existing unit's fixed capital investment; (iii) such additional investment must be made in acquiring new fixed capital; and (iv) such additional investment must result in increase in the production over and above the existing capacity.

80. Having explained the meaning of expansion of existing unit under industrial policy of 1989, it is now pertinent to highlight the fact that the respondent nos. 2 and 4 respectively in their counter affidavit before this Court have stated that the sanctioned subsidies were rejected due to the reason that MM Plant unit was nothing but an expansion of the Indo Flogates unit and that under Clause 4.4 of the industrial policy of 1989 though an industrial unit may carry any number of expansions but the subsidy incentive for such industrial unit would be allowed once only. It is the case of the respondent nos. 2 and 4 respectively that the decision to reject the subsidies was followed when they found out that the MM Plant unit was an expansion of the Indo Flogates unit and that Indo Flogates had already availed subsidy for the expansion of the Indo Flogates unit under the previous industrial policy which was supposed to be granted only once as per Clause 4.4 of the industrial policy of 1989. However, while rejecting the subsidies *vide* letter dated 04.10.2008, the respondents were unable to assign any reasons as to why the MM Plant unit was an expansion of Indo Flogates unit and/or how the abovementioned four essentials of Clause 2.2 were met. It was essential for the respondent authorities to provide cogent reasons behind their decision in recognizing the

MM Plant unit as an expansion, especially in the context of Clause 20.1 of the industrial policy of 1989, which mandated that the respondents reject the application for incentives on *merit*. Thus, in view of the above, the requirement of Clause 2.7 of industrial policy of 1989 and the tests for qualifying as a new unit appears to have been met by Indo Flogates while establishing MM Plant unit and there being nothing on record to prove contrary, we are of the view that MM Plant should be treated as a new industrial unit only.

81. Having thus answered, on the basis of the material on record, that the MM Plant unit satisfies the requirements of a new industrial unit and that the respondents failed to justify its classification as an expansion, it also becomes necessary to examine the manner in which the respondents sought to defend their stance before this Court and the High Court.

82. At this juncture, we are constrained to note that a major part of the respondents' submissions before this Court and the High Court are an afterthought, primarily to cover the failure in their duty to be objective, efficient, and reasoned while examining and processing applications for the grant of subsidies. It is significant to highlight at this moment one of the submissions of the respondents against the appellant company wherein it was submitted that in the applications of Indo Flogates there was no mention of the existing unit or previous investments i.e., about the earlier investment and subsidies granted while establishing Indo Flogates and carrying out expansions therein, and that the applications of Indo Flogates simply stated that this unit has been set up separately in the state with a separate registration

with the Government of India and with new and separate electrical connection obtained from the Orissa State Electricity Board (OSEB). On the basis of the above, it was stated that it fulfilled the criteria of a new unit for subsidy under industrial policy of 1989. Therefore, on the basis of the applications, the respondent no. 2 *vide* letter dated 05.11.1998, communicated to Indo Flogates that on further examination of matter, it had decided to treat MM Plant unit of Indo Flogates for manufacture of stool insert, stool coatings and gunning mix as a separate new industrial unit. It is relevant to note here that there was already a pre-formatted application form issued by the state wherein the applicant while applying for subsidy for new industrial unit had no choice but to accept to the pre-formatted clause in the draft application which stated that the applicant certifies that they had not either applied for or have received any amount by way of state investment subsidy before.

83. We do not agree with the argument of the respondents that MM Plant unit was recognised as a separate new industrial unit by merely relying on the contents of the application submitted by the appellant company. We must state that in such circumstances, the respondent authorities should have closely scrutinised and examined the merits and antecedents of each application before recognising a unit as new or an expansion of an existing unit, mentioning the reasons to do so, before forwarding the application internally for approval, and sanctioning the subsidies in favour of the applicant. It is a lame excuse to say that believing the contents of an application, the recognition of any unit as new or the expansion of an existing unit was followed. We are of the view that non-application of mind has no space in matters concerning policy decisions. We

are aware that although during such processes the authorities do exercise discretion, however, such exercise of discretion cannot merely be on some flimsy grounds. Having said this, a closer look into the applications of the Indo Flogates would reveal that what it had mentioned was not something incorrect. In its application, Indo Flogates mentioned that in collaboration with Magneco/Metrel of USA, it had established MM Plant unit as a separate unit meaning thereby with separate industrial registration, land and sheds, electricity connection, and thus, found itself fulfilling the criteria of being a new industrial unit entitled to fresh subsidy under the industrial policy of 1989. It is pertinent to state that in the same application, Indo Flogates had also mentioned that *"in case you need any further information / clarification, please write to us"* yet no information / clarification was sought by the respondent authorities in regards to the antecedents of Indo Flogates and subsidy having given before. Respondent no. 2 *vide* letter dated 05.11.1998 went on to recognise the MM Plant unit as a separate new industrial unit while mentioning that *"this is to certify that on further examination of the matter the director of industries have been pleased to decide to treat MM Plant as a separate new industrial unit under medium scale sector of M/s Indo Flogates"*.

84. Unlike and contrary to the above submission, the respondents in their counter affidavit before the High Court had stated that the earlier sanction of subsidy of Rs. 11,14,750/- (Rs. 10,00,000/- towards capital investment subsidy and Rs. 1,14,750/- towards DG Set subsidy) was based on the documents submitted by Indo Flogates. It was also argued that the fact of amalgamation of Indo Flogates and the appellant company was not disclosed to or

brought to the knowledge of the respondents before sanctioning the subsidies, therefore, MM Plant unit was earlier recognised as a new industrial unit and on that basis capital investment subsidy was sanctioned for MM Plant in favour of Indo Flogates. The respondents further argued that in the 35th meeting of sub-committee of state level committee, the very existence of Indo Flogates was not there as it was already amalgamated with the appellant company. However, we do not find any merit in this argument as the fact of amalgamation was also referred to by the appellant company (which till this time had amalgamated with Indo Flogates) in its letter dated 22.05.2001 wherein the respondents were asked to *"kindly be informed that following subsidy matters relating to* <u>*erstwhile lndo Flogates Ltd (since amalgamated with the Company)*</u> *are lying pending with the Industries Department"*. Whereas, the subsidies were sanctioned by the respondent nos. 2 and 4 respectively, later in point of time *vide* their letters dated 10.04.2003 and 19.04.2003 respectively. In fact, even before the letter dated 22.05.2001, a letter was sent to the respondent no. 3 on 15.12.2000, wherein the undersigned person was a representative of the appellant company and not that of Indo Flogates. Further, the said letter clearly mentions to that the issue of subsidy related to the erstwhile entity Indo Flogates. The relevant portion of the letter reads thus: *"discussion yesterday* <u>*undersigned*</u> *had with you, kindly be informed that following subsidy matters relating to* <u>*erstwhile*</u> *Indo Flogates ltd are presently lying pending with the Industries Department at Bhubaneswar"*. Thus, had the respondent authorities not acted in an absent-minded, lackadaisical, and procrastinated manner, they would have known the fact that Indo Flogates was not in existence anymore and that Indo

Flogates had amalgamated with the appellant company. That was precisely why the undersigned representative of the appellant company was liaising for sanctioned subsidies for MM Plant unit on behalf of Indo Flogates in all correspondence post amalgamation. In case the respondents had not acted in such an unmindful manner, they would have noted that amalgamation had taken place and would have sought supporting documents to that effect. Whatsoever the case could have been, even otherwise, the non-disclosure of amalgamation could not have been the ground for rejection of subsidies as the rights and benefits in the subsidies sanctioned in favour of Indo Flogates came to be transferred in favour of the appellant company after the amalgamation and, a new industrial unit, irrespective of its ownership, would have been entitled to the subsidies. At this juncture, it is also pertinent to mention that Part III of the amalgamation order dated 03.08.2000 explicitly states that all properties belonging to or in the ownership of or vested in or granted in favour of Indo Flogates including but without being limited to all ***subsidies***, will stand vested in the appellant company upon amalgamation.

85. Thus, in view of all that is stated above, we hold this issue to be in favour of the appellant company. We hold that the MM Plant unit is a new industrial unit under the industrial policy of 1989, as the same had also been classified by the respondents in the year 1998.

(II). **<u>If the answer to the issue no. (I) is in the affirmative then, whether the respondents were justified in rejecting the capital investment subsidy and DG Set subsidy respectively for MM Plant unit on the ground that both Indo Flogates and the appellant company had already exhausted the overall subsidy limit under the previous industrial policies?</u>**

86. The respondents contended that the Industries Department, Government of Orissa while exercising its power under Clause 20.1 of the industrial policy of 1989 had issued to the respondent no. 3 the instructions letter *vide* dated 28.10.1994, clarifying that the capital investment subsidy claims including the claims for additional subsidy on account of expansion / modernisation / diversification shall be limited to the overall financial limits prescribed under different IPRs and that this procedure was followed earlier also and that the same may continue to be followed in future. In this background, the respondents had argued that it is clear from the instruction letter dated 28.10.1994 that capital investment subsidy claim, including claim for additional subsidy in case of expansion, was subject to overall financial limits prescribed under different IPRs, therefore, the same should also apply in case of claim of a new industrial unit for capital investment subsidy as also in case of claim for additional subsidy in case of expansion / modernisation / diversification. On the basis of the instruction letter dated 28.10.1994, the respondents had submitted that both Indo Flogates and the appellant company was already being granted to their extent of overall maximum limit of subsidy of Rs. 15,00,000/- and Rs. 20,00,000/-, collectively, under the previous industrial policies i.e., industrial policies of 1980 and

1986 and, therefore, the subsidies sanctioned for MM Plant unit in favour of Indo Flogates could not have been disbursed in favour of later transferee i.e. the appellant company for being excessive of overall maximum limit of subsidy that can be granted as per the instruction letter dated 28.10.1994.

87. Before going into the merits of the aforesaid submission, we deem it necessary to reiterate a few important dates in the present matter:

(a) The effective date of the industrial policy of 1989 was 01.12.1989;
(b) The date of initial fixed capital investment was 01.02.1992;
(c) The date of commencement of commercial production was 21.11.1992;
(d) The dates of applications for DG Set subsidy and capital investment subsidy were 28.08.1993 and 29.09.1993 respectively;
(e) The instruction letter under Clause 20.1 of the industrial policy was issued to the respondent no. 3 on 28.10.1994;
(f) On 05.11.1998, the respondent no. 2 recognised the MM Plant unit as a separate new industrial unit of Indo Flogates;
(g) The amalgamation of Indo Flogates and the appellant company was approved *vide* High Court order dated 03.08.2000;
(h) The fact of amalgamation was informed to the respondents *vide* letter dated 22.05.2001;
(i) The DG Set subsidy and capital investment subsidy were sanctioned by the respondents *vide* letters dated 10.04.2003 and 19.04.2003 respectively;
(j) The respondents, on the basis of the instruction letter dated 28.10.1994, rejected the said subsidies *vide* letter dated

04.10.2008 on the ground that both Indo Flogates and the appellant company had availed the maximum overall limit of individual subsidies prescribed under the industrial policy of 1989;

(k) Industries Department, Government of Orissa had issued the notification dated 30.10.2008 and amended industrial policy of 1989 retrospectively to insert a new sub-clause being Clause 4.4, containing a verbatim requirement as had been provided under the instruction letter dated 28.10.1994.

88. Having set the important dates above, a close reading of Clause 20.1 of the industrial policy of 1989 is also required. Clause 20.1 of industrial policy of 1989 *inter alia* provides that the State Government may issue operational guidelines / instructions for administration of incentives and that an industrial unit, which *considers itself eligible* for any incentive under the policy, shall apply for the same *in accordance* with the operation guidelines / instructions and the same shall be *considered and disposed of on merits*. This means if an industrial unit, while submitting the application for subsidies to the respondent authorities, considers itself to be eligible for any incentive then it shall apply *"in accordance"* with the operational guidelines / instructions. At this juncture, it is pertinent to note that at the time when Indo Flogates had applied for DG Set subsidy and capital investment subsidy i.e., on 23.08.1993 and 29.09.1993 respectively, the instruction letter dated 28.10.1994 did not exist. This is why Indo Flogates, without there being any further instruction till this time, had applied under Clause 2.7 read with Clauses 4.1 and 5.1 of industrial policy of 1989 for capital investment subsidy *vide* application dated 29.09.1993, in accordance with the

existing eligibility requirements of being a new industrial unit and having no prescribed overall maximum limits for such new industrial unit. This is precisely the reason why Indo Flogates might have suggested to the respondent authorities in its application 29.09.1993 that it found itself fulfilling the criteria of a new industrial unit and considered itself entitled for a fresh subsidy under the policy.

89. Even otherwise, the requirement of a prescribed overall maximum limit for capital investment subsidy contained in the instruction letter dated 28.10.1994, though mentioned to be retrospective, was inserted as it is and in verbatim in the main industrial policy of 1989 *vide* amendment notification dated 30.10.2008. This amendment notification dated 30.10.2008 while adopting the verbatim requirement of the instruction letter dated 28.10.1994 further clarified that *"Capital Investment Subsidy claim including claims for additional subsidy on account of E/M/D shall be limited to the overall financial limit prescribed under this IPR. <u>In other words, if the eligible unit has availed of capital investment subsidy under the previous IPR during its operational period, **its claim for additional subsidy** would be limited to the differential amount between actual subsidy availed of during the operational period of the previous IPR and the maximum CIS prescribed under this IPR</u>"*. The phrase "claim for additional subsidy" read with words "eligible unit" used in the context therein is of paramount importance. This means if an eligible unit had already availed the benefit of capital investment subsidy under previous industrial policies then such eligible unit's claim for additional subsidy would be limited to differential

amount between subsidy availed under previous policies and the maximum limit under industrial policy of 1989.

90. We are of the opinion that a claim for additional subsidy could only be made when an eligible unit had already availed the benefits of the same and/or part of the same earlier in the previous policies. This means such eligible unit would necessarily would have to be an existing unit first. This is because a new industrial unit (in which fixed capital investment is required to take place only after the effective date of industrial policy of 1989) on the other hand would be receiving a fresh subsidy as per the scheme and objective of entire industrial policy of 1989 and not the additional subsidy which is otherwise meant for an industrial unit which was set up during the operation of previous policies. In such circumstances, the word "eligible unit" used in the instruction letter dated 28.10.1994 and in the amendment notification dated 30.10.2008 would require to be read as the existing industrial unit which is undergoing either expansion / modernisation / diversification. This view would fall squarely into place when one would refer to the heading of the amendment notification dated 30.10.2008 that clarified the intent behind the requirement of the instruction letter dated 28.10.1994. The heading of the amendment notification dated 30.10.2008 states that an amendment to industrial policy of 1989 is being carried out for the provisions of sanction of capital investment subsidy under expansion / modernisation / diversification programme and not for a new industrial unit. The relevant excerpt is as follows:

> *"Sub: Amendment of IPR-80, IPR-86, IPR-89, IPR-92 and IP-96 - Provisions for sanction of Capital Investment*

Subsidy (CIS) and exemption of sale Tax under Expansion / Modernization / Diversification (E / M / D) Programme with retrospective effect.”

(Emphasis Supplied)

91. Thus, in the conspectus of the aforesaid discussion and having already held the MM Plant unit to be a new industrial unit under the industrial policy of 1989, we are of the view that the respondent authorities were absolutely wrong in rejecting the capital investment subsidy and DG Set subsidy for MM Plant unit on the ground that since both Indo Flogates and the appellant company had already availed the overall subsidy limit under the previous industrial policies of 1980 and 1986 respectively, no further subsidies could have been sanctioned for the MM Plant unit in favour of Indo Flogates.

(III). Whether the respondents are estopped from refusing to disburse the capital investment subsidy and DG Set subsidy respectively for the MM Plant unit to the appellant company?

92. The learned counsel appearing for appellant company contended that the doctrine of promissory estoppel ought to operate in their favour in the present case. Although the conclusions we have reached on the foregoing two issues are, in our considered view, sufficient to finally resolve the controversy yet, we deem it appropriate, indeed necessary, with a view to doing complete justice between the parties and for the definitive settlement of all questions arising in the present *lis*, to also examine this issue.

93. The common law acknowledges multiple forms of equitable estoppel, one such doctrine being promissory estoppel. In ***Crabb v. Arun DC***, reported in **[1976] 1 Ch 179**, Lord Denning, speaking for the Court of Appeal, examined the equitable origins of the doctrine of promissory estoppel and observed as follows:

> *"The basis of this proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity" If I may expand that, Lord Cairns said: "It is the first principle upon which all Courts of Equity proceed", that it will prevent a person from insisting on his legal rights – whether arising under a contract or on his title deed, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."*

94. The essential elements of the doctrine of promissory estoppel have also been discussed in ***Chitty on Contracts : Hugh Beale, Chitty on Contracts*** (32nd edn., Sweet & Maxwell 2017):

> *"4.086. For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on his promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships.*

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4.088 […] The doctrine can also apply where the relationship giving rise to rights and correlative duties is non-contractual: e.g. to prevent the enforcement of a liability imposed by statute on a company director for signing a bill of exchange on which the company's name is not correctly given; or to prevent a man from ejecting a woman, with whom he has been cohabitating, from the family home."

95. ***Chitty*** *(supra)* clarifies that the doctrine of promissory estoppel may operate even in the absence of a pre-existing legal relationship between the parties. It is, however, cautioned that such an application may be misconceived, as it would result in the creation of new rights inter se the parties, whereas the true purpose of the doctrine is to prevent the enforcement of pre-existing rights in circumstances where it would be inequitable to do so:

"4.089. It has, indeed, been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties, or where there is only a putative contract between them: e.g. where the promisee is induced to believe that a contract into which he had undoubtedly entered was between him and the promisor, when in fact it was between the promisee and another person. But it is submitted that these suggestions mistake the nature of the doctrine, which is to restrict the enforcement by the promisor of previously existing rights against the promisee. Such rights can arise only out of a legal relationship existing between these parties before the making of the promise or representation. To apply doctrine where there was no such relationship would contravene the rule (to be

> *discussed in para.4-099 below) that the doctrine creates no new rights."*

96. Under English law, judicial pronouncements have historically postulated that the doctrine of promissory estoppel cannot be employed as a 'sword' to found an independent cause of action for enforcing a promise unsupported by consideration. Its application in those decisions has been confined to a 'shield', whereby the promisor is estopped from insisting upon the enforcement of strict legal rights when, by words or conduct, a representation has been made to suspend or modify the exercise of such rights. In ***Combe v. Combe***, reported in **[1951] 2 K.B. 215**, the Court of Appeal held that consideration is an essential element of the cause of action:

> *"It [promissory estoppel] may be part of a cause of action, but not a cause of action itself […] The principle [promissory estoppel] never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind"*

97. Even within English law, the application of the rule laid down in ***Combe*** *(supra)* has not been consistent, and the width of the principle itself has been a matter of doubt. In the absence of any authoritative pronouncement by the House of Lords recognising promissory estoppel as an independent cause of action, it has been considered difficult to state with certainty that English law has moved away from the traditional position of treating the doctrine as a 'shield' rather than a 'sword'. In contrast, the

position in the United States and Australia is comparatively less restrictive.

98. Whereas India adopted a more broader formulation of the doctrine. Comparative law enables countries which apply a doctrine from across international frontiers to have the benefit of hindsight.

99. This Court has given an expansive interpretation to the doctrine of promissory estoppel with a view to remedy the injustice being done to a party who has relied on a promise. In ***Motilal Padampat Sugar Mills v. State of Uttar Pradesh***, reported in **(1979) 2 SCC 409**, this Court viewed promissory estoppel as a doctrine rooted in equity, unrestrained by the requirement of consideration that traditionally circumscribed its application under English law. Thus, speaking through Justice P. N. Bhagwati (as His Lordship then was), the Court observed as follows:

> *"12 […] <u>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</u> […] 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."*
>
> (Emphasis Supplied)

➢ **<u>From estoppel to expectations</u>**

100. Under English law, the doctrine of promissory estoppel has evolved alongside the doctrine of legitimate expectation. The latter is anchored in principles of fairness in public administration and is attracted where a public authority, by its representation or conduct, leads an individual to entertain an expectation of receiving a substantive benefit. The contours of the doctrine of substantive legitimate expectation were elucidated in ***R v. North and East Devon Health Authority, ex p Coughlan***, reported in **[2001] QB 213**, in the following terms:

> *"55 […] But what was their legitimate expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in In re Findlay. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*
>
> *56 […] <u>Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.</u> Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

(Emphasis Supplied)

101. Under English law, the doctrine of legitimate expectation initially emerged within the domain of public law as an analogue to the doctrine of promissory estoppel in private law. Over time, however, English law has drawn a clear distinction between the two, treating legitimate expectation and promissory estoppel as discrete remedies operating in the spheres of public law and private law respectively. In this context, ***De Smith's Judicial Review***, authored by Harry Woolf and others (8th edn., Thomson Reuters, 2018), highlights the contrast between the public law orientation of the doctrine of legitimate expectation and the private law foundations of promissory estoppel:

> *"despite dicta to the contrary [Rootkin v Kent CC, (1981) 1 WLR 1186 (CA); R v Jockey Club Ex p RAM Racecourses Ltd, [1993] AC 380 (HL); R v IRC Ex p Camacq Corp, (1990) 1 WLR 191 (CA)], 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 [R v Ministry for Agriculture, Fisheries and Foods Ex p Hamble Fisheries (Offshore) Ltd, (1995) 2 All ER 714 (QB)] […] <u>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</u> [Simon Atrill, 'The End of Estoppel in Public Law?' (2003) 62 Cambridge Law Journal 3]."*
>
> (Emphasis Supplied)

102. Another point of distinction between the doctrines of promissory estoppel and legitimate expectation under English law is that the latter is capable of constituting an independent cause of action. The ambit of the doctrine of legitimate expectation is wider than

that of promissory estoppel, inasmuch as it takes into account not only an express promise made by a public authority but also consistent official practice. Further, in the application of promissory estoppel, it may be necessary to demonstrate that the promisee has suffered detriment as a consequence of acting in reliance upon the promise. While it is generally sufficient to show that the promisee has altered its position on the faith of the representation, the absence of any resulting prejudice may nonetheless be a relevant consideration in determining whether it would be inequitable to permit the promisor to resile from the promise. No such requirement, however, inheres in the doctrine of legitimate expectation. In ***Regina (Bibi) vs Newham London Borough Council***, reported in **[2002] 1 W.L.R. 237**, the Court of Appeal held:

> *"55. The present case is one of reliance without concrete detriment. We use this phrase because there is moral detriment, which should not be dismissed lightly, in the prolonged disappointment which has ensued; and potential detriment in the deflection of the possibility, for a refugee family, of seeking at the start to settle somewhere in the United Kingdom where secure housing was less hard to come by. In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power. To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply*

to place their trust in what has been represented to them."

(Emphasis Supplied)

103. Consequently, while the basis of the doctrine of promissory estoppel in private law is a promise made between two parties, the basis of the doctrine of legitimate expectation in public law is premised on the principles of fairness and non-arbitrariness surrounding the conduct of public authorities. This is not to suggest that the doctrine of promissory estoppel has no application in circumstances when a State entity has entered into a private contract with another private party. Rather, in English law, it is inapplicable in circumstances when the State has made representation to a private party, in furtherance of its public functions.

➢ **Doctrine of legitimate expectations in Indian Law**

104. Under Indian law, the doctrines of promissory estoppel and legitimate expectation have often tended to be conflated in judicial discourse. This tendency has been noted and analysed in Jain and Jain's well-known treatise, ***Principles of Administrative Law*** (7th edn., EBC 2013):

> *"At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel'.*
>
> *xxx xxx xxx*

A reading of the relevant Indian cases, however, exhibit some confusion of ideas. It seems that the judicial thinking has not as yet crystallised as regards the nature and scope of the doctrine. At times, it has been referred to as merely a procedural doctrine; at times, it has been treated interchangeably as promissory estoppel. However both these ideas are incorrect. As stated above, legitimate expectation is a substantive doctrine as well and has much broader scope than promissory estoppel.

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In Punjab Communications Ltd. v. Union of India, 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."

105. While such doctrinal conflation has the regrettable effect of introducing uncertainty into the law, it is ultimately citizens who bear its adverse consequences. Representations made by public authorities must, therefore, be subjected to the most exacting standards, for citizens order their affairs and regulate their

conduct on the basis of the trust they repose in the State. The same considerations apply with equal force in the commercial sphere, where predictability and consistency are indispensable to rational business planning. A failure on the part of public authorities to honour their representations, absent adequate and cogent justification, undermines the confidence of citizens in the State and erodes the credibility of governmental action. The creation of a business-friendly environment conducive to investment and trade is intrinsically linked to the degree of faith that may be placed in government to fulfil the expectations it engenders. Professors Jain and Deshpande have characterised the consequences of this doctrinal confusion in the following terms:

> *"Thus, in India, the characterization of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel in the light of the evolution of doctrines like LE [Legitimate Expectations] and abuse of power. If the Supreme Court of India has shown its creativity in transforming the notion of promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the doctrine of LE for judicial review of resilement of administrative authorities from policies and longstanding practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil. Presently, in the absence of a like doctrine to that of*

promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation."

106. Further, the necessity for this doctrine to possess an independent and autonomous existence was articulated by Justice Frankfurter of the United States Supreme Court in ***Vitarelli v. Seaton***, reported in **359 U.S. 535 (1959)**, in the following words:

> *"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."*

107. In ***National Buildings Construction Corporation v. S. Raghunathan*** reported in **[2003] 1 WLR 348**, a three Judge bench of this Court, speaking through Justice S. Saghir Ahmad, held that:

> *"18. 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. <u>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</u>."*
>
> (Emphasis Supplied)

108. However, it is necessary to bear in mind that the aforesaid observation was made by this Court in the context of examining the contours of the doctrine of legitimate expectation under English law as it then stood. As noticed earlier, at that stage of its development, English law exhibited a significant degree of overlap between the doctrines of legitimate expectation and promissory estoppel, the former often being invoked by analogy with the latter. Subsequent developments in English law, particularly following the decision of this Court in ***National Buildings Construction Corporation*** *(supra)*, reflect a conscious effort to disentangle the two doctrines and to locate the doctrine of legitimate expectation on a distinct and more expansive doctrinal footing. In ***Regina*** (***Reprotech (Pebsham) Ltd) vs East Sussex County Council***, reported in **[2003] 1 WLR 348**, the House of Lords has held thus:

> *"33. In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in Newbury District Council v Secretary of State for the Environment [1981] AC 578 , 616, <u>estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone</u>. (See also*

Dyson J in R v Leicester City Council, Ex p Powergen UK Ltd [2000] JPL 629 , 637.)

34. <u>There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power… But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote.</u> Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case, at pp 254–255) while ordinary property rights are in general far more limited by considerations of public interest: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389.

35. It is true that in early cases such as the Wells case [1967] 1 WLR 1000 and Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222 , Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful […] It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet."

(Emphasis Supplied)

109. In a concurring opinion in ***Monnet Ispat and Energy Ltd. v. Union of India***, reported in **(2012) 11 SCC 1**, Justice H. L.

Gokhale underscored the distinct considerations underlying the doctrines of promissory estoppel and legitimate expectation. It was observed that the invocation of promissory estoppel presupposes the existence of a clear promise, acting upon which the promisee has altered its position to its detriment. In contrast, the application of the doctrine of legitimate expectation is primarily informed by considerations of fairness and reasonableness in State action. The relevant observation is as under:

> *"Promissory Estoppel and Legitimate Expectations*
>
> *289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice. In the instant case it was only a proposal, and it was very much made clear that it was to be approved by the Central Government, prior whereto it could not be construed as containing a promise. Besides, equity cannot be used against a statutory provision or notification.*
>
> *290. [...] In any case, in the absence of any promise, the Appellants including Aadhunik cannot claim promissory estoppel in the teeth of the notifications issued under the relevant statutory powers. Alternatively, the Appellants are trying to make a case under the doctrine of legitimate expectations. The basis of this doctrine is in reasonableness and fairness. 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."*
>
> (Emphasis Supplied)

110. In ***Union of India v. Lt. Col. P. K. Choudhary***, reported in **(2016) 4 SCC 236**, this Court considered the decision in **Monnet Ispat** *(supra*) and noted its reliance on the judgment in ***Attorney General for New South Wales v. Quinn***, reported in **(1990) 64 Aust LJR 327**. This Court thereafter observed as follows:

> *"This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."*

111. Thus, 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.

112. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in ***Food Corporation of India v. Kamdhenu Cattle Feed Industries***, reported in **(1993) 1 SCC 71**, held thus:

> *"7. 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 'fairplay 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. <u>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.</u> 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.

8. <u>The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law.</u> Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation *gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*

(Emphasis Supplied)

113. In ***NOIDA Entrepreneurs Assn. v. NOIDA***, reported in **(2011) 6 SCC 508**, a two judge bench of this Court, speaking through Justice B. S. Chauhan, elaborated on this relationship in the following terms:

> *"39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.*
>
> *xxx xxx xxx*
>
> *41. 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 [...]"

As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression.

114. As briefly discussed above, the operation of doctrine of promissory estoppel against government instrumentalities finds its reference in a pivotal decision of this Court in the case of ***Motilal Padampat*** *(supra).* In this case, the State Government of UP in 1968 had taken a policy decision to grant the incentive of exemption from sales tax for a period of three years to all new industrial units being established within the State. Pursuant to this policy, the appellant addressed a communication to the Director of Industries, stating that, in view of the sales-tax exemption announced by the Government, it intended to set up a plant unit for the manufacture of vanaspati and sought confirmation regarding the availability of the exemption. The Director of Industries affirmed the position, and the assurance was further endorsed and confirmed by the Chief Secretary to the State Government. Acting on the strength of these assurances, the appellant proceeded to establish the plant unit. In and around 1969, the State Government expressed reservations regarding the grant of exemption and requested the appellant to attend a meeting, during which the appellant reiterated that the government had already granted sales-tax exemption and that it had proceeded with the establishment of the plant unit on the strength of that assurance. Subsequently, in 1970, the State Government adopted a revised policy decision whereby new vanaspati units in the State that commenced commercial

production by 30.09.1970 would be entitled only to a partial concession in sales tax. Although the appellant's unit went into commercial production on 02.07.1970, the State Government once again altered its policy and, on 12.08.1970, communicated its decision to rescind the concession earlier granted in favour of the appellant. On this note, this Court thoroughly examined the doctrine of promissory estoppel and observed that it is a principle evolved by equity to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel.

115. According to this Court, the true principle of promissory estoppel seemed to be that where one party has, by his words or conduct, made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made. Where it is in fact so acted upon by the other party, the promise would be binding on the party making it, and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. This would be so irrespective of whether there is any pre-existing relationship between the parties or not.

116. It was further observed that it is not necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise. This Court was of the view that the doctrine of promissory estoppel is also applicable against the government, where the government makes a promise

knowing or intending that it would be acted upon by the promisee. Where, in fact, the promisee, acting on it, alters his position, the government would be held bound by the promise. 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.

117. Applying the said doctrine to facts of that case, this Court had observed that the in the letter of the chief secretary to the government, a categorical representation was made by him on behalf of the government that the proposed vanaspati unit of the appellant would be entitled to exemption sales tax for a period of three years from the date of commencement of production. This representation was made by way of clarification and as a definite commitment on the part of the government to grant exemption. Therefore, the representation was made by the government knowing and intending that it would be acted on by the appellant, because, the appellant had decided to set up a unit for manufacture of vanaspati only on account of the exemption from sales tax promised by the government. The relevant observations are as under:

> *"7. <u>That takes us to the question whether the assurance given by respondent 4 on behalf of the State Government that the appellant would be exempt from Sales Tax for a period of three years from the date of commencement of production could be enforced against the State Government by invoking the doctrine of promissory estoppel</u>. Though the origins of the doctrine of promissory estoppel may be found in Hughes v. Metropolitan Railway Co. and Birmingham and District Land Co. v. London and*

North-Western Rail Co. authorities of old standing decided about a century ago by the House of Lords, it was only recently in 1947 that it was rediscovered by Mr. Justice Denning, as he then was, in his celebrated judgment in Central London Property Trust Ltd. v. High Trees House Ltd.. <u>This doctrine has been variously called 'promissory estoppel', 'equitable estoppel', 'quasi estoppel' and 'new estoppel'. It is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel', it is, as we shall presently point out, neither in the realm of contract nor in the realm of estoppel</u> […]

8. […] <u>The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not</u>.

xxx xxx xxx

32. We may now turn to examine the facts in the light of the law discussed by us. <u>It is clear from the letter of respondent 4 dated January 23, 1969 that a categorical representation was made by respondent 4 on behalf of the Government that the proposed vanaspati factory of the appellant would be entitled to exemption from sales tax in respect of sales of vanaspati effected in Uttar Pradesh for a period of three years from the date of commencement of production. This representation was made by way of clarification in view of the suggestion in</u>

<u>the appellant's letter dated January 22, 1969 that the financial institutions were not prepared to regard the earlier letter of respondent 4 dated December 22, 1968 as a definite commitment on the part of the Government to grant exemption from sales tax.</u> Now the letter dated January 23, 1969 clearly shows that respondent 4 made this representation in his capacity as the Chief Secretary of the Government, and it was therefore, a representation on behalf of the Government […] We must, therefore, proceed on the basis that this representation made by respondent 4 was a representation within the scope of his authority and was binding on the Government. <u>Now, there can be no doubt that this representation was made by the Government knowing or intending that it would be acted on by the appellant, because the appellant had made it clear that it was only on account of the exemption from sales tax promised by the Government that the appellant had decided to set up the factory for manufacture of vanaspati at Kanpur. The appellant, in fact, relying on this representation of the Government, borrowed moneys from various financial institutions, purchased plant and machinery from M/s. De Smet (India) Pvt. Ltd., Bombay and set up a vanaspati factory at Kanpur. The facts necessary for invoking the doctrine of promissory estoppel were, therefore, clearly present and the Government was bound to carry out the representation and exempt the appellant from sales tax in respect of sales of vanaspati effected by it in Uttar Pradesh for a period of three years from the date of commencement of the production.</u>

33. The State, however, contended that the doctrine of promissory estoppel had no application in the present case because the appellant did not suffer any detriment by acting on the representation made by the Government: the vanaspati factory set up by the appellant was quite a profitable concern and there was no prejudice caused to the appellant. This contention of the State is clearly unsustainable and <u>must</u> be rejected. <u>We do not think it is</u>

necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise [...]"

(Emphasis Supplied)

118. Further, this Court in the case of ***Pawan Alloys & Casting (P) Ltd. v. U.P. SEB***, reported in **(1997) 7 SCC 251**, had the occasion to consider the application of the doctrine of promissory estoppel against the government with respect to an incentive policy. In this case, the U.P. State Electricity Board had issued three notifications dated 29.10.1982, 13.07.1984, and 28.01.1986 respectively on identical terms, notifying the revised rate schedules appended thereto, which were to apply to all consumers directly supplied with electricity by the Board throughout the State of U.P. Each of these notifications stipulated that the revised rate schedule would come into force from the respective dates mentioned therein. Among the items incorporated in these rate schedules was one relating to incentives for new industrial units. The corresponding item in the last notification dated 28.01.1986 provided that a development rebate of 10% (ten percent) on the amount of the bill pertaining to energy charges would be granted to a new industrial unit for a period of three years from the date of commencement of supply. The Board, however, issued a subsequent notification dated 31.07.1986 deleting the said item relating to incentives for new industrial units from the notification dated 28.01.1986. The appellant contended that, by virtue of the principle of promissory estoppel, the Board was not entitled to withdraw the rebate prematurely through its notification dated 31.07.1986.

119. This Court, for the purpose of applying the doctrine of promissory estoppel to the above set of facts, held that the Board had issued the notifications in question, acting in its wisdom and pursuant to the directions of the State, in furtherance of the package of incentives offered by the State of U.P. to new industrial units. By the plain terms of these notifications, the Board, functioning as an arm of the State Government had extended concessions in the form of rebates in electricity duty to the new industrial units, with the objective of attracting such units to invest in the state and bringing them within its fold as prospective consumers of electricity. Through these notifications, the Board had clearly held out a promise to new industries, and since such industries had admittedly established themselves in the region where the Board operated, acting upon that promise, equity required that the Board be held bound by it. It was further observed that the new industrial units, having been induced to establish themselves in the region on the strength of the promise, had altered their position irretrievably. They had invested substantial amounts in setting up infrastructure and had necessarily changed their position relying on the representation that they would receive the promised benefit i.e., a rebate of 10% (ten percent) on their electricity bills for at least three years as an infancy benefit, so as to enable them to effectively compete with existing industries in the market. On the force of these facts, this Court was of the opinion that the Board could certainly be pinned down to its promise by the application of the doctrine of promissory estoppel. The relevant observation is as under:

> *"19. <u>It is, therefore, not possible to agree with the contention of learned Senior Counsel for the Board that</u>*

these three notifications did not hold out any promise or any representation to the general public enabling the new industries to get established acting on the said representation. It is obvious that after the expiry of this three-year period the Board would be able to charge full rate for electricity supplied to these new customers who would then become sufficiently old and mature and would not need any more rebate. It cannot, therefore, be said that the Board had no interest in these new industries, their prospective customers, and was not interested in attracting them to the territory catered to by it by the supply of electricity. It may be that the Board exercised its statutory powers under Section 49 of the Act for that purpose but all the same it in its wisdom and acting on the direction under Section 78-A of the Act pursuant to the package of incentives offered by the State of U.P. to these new industries, had issued the said notifications holding out these promises. But even assuming that the State had no role to play in this connection as submitted by Shri Dave for the respondents, these three notifications on their own wordings leave no room for doubt that they did contain offers of incentives to new industries who would be the prospective new consumers of electricity and, therefore, the Board's future customers.

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21. In the present case even leaving aside the promissory estoppel against the State of U.P. it can clearly be visualised that by the mere wordings of the aforesaid three notifications the Board acting as a limb of the State of U.P. had offered these concessions by way of rebate in electricity duty to the new industries so as to attract them to the State to enable the Board to take them in its fold as prospective consumers of electricity to be sold by it to them.

xxx xxx xxx

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

(Emphasis Supplied)

120. Additionally, in the case of ***Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.***, reported in **(1983) 3 SCC 379**, this Court had observed that the doctrine of promissory estoppel applies against a statutory corporation which in the discharge of its duties makes a clear and unequivocal promise that is acted upon by the promisee. In this case, the appellant was Gujarat State Financial Corporation (GSFC) that had sanctioned a loan in

favour of the respondent for setting up a hotel. On the basis of such sanctioning, the respondent invested in securities, incurred expenditures, and undertook substantial liabilities upon for its business. Subsequently, the appellant GSFC refused to disburse the loan. Dismissing the appeal, this Court held that the GSFC, being an instrumentality of the State under Article 12 of the Constitution of India, 1950, could not have arbitrarily resiled from its solemn promise, particularly when the promisee had altered its position by relying thereon. In such circumstances, this Court held that promissory estoppel would operate against the appellant GSFC, and such promise would be enforceable to compel the performance of its obligation. The relevant observation is as under:

> *"9. It was next contended that the dispute between the parties is in the realm of contract and even if there was a concluded contract between the parties about grant and acceptance of loan, the failure of the Corporation to carry out its part of the obligation may amount to breach of contract for which a remedy lies elsewhere but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. It is too late in the day to contend that the instrumentality of the State which would be "other authority" under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. It was not disputed and in fairness to Mr Bhatt, it must be said that he did not dispute that the Corporation which is set up under Section 3 of the State Financial Corporation Act, 1955 is an instrumentality of the State and would be "other authority" under Article 12 of the Constitution. <u>By its letter of offer dated July 24, 1978 and the subsequent agreement dated February 1,</u>*

1979 the appellant entered into a solemn agreement in performance of its statutory duty to advance the loan of Rs 30 lakhs to the respondent. Acting on the solemn undertaking, the respondent proceeded to undertake and execute the project of setting up a 4-star hotel at Baroda. The agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Acting on the promise of the appellant evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the back drop of this incontrovertible fact situation, the principle of promissory estoppel would come into play. In Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of U.P.2 this Court observed as under : [SCC para 8, p. 425 : SCC (Tax) p. 160]

> *"The true principle of promissory estoppel, therefore, seems to be that where one party has by his words of conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any preexisting relationship between the parties or not."*

> *10. Thus the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent.*
>
> *xxx xxx xxx*
>
> *13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12.*
>
> (Emphasis Supplied)

121. Furthermore, the Gujarat High Court, in ***Tata Metals and Strips Ltd. v. State of Gujarat***, reported in **1991 SCC OnLine Guj 220**, was also seized of a similar issue. The issue arose in a situation where the State Government, with a view to encouraging the establishment of industries within the State and achieving the objectives of developing small, medium, and large scale industries in rural and backward areas. This was intended to ensure balanced industrial growth and reduce congestion in developed centres such as Ahmedabad, Baroda, and Surat respectively. For the said purpose, the State Government had introduced two distinct schemes by way of two separate resolutions. By the first resolution, it framed the “State Cash Subsidy Scheme for Industries”. By the second, it introduced a scheme providing for sales tax exemption and the grant of loans equivalent to the amount of sales tax paid on the sale of finished

products. Under this scheme, sales tax exemption was to be granted to all small-scale new industrial units commissioned on or after 01.11.1977, and interest-free sales-tax loan benefits were made available to medium and large-scale industrial units commissioned during the currency of the scheme, including for expansion and diversification of existing units. All three schemes came into effect from 01.11.1977. However, on 27.08.1980, the State Government reviewed the package of incentives introduced under the said resolutions and decided to introduce a new scheme of sales tax benefits in place of the then prevailing sales tax exemption and loan scheme, with effect from 01.06.1980. The earlier cash subsidy scheme was retained without modification. The newly framed scheme, titled "The New Sales Tax Incentive Scheme for Industries", became effective from 01.06.1980 and was intended to remain in force for a period of five years. Under this scheme, new industrial units, including expansion or diversification by existing units, commissioned i.e., having commenced commercial production on or after 01.06.1980 were eligible to opt for the new sales tax benefits in lieu of the benefits under the older scheme. Under the new scheme, all eligible industrial units were given the choice between two modes of sales-tax incentives: (a) sales tax exemption incentives or (b) sales tax deferment incentives. Where a new industrial unit opted for the sales tax deferment scheme, the recovery of sales tax payable on the sale of its products was to be deferred to the extent and for the period stipulated in the resolution.

122. In the aforesaid backdrop, the petitioner contended that, relying upon the aforesaid sales tax incentive schemes, it had made substantial investments of approximately Rs. 2 crore in the

specified area during the period 1979 to 1982. The commercial production also commenced on 31.03.1982. It was therefore asserted that the petitioner had become entitled to the benefits of the sales tax incentive schemes notwithstanding the subsequent government resolution dated 07.01.1982, by which cold rolled steel strips and re-rolling of steel, including stainless steel industries, were declared ineligible for any incentives under Government resolutions.

123. The High court, while relying on ***Motilal Padampat*** *(supra)* and applying the doctrine of promissory estoppel as explained therein, observed that although the scheme itself stated that the State Government might, from time to time, review the list of industries excluded from its purview and may remove, amend, or add any item to that list, yet such a stipulation did not render the assurance held out by the State Government a conditional one. By incorporating such a statement in the resolution, the State Government merely indicated the power it already possessed i.e., it made explicit what was otherwise implicit. The court was of the opinion that on the strength of this clause, it could not have been inferred that the assurance extended under the scheme was that a new industrial unit would continue to receive benefits only so long as its industry was not included in the list of excluded industries. The assurance was not a limited or qualified one. It was not intended to mean that the benefit would be available only until the industry came to be excluded from the scheme. Where a new industrial unit had set up an industry not excluded from the purview of the scheme and had commenced commercial production before that industry was subsequently included in the exclusion list, it would be

unreasonable and unjust to deprive such an industrial unit of the benefit of the scheme, especially when it had already become eligible and had started receiving the incentives. In other words, the Government may withdraw an exemption previously granted, but only if such withdrawal does not offend the doctrine of promissory estoppel or deprive an industrial unit of an exemption which it is otherwise entitled to claim by virtue of that doctrine. Where the Government has offered an incentive of exemption to a new industry, and where an industry has been established in reliance on such representation in order to avail the benefit, that new industry may legitimately contend that the exemption cannot thereafter be withdrawn. The relevant observation is as under:

> *"<u>Though it is true that in the scheme itself it is declared that the Government might review the list of industries excluded from the purview of the scheme from time to time and remove, amend or add any item from and to the said list, it cannot be said that the assurance which the Government held out under the scheme was a conditional one. As rightly pointed out by the learned counsel for the petitioner, by stating such a thing in the resolution what the Government had done was merely to indicate the power which it possesses. Thus, by stating like that in the resolution, what the Government did was to make explicit what was implicit. On the basis of such a statement in the scheme, it is not possible to hold that the assurance which the Government held out was that the new industrial unit will continue to get the benefit under the scheme so long as it is an industry not included in the list of industries excluded from the purview of the scheme</u>. The assurance held out by the Government was not a limited one in the sense that the benefit under the scheme was to be available to the new units so long as that industry was not excluded from the purview of the scheme. <u>If a new</u>*

unit had set up an industry which was not excluded from the purview of the scheme and had started commercial production before it came to be included in that list, it would be unreasonable and unjust to deprive that new industrial unit of the benefit of the scheme even though it had become eligible under the scheme and had started receiving benefits under the scheme […]

[…] In other words, the Government can withdraw an exemption granted by it earlier if such withdrawal can be done without offending the rule of promissory estoppel and depriving an industry entitled to claim exemption from payment of tax under the said rule. If the Government grants exemption to a new industry and if on the basis of the representation made by the Government an industry is established in order to avail of the benefit of exemption, the new industry can legitimately raise a grievance that the exemption cannot be withdrawn except by means of legislation.

In our opinion, on true interpretation of the resolution of 1980, it will have to be held that the Government did give a promise to the entrepreneurs that if a new unit or project was set up on the basis of the assurance held out under the scheme, and that the new industrial project was commissioned on or after 1st June, 1980, then it was entitled to the benefits available under that scheme, if by the time it was commissioned, i.e., by the time it commenced commercial production, the said industry was not included in the list of excluded industries. As the scheme was operative for a period of five years only from 1st June, 1980, it will have to be further held that the assurance of benefits was available to those new industrial units or projects which had started commercial production on or after 1st June, 1980, but before 31st May, 1985, and which were not excluded earlier from the benefits of the scheme. So far as the petitioner is concerned, the petitioner had started commercial production on 31st March, 1982. The industry in which it *was engaged came to be included in the list of excluded industries on 15th September, 1982, that is after it started commercial production, and as we are not called upon to decide in this case whether it stood excluded by the resolution dated 7th January, 1982, it will have to be held that the petitioner was entitled and continued to remain entitled to the sales tax deferment benefit under the scheme for the full period, if other conditions were satisfied by it [...]"*

(Emphasis Supplied)

124. We shall now proceed to consider two more decisions on this issue, particularly because the High Court of Orissa, in those cases, has cogently articulated the application of the doctrine of promissory estoppel in the context of the industrial policy of 1986 and the industrial policy of 1989 respectively.

125. In the case of ***Camma Textile Industries v. State of Orissa***, reported in **1994 SCC OnLine Ori 207**, wherein the Government of Orissa had announced several incentives in the form of tax concession as well as subsidy to those entrepreneurs who decided to set up industries within the State of Orissa and such incentive based policies were called as the industrial policies. The High Court noted that the industrial policies of the state announced in 1980 and 1986 respectively brought about an upsurge in the industrial climate of the State and even entrepreneurs from outside the State became excited to set up industries within the State. Therefore, in order to enhance the tempo of industrialisation in the State, the government had decided to further liberalise the package of incentives and announced the industrial policy of 1989 with the twin objective of encouraging new industries and providing support to

industries which had come up in the State during the last few years and, therefore, the new industrial policy of 1989 was allowed to operate with effect from 01.12.1989, the date on which the said policy was issued. The petitioner's case in nutshell was that prior to the issuance of the industrial policy of 1989 and while the industrial policy of 1986 was in force, the state level committee held a meeting on 29.03.1989 and sanctioned a capital investment subsidy of Rs. 25,00,000/- in favour of the petitioner for the project of synthetic fabrics to be set up by the petitioner in the district of Balasore. Under the Industrial Policy, 1986, the capital investment subsidy in respect of the new industrial units as well as expansion / modernisation / diversification projects in Zone-B for the district of Balasore was 25% (twenty – five percent) of the fixed capital subject to the limit of Rs. 25,00,000/-. The IPICOL (which is the respondent no. 3 in the present appeal) to whom the petitioner had applied for financial assistance had intimated the petitioner *vide* letter dated 10.03.1989, about the financial assistance sanctioned by the corporation and indicated therein that the central subsidy of Rs. 25,00,000/- has been taken into account while deciding the term loan to be granted by the IPICOL. The OSFC (which is the respondent no. 1 in the present appeal) also intimated *vide* letter dated 26.07.1989 that the state level committee (sub-committee of state level committee is the respondent no. 4 in the present appeal) in its 53rd meeting had sanctioned a subsidy of Rs. 25,00,000/- to the petitioner's unit.

126. Upon the aforesaid unequivocal assurances from the OSFC and the IPICOL as well as the decision of the State Government taken by its state level committee, the petitioner had started making

investments for setting-up the industrial unit in the district of Balasore and had invested a substantial amount by 30.11.1989. Thereafter on 03.08.1992, the OSFC intimated the petitioner that the subsidy which had been sanctioned earlier in their favour to the tune of Rs. 25,00,000/- stood cancelled and instead only a sum of Rs. 15,00,000/- had been sanctioned as subsidy by the state level committee in its meeting dated 04.07.1992. Since the petitioner had already made a huge investment pursuant to the unequivocal assurances held out to it by the State Government, OSFC, and IPICOL, respectively with regard to the grant of subsidy to the tune of Rs. 25,00,000/-, on receiving the letter of the OSFC reducing the subsidy to the tune of Rs. 15,00,000/-, a representation was made to the OSFC and the matter was also brought to the notice of the director of industries. However, since the petitioner did not receive any favourable communication from either of them, it approached the High Court for enforcement of the promises held out to it by the opposite parties and for a declaration that the opposite parties were bound by the principle of promissory estoppel.

127. The High Court held that there was no dispute that the opposite parties had sanctioned a subsidy of Rs. 25,00,000/- in favour of the petitioner's new industrial unit, which had been duly communicated to the petitioner by IPICOL *vide* letter dated 10.03.1989 and again by the OSFC through its letter dated 26.07.1989. The Court further noted that even the State Government, in its counter affidavit, had conceded this position. It was also undisputed that the industrial unit had been set up in 1989 and that the petitioner had made substantial investments between July 1989 and January 1990. Although the

State Government contended that the Government of India had withdrawn the central subsidy and had communicated this withdrawal to the State in 1989, the said fact had never been conveyed to the petitioner until the rejection letter dated 03.08.1992, by which time a reduced amount of subsidy had again been sanctioned and communicated by the OSFC, and by that stage, the petitioner had already made substantial investment in establishing the unit. In view of the unequivocal promise and assurance extended to the petitioner, and the petitioner having established the industrial unit pursuant to that promise and having incurred substantial expenditure in doing so, the High Court held that the opposite parties were bound by the assurances given and could not be permitted to resile therefrom. The conclusion was irresistible that the petitioner had relied upon the assurances contained in the letters dated 10.03.1989 and 26.07.1989, and, acting upon them, had altered its position by making significant financial investment in setting up the industrial unit. Consequently, the opposite parties were obliged to honour the representation made to the petitioner by sanctioning and disbursing the amount of Rs. 25,00,000/-. In this manner, the High Court, relying upon this Court's decision in ***Motilal Padampat*** *(supra)*, held that the principle of promissory estoppel squarely applied to the facts of the case and that the opposite parties must be held bound by it. The relevant observations are as under:

> *"8. <u>The principle of promissory estoppel is a principle evolved by equity to avoid injustice and, as has been said by the apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh, (1979) 2 SCC 409 : A.I.R. 1979 S.C. 621, it is neither in the realm of contract nor in the realm of estoppel. According</u>*

to the law laid down by the Supreme Court in the aforesaid case, the true principle of promissory estoppel is that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relationship or effect a legal relationship to arise in future knowing or int ending that it would be acted upon by the other party to whom the promise is made and, in fact, it is so acted upon by the other party, the promise would be binding upon the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties. The learned Judges in the said case also observed that it is not necessary, in order to attract the applicability of the doctrine, that the promisee acting in reliance on the promise should suffer any detriment and what is necessary is that the promisee should have altered his position in reliance on the promise.

xxx xxx xxx

11. Bearing in mind the law laid down by the apex Court in the aforesaid cases, and examining the averments made in the writ application as well as the documents appended thereto, there cannot be any dispute that the opposite parties had sanctioned a subsidy of Rs. 25 lakhs in favour of the petitioner-industry which was communicated to be petitioner by the IPICOL in its letter dated 10- 3-1989, annexed as Annexure-2, and also by the OSFC in its letter dated 26-7-1989, which has been annexed as Annexure-3. Even the State Government in its counter affidavit has conceded to the aforesaid position. It is also an admitted fact that the industry was set-up in the year 1989 and substantial investment was made by the petitioner during the period July, 1989 to January, 1990, as is apparent from Annexures-3, 5, 6 and 7. Though the State Government had taken a stand that the Government of India had withdrawn the Central Subsidy and communicated the same to the State

Government in 1989, but the said fact had never been communicated to the petitioner until 3-8- 1992, when the reduced amount of subsidy was sanctioned again and was communicated to the petitioner by the OSFC under Annexure-8 and by that time the petitioner had made substantial investment in setting-up the factory. In view of the unequivocal promise and assurances to the petitioner under Annexures-2 and 3, and the petitioner having set-up the industry pursuant to the promise in question and having made substantial expenses for setting-up the industry, the opposite parties must be bound by the assurances given by them to the petitioner and cannot be permitted to back out from the same. In the facts pleaded and proved, the conclusion is irresistible that the petitioner has relied upon the assurance given to it under Annexures 2 and 3 and acting on the said assurances has altered its position by way of making huge financial investment in setting up the industry and, therefore, the opposite parties must adhere to the representation made by them to the petitioner by way of sanctioning Rs. 25 lakhs as subsidy and intimating the same to the petitioner through the financial institutions of the State Government, namely the OSFC and the IPICOL. In our considered opinion, the principle of promissory estoppel squarely applies and the opposite parties must be bound by the same. We accordingly hold that the opposite parties were not entitled to cancel the sanctioned amount of subsidy of Rs. 25 lakhs to the petitioner communicated to it under letter dated 26-7-1989 and the said order is grossly (sic) detrimental to the petitioner's interest. In the aforesaid premises we allow this writ application and issue a writ of mandamus calling upon the opposite parties to disburse the balance amount of Rs. 10 lakhs to the petitioner which they are bound by their earlier sanction and promise pursuant to which the petitioner has acted to its detriment. The amount in question representing the balance subsidy should be paid to the petitioner within 2 months from the *date of the receipt of our order. There will, however, be no order as to costs."*

(Emphasis Supplied)

128. The second decision of High Court of Orissa relevant for our purpose is the case of ***Prachi Engineering Pvt. Ltd. v. State of Orissa***, reported in **1998 SCC OnLine Ori 27**, wherein the High Court, while dealing with the application of doctrine of promissory estoppel to the incentive of electricity concession promised by the State Government under industrial policy of 1989, unequivocally held that it is a settled law that industrial policy regulations issued by the State Government constitute a set of promises which the State Government is bound to honour if an industrial unit satisfies the various criteria prescribed under the relevant clauses. The High Court further held that where such benefits are denied, a cause of action may arise before a court of law in an appropriate case. In that view of the matter, the High Court observed that there existed sufficient justification for the government to extend the benefits under a particular policy if an industrial unit has come into existence or has commenced commercial production at any time during the period for which the policy remains in force.

129. The High Court observed that, since the industrial policy was of the year 1989, the relevant five-year period would run from 01.12.1989 to 30.11.1993. As the object of the policy was to extend various incentives enumerated therein to eligible units, such benefits ought not to be denied by interpreting any clause of the policy in a manner that frustrates its object, creates bottlenecks, or deprives an industrial unit of incentives to which it is otherwise entitled. In essence, the High Court held that if an

industrial unit is set up and goes into commercial production at any point after the commencement of a particular policy and during the period for which the policy remains operative, the government has no justification to deny the benefits contemplated under that policy. The relevant observation is as under:

> *"8. <u>It is settled law that the I.P.Rs. by the Government are a set of promises which the Government is bound to honour if an industry fulfils various criteria laid down under the clauses. In case of denial of these benefits, action may lie in Courts of law in appropriate cases. In that view of the matter, there is every justification for the Government to extend the benefit under a particular policy, if the industrial unit has come into existence on set up or goes for commercial production any time during the period when that particular policy is in force. In the present case, the I.P.R. being of 1989, the period of five years would be from 1-12-1989 to 30-11-1993. Since the object of the policy is to grant various incentives enumerated under the policy to an eligible unit the same should not be denied merely by interpreting the clause of the policy in such a way that such interpretation instead of furthering the objects for which the policy is framed would create bottle-neck and deprive the particular industrial unit from availing the incentives to which it is otherwise entitled, but for the mere fact that capital investment either in small or big scale has been made prior to the effective date. In other words, if any time after the date of coming into force of any particular policy (in the present case 1-12-1989) an industrial unit is set up and goes into commercial production during the period in which the policy is in force, there is no justification for the Government to deny the benefits under the police (sic)</u> even though capital investment might have made prior to the effective date."*

(Emphasis Supplied)

➢ **<u>Respondent authorities in breach of policy commitments</u>**

130. Now adverting to the facts of the present case, it is pertinent to reiterate that the industrial policy of 1989 was introduced with the twin objectives of encouraging new industries as well as supporting the existing industries. The effective date from which the industrial policy of 1989 came into force was 01.12.1989. On the strength of the incentives made available to a new industrial unit and having regard to the objectives underlying the industrial policy of 1989, Indo Flogates invested funds for the establishment of the MM Plant unit. The date of initial fixed capital investment in the said MM Plant unit was 01.02.1992, and thereafter the unit commenced commercial production. The date of commencement of commercial production stood recorded as 21.11.1992. Pursuant thereto, Indo Flogates submitted two applications dated 28.08.1993 and 29.09.1993 respectively to the respondent no. 3, *inter alia* seeking the grant of DG Set subsidy and capital investment subsidy. Thereafter, the respondent no. 2, on 05.11.1998, communicated the decision of the respondent no. 3 recognising the MM Plant unit as a separate new industrial unit of Indo Flogates. Subsequently, the respondent no. 2 informed Indo Flogates, *vide* letter dated 09.06.2000, that the applications for the respective subsidies had been recommended to the State Government for approval.

131. Finally, the respondent no. 1 *vide* letters dated 10.04.2003 and 19.04.2003 respectively conveyed the decision of the respondent no. 4 of sanctioning an amount of Rs. 1,14,750/- towards the DG Set subsidy and Rs. 10,00,000/- towards the capital investment

subsidy. In the meanwhile, the MM Plant unit was still in production and continued to incur substantial expenses in its operation on the assurances given by the respondent authorities. Further, Indo Flogates and the appellant company came to be amalgamated *vide* the High Court order dated 03.08.2000. Therefore, all rights and interests including the benefit of subsidies in favour of Indo Flogates came to be transferred in favour of the appellant company. It is pertinent to note here that the fact of amalgamation was informed to the respondents *vide* letter dated 22.05.2001 i.e. even before the sanction letters dated 10.04.2003 and 19.04.2003 respectively. Pursuant to sanctioning of subsidies, the appellant company between 2003 and 2007, made as many as nine written requests to the respondent authorities for disbursement of the sanctioned subsidies in their favour.

132. During the period referred to above, the respondents had also acknowledged the sanction of the subsidies on two occasions. *Firstly*, on 24.03.2007 wherein the respondent no. 1 had communicated to the appellant company that sanctioned amount may be processed for disbursal on the receipt of the respondent no. 3. *Secondly*, on 23.08.2007 wherein the respondent no. 3 after conducting a site inspection of the MM Plant unit recommended the disbursal of amounts towards subsidies. Therefore, in view of the unequivocal promises and assurances made to the appellant company under various communications particularly the letters dated 05.11.1998, 10.04.2003, 19.04.2003, 24.03.2007, and 23.08.2007 respectively as mentioned above, and the appellant having set up and continuing the production in the MM Plant unit by incurring

substantial expenses in the expectation to such promises and assurances, we are in complete agreement with the views of the High Court of Orissa adopted in ***Camma Textile*** *(supra)* and ***Prachi Engineering*** *(supra)* respectively. Thus, on this note also, we are of the opinion that the appellant company is entitled to disbursal of capital investment subsidy and DG Set subsidy and that the respondents are precluded from refusing to disburse the same in favour of the appellant company.

133. This litigation is a fine specimen of the bureaucratic lethargy. It is this bureaucratic lethargy which gave rise to this long drawn litigation. This Court in many of its decisions has reminded various State Governments that if the object of formulating the industrial policy is to encourage investment, employment and growth, the bureaucratic lethargy of the State apparatus is clearly a factor which will discourage entrepreneurship.

134. The State must abandon the colonial conception of itself as a sovereign dispensing benefits at its absolute discretion. Policies formulated and representations made by the State generate legitimate expectations that it will act in accordance with what it proclaims in the public domain. In the exercise of all its functions, the State is bound to act fairly and transparently, consistent with the constitutional guarantee against arbitrariness enshrined in Article 14 of the Constitution of India. Any curtailment or deprivation of the entitlements of private citizens or private business must be proportional to a requirement grounded in public interest. This understanding of the limits of State power has been recognised and reiterated by this Court in a consistent line of decisions. As an illustration, we

would like to extract this Court's observations in ***National Buildings Construction Corporation*** *(supra)*:

> *"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."*
>
> (See: ***The State of Jharkhand and Ors. v. Brahmputra Metallics Ltd, Ranchi and anr.***, reported in (2023) 10 SCC 634)

G. <u>CONCLUSION</u>

135. In view of the foregoing and considering the totality of the circumstances, our conclusion on each issue is as follows:

(i) The MM Plant unit fulfils the definition of a *"new industrial unit"* under Clause 2.7 of the industrial policy of 1989. This is because the fixed capital investment for the MM Plant unit was made after the effective date of the industrial policy of 1989, i.e., 01.12.1989, and the unit was separately registered, separately located, independently powered, and commenced independent commercial production in 1992.

(ii) The MM Plant is not an expansion/modernisation/ diversification of an existing unit as defined under Clause 2.2 of the industrial policy of 1989. The MM Plant unit constitutes a physically and functionally distinct industrial undertaking, meeting the judicial tests as more particularly discussed above, distinguishing a new unit from an expanded unit.

(iii) The concept of overall financial limit under the amended Clause 4.4 as introduced retrospectively *vide* the instruction letter dated 28.10.1994 and later the amended notification dated 30.10.2008 applies only to expansion / modernisation / diversification of an existing unit. It has no application to new industrial units, which are governed by Clause 4.1 and are entitled to all incentives including fresh subsidy subject *inter alia* to the unit wise caps specified in Clause 5.1 and Clause 11.4.4 of industrial policy of 1989 respectively.

(iv) The appellant company is entitled to the disbursement of sanctioned subsidies. We have held that a clear and unequivocal representation was made by the respondent authorities with respect to sanction and grant of subsidies by way of various communications particularly the letters dated 05.11.1998, 10.04.2003, 19.04.2003, 24.03.2007, and 23.08.2007 respectively as mentioned above, and the appellant company having legitimate expectation that sanctioned subsidies would be disbursed, and acting upon the same set up and continued the production in the MM Plant unit by incurring substantial expenses pursuant to such promises and assurances. This reliance on the promises and assurances of respondents was neither speculative nor unilateral, but flowed directly from unequivocal sanction and official communications issued by the respondents, rendering the subsequent *volte-face* not only unfair but also untenable.

136. In view of the above, the appeal succeeds and is hereby allowed. Accordingly, the impugned judgment and order of the High Court is hereby set aside.

137. The respondents are hereby directed to disburse an amount of Rs. 11,14,750/- along with interest at the rate of 9% p.a. from the date of sanction of respective subsidies towards the capital investment and the DG Set for MM Plant unit in favour of the appellant company within a period of 3 months from the date of this judgment.

138. Pending applications, if any, shall stand disposed of.

.. J.
(J.B. Pardiwala)

.. J.
(R. Mahadevan)

New Delhi;
6th January, 2026