IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

Present :- Hon'ble Mr. Justice Md. Nizamuddin

WPO 544 of 2019

IFGL Refractories Ltd. & Anr.
Vs
Union of India & Ors.

For the Petitioners :- **Mr. J.P. Khaitan, Sr. Adv.**
Mr. Saurabh Bagaria, Adv.
Mr. Indranil Banerjee, Adv.
Mr. Ayush Jain, Adv.

For the Respondents :- **Mr. Vipul Kunalia, Adv.**
Mr. Soumen Bhattacharjee, Adv.
Mr. Anurag Roy, Adv.

Judgment On :- **03.10.2023**

MD. NIZAMUDDIN, J.

The Court: Heard learned Advocates appearing for the parties.

In this writ petition petitioner has made prayer for relief of declaration by this writ court that Explanation to Section 10AA (1) of the Income Tax Act, 1961, inserted by Finance Act, 2017, inserted with prospective effect, as unconstitutional allegedly violative of Articles 14, 19(1)(g) and 265 of the Constitution of India and for direction upon the respondent authority concerned to consider the petitioners' claim of deduction under Section 10AA of the Income Tax Act, 1961, without applying the aforesaid Explanation.

Facts involved in this case according to the petitioner, in short, are as follows:

IFGL Exports Ltd. was incorporated on 7th September, 2007, which established its unit on May, 2012, at Kandla Special Economic Zone, Gujarat, for manufacture of specialized refractories and commenced operations from May, 2012 and IFGL Exports Ltd. allegedly became eligible for claiming

exemption under Section 10AA of the Income Tax Act, 1961, from the Assessment Year 2013-14 onwards.

Letter of approval was issued by the Development Commissioner, Kandla Speical Economic Zone to IFGL Exports Ltd. 7th November, 2007, for extending all the facilities and entitlements admissible to its unit established at Kandla Special Economic Zone, Gujarat, subject to the provisions of the Special Economic Zones Act, 2005.

Letters of approval were issued from time to time by the Development Commissioner, Kandla Special Economic Zone to IFGL Exports Ltd. for extending the validity of the approval granted by letter dated 07.11.2007, to its unit established in new area of Kandla Special Economic Zone, Gujarat.

Effective date of amalgamation of the petitioner/IFGL Refractories Ltd. with IFGL Exports Ltd. pursuant to sanction Scheme of Amalgamation by the National Company Law Tribunal, Kolkata, is 1st April, 2016, and the name of IFGL Exports Ltd. was changed to IFGL Refractories Ltd. by the Registrar of Companies, West Bengal.

On 01.04.2018 Explanation was inserted after Section 10AA(1) of the Income Tax Act, 1961, by the Finance Act, 2017, with effect from the aforesaid date prospectively.

Main contentions of the petitioners in challenging the aforesaid impugned legislation are as follows:

Section 10AA of the Income Tax Act, 1961, contained in Chapter III of the Income Tax Act, 1961 – 'Income Not Forming Part of Total Income' provides for exemption to eligible units established in a Special Economic Zone while computing the gross total income of the unit.

Petitioner submits that the petitioner has two manufacturing units, one situated in Kalunga Industrial Estate, Odisha (ineligible Unit) and the other in New Area of Kandla Special Economic Zone, Gujarat (Eligible Unit for claiming exemption under Section 10AA of the Income Tax Act, 1961). The said eligible unit was set up in May, 2012 for availing the scheme provided in Section 10AA

under Chapter III of the Income Tax Act, 1961 entitling it for exemption from the Assessment Year 2013-14 onwards.

Petitioner submits that Section 10AA of the Income Tax Act, 1961 is in pari materia to the provision of Section 10A of the Income Tax Act, 1961. Interpreting the nature and the stage at which exemption as per Section 10A of the Income Tax Act, 1961, is available, the Hon'ble Supreme Court of India in the case of CIT and Anr. –vs- Yokogawa India Ltd. reported in [2017] 391 ITR 274 (SC) held that exemption under Section 10AA of the Income Tax Act, 1961 can be claimed from the total income of the unit/undertaking, immediately after the stage of determination of its profits and gains, without first doing inter unit profit/loss adjustments and set off of brought forward losses and the exemption would be allowed while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI.

Petitioner submits that on being eligible for claiming exemption under Section 10AA of the Income Tax Act, 1961, from the Assessment Year 2013-14 onwards, it claimed exemption under the said section from the total income of its eligible unit immediately after the stage of determination of its profits and gains without aggregation of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act, i.e. without first doing any inter unit profit/loss adjustments or set off of brought forward losses and the stage of claiming exemption while computing the gross total income of the eligible undertaking under Chapter IV of the Income Tax Act, 1961, i.e. in conformity with the settled law as laid by the Hon'ble Supreme Court in the cases of Yokogawa (supra). However, the Finance Act, 2017, inserted the following Explanation after Section 10AA(1) of the Income Tax Act, 1961, w.e.f. 01.04.2018, is as follows:

"Explanation .- For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this Section and the deduction under this

Section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this Section and the deduction under this Section shall not exceed such total income of the assessee."

Petitioner submits that the Explanation inserted in Section 10AA(1) of the Income Tax Act, 1961 allows the exemption under the said section to be claimed from the total income computed in accordance with the provisions of the Income Tax Act, 1961, and such total income of the petitioner being computed before giving effect to the provisions of section 10AA of the Act i.e. after doing inter unit profit/loss adjustments and thereafter setting off the brought forward losses of the petitioner. By the said Explanation the decision of the Hon'ble Supreme Court of India in the case of Yokogawa (supra) stands nullified. Thus from the Assessment Year 2018-19 onwards, by reason of the said Explanation the petitioner company stands deprived of the exemption/entire exemption which was available to it under Section 10AA of the Income Tax Act, 1961, prior to insertion of the said Explanation since loss from its ineligible unit and brought forward losses to get adjusted with the total income of the unit/undertaking, before the exemption under Section 10AA of the Income Tax Act, 1961.

Petitioner submits that Section 10AA of the Income Tax Act, 1961, as contained in Chapter III of the Income Tax Act, 1961, incomes under which do not form part of total income. Since section 10AA of the Income Tax Act, 1961 does not form part of total income, it cannot be included in total income. The Explanation inserted in Section 10AA(1) of the Income under the Act 1961, which is in Chapter III has created a situation where this exempt income is sought to be included in total income. Section 10AA of the Income Tax Act, 1961 provides a vested right to entities setting up units in Special Economic Zones for generating exempt income by way of providing deduction from the total Income Tax Act, which is vested right available to the petitioner company because of its eligible unit set up in Kandla Special Economic Zone, Gujarat has been disturbed and denied.

Petitioner submits that the Explanation inserted in Section 10AA(1) of the Income Tax Act, 1961, remains in the statute book and denies the petitioner company of its entitled benefit as per Section 10AA(1) of the Income Tax Act, 1961. An Explanation is added to a Section to elaborate upon and explain the meaning of the words appearing in the Section and Explanation to a statutory provision has to be read with the main provision to which it is added as an Explanation. An Explanation appended to a section or a sub-section becomes an integral part of it and it has no independent existence apart from it. The purpose of an Explanation is not to limit the scope of the main section and it cannot override what the main Section provides. Therefore, the Explanation inserted to Section 10AA(1) of the Income Tax Act, 1961, w.e.f 01.04.2018, cannot override what Section 10AA(1) of the Income Tax Act, 1961 provides for and cannot limit the scope of section 10AA(1) of the Income Tax Act, 1961. The said Explanation has to be read along with Section 10AA(1) of the Income Tax Act, 1961 and has no independent existence of its own.

Petitioner submits that the Explanation inserted to Section 10AA(1) of the Income Tax Act, 1961 denies the benefit otherwise available as per Section 10AA(1) of the Income Tax Act, 1961 and is thus nugatory as the whole purpose of giving tax incentive to eligible units situated in special economic zones as per Section 10AA of the Income Tax Act, 1961 stands defeated and frustrated by the said Explanation introduced by the Finance Act, 2017. An Explanation cannot override the main Section and take away or impair the statutory rights vested by the main Section. The Explanation can clarify the main Section but cannot change the substantive provisions of the main Section under the Act. The Explanation inserted in Section 10AA(1) of the Income Tax Act, 1961 by the Finance Act, 2017 interferes with the substantive provision for availing exemption under the said Section as it negates the exemption guaranteed under Section 10AA (1) of the Income Tax Act, 1961 and results in an absurdity and Section 10AA of the Income Tax Act, 1961 which is otherwise clear and unambiguous, is rendered redundant.

Petitioner submits that the Explanation inserted in Section 10AA(1) of the Income Tax Act, 1961 is a piece of colourable legislation as it denies the exemption available under Section 10AA of the Income Tax Act, 1961 to eligible units/undertakings, resulting in discrimination and therefore offends Article 14 of the Constitution of India. The Explanation is also arbitrary, unreasonable since it denies the exemption available as per Section 10AA of the Income Tax Act, 1961 to eligible units established in Special Economic Zones established for the purpose of availing the benefit as per Section 10AA of the Income Tax Act, 1961, and violates Article 19(1)(g) of the Constitution of India.

In support of his contention, Mr. Khaitan learned Senior Advocate representing the petitioner has relied on the following judgments:

(1) S. Sundaram Pillai –vs- V.R. Pattabiraman, (1985) 1 SCC 591- Paragraph 53 at Page 613 of the Reports.

(2) Sedco Forex International Drill. Inc. –vs- CIT, (2005) 12 SCC 717- Paragraph 17 at page 724 of the Reports.

(3) Indian Aluminium Co. –vs- State of Kerala, (1996) 7 SCC 637 – Paragraph 56 at Pages662-663 of the Reports.

(4) MRF Ltd. –vs- Assistant Commissioner, (2006) 8 SCC 702- Paragraphs 38 and 39 at Page 722 of the Reports.

(5) State of Jharkhand –vs- Brahmputra Mettallics Ltd. 2020 SCC OnLine SC 968- Paragraphs 40 to 54 of the Reports.

Mr. Kundalia, Learned Advocate appearing for the respondents opposing the writ petition and in justification of the impugned Legislation makes the following submissions:

Scope of interference in fiscal statutes- While dealing with economic legislation, the court should interfere only in those few cases where the view reflected in the legislation would not be possible to be taken at all. When it comes to taxing statutes, the law laid down is clear that it can be said to be a breach only when there is perversity or gross disparity resulting in clear and hostile discrimination without any rational justification for the same, as laid

down in State of Himachal Pradesh –vs- Goel Bus Services, reported at 2023 SCC OnLine SC 46, (paragraphs 27-30).

Respondent submits that in the instant case, there was no such hostile discrimination or perversity in the impugned legislation. Consequent to the interpretation of Section 10A of the Act, in Commissioner of Income Tax –vs- Yokogawa India Ltd., reported at [2017] 391 ITR 274 (SC), there was a possibility of vagueness in interpretation of the dominant object of Section 10AA of the Act, and to remove such vagueness, the legislature deemed it fit to insert the Explanation to Sub Section (1) of Section 10AA of the Act. This was done in order to suppress the mischief in interpreting the Section 10AA of the Act as has been done by the assessee herein, and such clarification was for the purpose of interpreting the aforesaid section in the way the legislature had always intended it to be. The legislature in its wisdom refrained from making the explanation retrospective in effect in order to avoid curtailment of any substantive effect of its right it might have had on the assessee.

Respondents submits that so far as scope of Explanation to a provision is concerned, it is settled law, as per Sedco Forex –vs- CIT, reported at (2005) 12 SCC 717, (paragraph 17), that an Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section. The explanation 10AA of the Act did not expand the scope of the provision, or curtail any rights. It is merely clarifactory with only prospective effect. However, even if it is hypothetically considered that the explanation expanded the scope of Section 10AA of the Act even then as per Sedco Forex (supra), there is no bar to such Explanation.

Respondent submits that the case of S. Sundaram Pillai –vs- Pattabiraman, reported at (1985) 1 SCC 591, (paragraph 53), lays down the scope of Explanations. The said paragraph inter alia states that an Explanation can be inserted to clarify any vagueness in the parent provisions and to suppresses the mischief arising from the gap in interpretation of the parent provision. In the instant case, the Explanation to sub –section (1) of Section

10AA of the Act was inserted merely to plug the gap after the decision in Yokogawa (supra) and to suppress the mischief of deliberate misinterpretation of the Section as has been done by the assessee. However, the explanation in question is clarifactory in nature since no right of the petitioner has been curtailed and only the scope of the Section has been properly defined.

Respondents submit that the original unit under the assessee being IFGL Exports Ltd. at the relevant time was set up on 7th September, 2007, which duly enjoyed the benefits of Section 10AA of the Act. However, this unit of the assessee was going to get the benefit of deduction of 100 per cent of export profits only for the first 5 years according to Section 10AA(1)(i) of the Act, subsequently, that deduction became 50 percent of export profits after the first 5 years. Thus, the assessee was going to lose out on 50 percent of the benefits under Section 10AA of the Act. Thus, the erstwhile IFGL Exports Ltd. merged with IFGL Refractories Ltd./petitioner, which had a loss-making unit, and the new entity was called IFGL Refractories Ltd./petitioner. The new entity had 2 units, one eligible unit in Kandla SEZ, Gujarat, and one ineligible unit in Kalunga Industrial Estate, Odisha.

Respondents submit that the ineligible unit was brought in solely to take advantage of its loss-making status. The assessee/petitioner through deliberate misinterpretation of Section 10AA of the Act would add the losses from the ineligible unit and bring down the total taxable income, and then take deduction under Section 10AA of the Act to further reduce taxable income. This sort of tax evasion was not the intended object behind the provision. The legislature had to bring in the Explanation to Section 10AA of the Act to prevent such tax evasion and to specify that the deduction was available only on the total profits of the 2 units combined, and not only the profit-making unit.

Respondents submit that the intention of the legislature in inserting the Explanation to Section 10AA of the Act is evident from paragraph numbers 15.2 and 15.3 of the CBDT Circular No. 3 of 2008, dated 12th March, 2008, in [2008] 299 ITR, which specifies that the deduction under Section 10AA of the

Act was being provided to incentivise new industry and not to facilitate availment of tax concessions by existing industries. Thus, the legislature's intention was very clear, and the assessee can have no legitimate expectation of taking undue advantage of Section 10AA of the Act to evade tax by utilising its loss-making unit after the merger.

Respondents submit that if the assessee had not merged with the loss-making ineligible unit, then there would have been no dispute. The assessee would have had only one unit and it would have taken benefits under Section 10AA of the Act as applicable. However, the assessee merged with the loss-making unit to take undue benefits under Section 10AA of the Act. The explanation would have changed nothing for the assessee if it did not try to evade tax through merger with the ineligible unit. Thus, the assessee changed the situation and then tried to take undue advantage, but there can be no legitimate expectation on its part with regard to Section 10AA of the Act.

Respondents submit that scope of legitimate expectation as held in MRF Ltd. –vs- Asst. Comm. Sales Tax, reported at (2006) 8 SCC 702, (paragraphs 38 and 39) that legitimate expectation of a person cannot be defeated by arbitrariness, but the test of arbitrariness is based on the facts and circumstances of each case. In this instant matter, there was no retrospective curtailment of rights since the Explanation inserted in Section 10AA of the Act was to be prospectively applied. Thus, there was no violation of any legitimate expectation, since the legitimate expectation of the assessee was only with regards to the original unit, and not the ineligible loss-making unit after the merger. The assessee could have no legitimate expectation of taking benefit under Section 10AA of the Act, since it brought in the loss-making unit to evade tax through reduction in taxable income before taking benefit of deduction under Section 10AA of the Act.

Respondents submit that in the instant case, there was no arbitrariness or perversity, since the assessee had no vested right to take undue advantage of Section 10AA of the Act. The assessee desired to take a sort of double benefit by reducing taxable income through the loss-making unit and then claiming

deduction for the profit-making unit. This cannot be a legitimate expectation, and if the legislature stops this tax evasion through a clarifactory explanation, then that cannot be said to be arbitrary or perverse.

Respondents submit that in paragraph 73 of judgment in KB Tea (supra), it has been held in point VII that the expectation sought to be protected by judicial review must be based on a legitimate interest. In paragraph 44 of Sivanandan (supra), it has been held that the individual who claims the violation of legitimate expectation must establish the legitimacy of the expectation first. Here, there is no legitimate expectation on the part of the assessee, since its sole motive of challenging the Explanation inserted is to continue evading tax by deliberately misinterpreting the scope of Section 10AA of the Act.

It has been held in Sivanandan (supra) at paragraph 36 therein, that legitimate expectation cannot hinder the power of a public authority in its policy making role, which forms the basis of the law making functions of the legislature. The legislature has to take into consideration diverse factors, concerns and interest before making any policy decision or legislation. This has also been the opinion of the Hon'ble Apex Court in Indian Ex-Servicemen Movement –vs- Union of India, reported at (2022) 7 SCC 323, specifically paragraph 68 therein.

Respondents submit that on the petitioner's reliance upon Indian Aluminium Co. –vs- State of Kerala, reported at (1996) 7 SCC 637, to argue that the legislature cannot overrule a decision of the Court by inserting an Explanation, such argument is not tenable since in light of sub-paragraph (7) of Paragraph 56 therein since the insertion of the Explanation to sub-section (1) of Section 10AA of the Act was not validating any invalid law, and was also not imposing any new tax, illegally or otherwise. The Explanation was not inserted to impose any new tax liability on the assessee but to merely clarify the position of law already existing as per the parent provision. The Explanation does not introduce any new method of computation of the tax thereby curtailing the rights of the assessee in any way, it merely clarifies the

vagueness around the deduction that crept in due to the deliberate misapplication of the decision in Yokogawa (supra) by the assessee to the facts and circumstances of this case. The assessee does not have a vested right to claim deduction since such deduction is only allowable in terms of the provisions of Section 10AA of the Act, and the Explanation inserted merely clarifies the intention of the legislature and does not alter the position of law as contained in the parent provision.

Respondent submit that in any case, the decision in Yokogawa (supra) is not applicable in the instant case since that decision dealt with Section 10A of the Act, and not Section 10AA of the Act. Sections 10A and 10AA of the Act are not in pari materia and thus it cannot be said that the decision in Yokogawa (supra) was in any manner applicable to this instant case, and thus there was no need for the legislature to insert the aforesaid Explanation to circumvent the decision in Yokogawa (supra).

Therefore, the contention of the petitioner that the Explanation to Section 10AA(1) of the Act is unconstitutional is without merits.

Respondents in support of his contention for dismissing the Writ Petition has relied on relevant paragraphs of the judgment in the case of State of Himachal Pradesh & Ors. –vs- Goel Bus Services Kullu reported in 2023 SCC OnLine SC 46 which are quoted as hereunder:

> ***"27. It is by now well settled that any tax legislation may not be easily interfered with. The Courts must show judicial restraint to interfere with tax legislation unless it is shown and proved that such taxing statute is manifestly unjust or glaringly unconstitutional. Taxing statutes cannot be placed or tested or viewed on the same principles as laws affecting civil rights such as freedom of speech, religion, etc. The test of taxing statutes would be viewed on more stringent tests and the law makers should be given greater latitude. It would be useful to refer to a couple of judgments on the above proposition.***
>
> ***28. In the case of R.K. Garg etc. vs. Union of India and others, (1981) 4 SCC 675, the Constitution Bench was judging the constitutionality of economic legislation wherein challenge was to the validity of the provisions of Special Bearer Bonds (Immunities***

and Exemption Act, 1981) on the grounds of discrimination and violation of Article 14. P.N. Bhagwati J., speaking for himself, Chief Justice Chandrachud, A.C. Gupta, S. Murtaza Fazal Ali and A.N. Sen, J.J., observed in paragraph 7 regarding the presumption in favour of constitutionality of the statute and that the burden is on the person who attacks it, to establish that there has been clear transgression of the constitutional principles. In paragraph 8, it was laid down that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. The views of Justice Frankfurter in the case of Morey vs. Doud, 354 US 457 was relied upon. The same is reproduced hereunder:

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

29. In case of Bhavesh D. Parish and others vs. Union of India and another, (2000) 5 SCC 471, the challenge was to the validity of section 9 of Reserve Bank of India Act as amended by the Amendment Act 1997 on the ground that it was violative of Article 14 and Article 19(1)(g) of the Constitution. This Court dismissed the challenge to the said provision in paragraph 26 of the report. It observed that matters of economic policy should be best left to the wisdom of the legislature. Further, it went on to state that in the context of a changed economic scenario the expertise of the people dealing with the subject should not be lightly interfered with. It was also observed that while dealing with economic legislation, this court would interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

30. In the case of Indian Oil Corporation Limited vs. State of Bihar and another, (2018) 1 SCC 242, provisions of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act 1993, was under challenge. Justice Nariman speaking for the Bench observed in paragraph 25 that when it comes to taxing statute, the law laid down by this Court is clear that it can be said to be breach only when there is perversity or gross

disparity resulting in clear and hostile discrimination without any rational justification for the same."

Respondents have relied on the relevant paragraph nos. 36 and 44 of the judgment in the case of Sivanandan C T & Ors. –vs- High Court of Kerala & Ors being Writ Petition (Civil) No. 229 of 2017 reported in 2023 INSC 709 which are quoted hereunder:

"36. The doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it. The public authority has the discretion to exercise the full range of choices available within its executive power. The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision. The courts are generally cautious in interfering with a bona fide decision of public authorities which denies a legitimate expectation provided such a decision is taken in the larger public interest. Thus, public interest serves as a limitation on the application of the doctrine of legitimate expectation. Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. While performing a balancing exercise, courts have to often grapple with the issues of burden and standard of proof required to dislodge the claim of legitimate expectation."

"44. From the above discussion, it is evident that the doctrine of substantive legitimate expectation is entrenched in Indian administrative law subject to the limitations on its applicability in given factual situations. The development of Indian jurisprudence is keeping in line with the developments in the common law. The doctrine of substantive legitimate expectation can be successfully invoked by individuals to claim substantive benefits or entitlements based on an existing promise or practice of a public authority. However, it is important to clarify that the doctrine of legitimate expectation cannot serve as an independent basis for judicial review of decisions taken by public authorities. Such a limitation is now well recognized in Indian jurisprudence considering the fact that a legitimate expectation is not a legal right.34 It is merely an expectation to avail a benefit or relief based on an existing promise or practice. Although the decision by a public authority to deny legitimate expectation may be termed as arbitrary, unfair, or abuse of power, the validity of the decision itself can only be questioned on established principles of equality and non-arbitrariness under Article 14. In a nutshell, an individual who claims a benefit or entitlement based on the doctrine of legitimate expectation has to

establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to the violation of Article 14."

Respondents have relied on the relevant paragraph no. 38 of the judgment in the case of MRF Ltd., Kottayam –vs- Assistant Commissioner (Assessment) Sales Tax & Ors reported in (2006) 8 Supreme Court Cases 702 which is quoted hereunder:

"38.The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been re-stated by this Court in Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer. It was observed in paras 8 & 9: (SCC pp. 633-34)

"8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision maker should justify the denial of such expectation by showing some overriding public interest. (See Union of India and Ors. v. Hindustan Development Corporation and Ors. (AIR 1994 SC 988).

9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article

14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non- arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness." (Emphasis supplied)

Respondents have relied on the relevant paragraph nos. 68-71 of the judgment in the case of Hero Motocorp Limited –vs- Union of India & Ors reported in (2023) 1 Supreme Court Cases 386 : 2022 SCC OnLine SC 1436 which are quoted hereunder:

"68. However, a common thread in all these judgments that could be noticed is that all these judgments consistently hold that there can be no estoppel against the legislature in the exercise of its legislative functions. The Constitution Bench in the case of M. Ramanatha Pillai has approved the view in American Jurisprudence that the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. It further held that the only exception with regard to applicability of the doctrine of estoppel is where it is necessary to prevent fraud or manifest injustice. The analysis of all the judgments of this Court on the issue would reveal that it is a consistent view of this Court, reiterated again in Godfrey Philips, that there can be no promissory estoppel against the legislature in the exercise of its legislative functions.

69. Undisputedly, the Notification dated 18th July 2017 withdrawing the exemption notifications was issued in pursuance of the statutory mandate as provided under Section 174(2)(c) of the CGST Act. If the contention as raised by the appellants is to be

accepted, it would make the provisions under the proviso to Section 174(2)(c) of the CGST Act redundant and otiose. The legislature in its wisdom has specifically incorporated the proviso to Section 174(2)(c) providing therein that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded. If the contention is accepted, it will amount to enforcing a representation made in the said O.M. of 2003 and 2003 Notification contrary to the legislative incorporation in the proviso to Section 174(2)(c) of the CGST Act. In other words, it will permit an estoppel to be operated against the legislative functions of the Parliament. We are, therefore, of the considered view that the claim of the appellants on estoppel is without merit and deserves to be rejected.

70. It is further to be noted that this Court has also consistently held that when an exemption granted earlier is withdrawn by a subsequent notification based on a change in policy, even in such cases, the doctrine of promissory estoppel could not be invoked. It has been consistently held that where the change of policy is in the larger public interest, the State cannot be prevented from withdrawing an incentive which it had granted through an earlier notification. Reliance in this respect could be placed on the judgments of this Court in the cases of vs. Union of India , Shrijee Sales Corpn. vs. Union of India, State of Rajasthan vs. Mahaveer Oil Industries, Shree Sidhbali Steels Ltd. vs. State of U.P., and DG of Foreign Trade vs. Kanak Exports.

71. Recently, this Court, in the case of Unicorn Industries (supra), after surveying the earlier judgments of this Court on the issue has observed thus: (SCC p. 589, para 26)

"26. It could thus be seen that, it is more than well settled that the exemption granted, even when the notification granting exemption prescribes a particular period till which it is available, can be withdrawn by the State, if it is found that such a withdrawal is in the public interest. In such a case, the larger public interest would outweigh the individual interest, if any. In such a case, even the doctrine of promissory estoppel would not come to the rescue of the persons claiming exemptions and compel the State not to resile from its promise, if the act of the State is found to be in public interest to do so."

Respondents have relied on the relevant paragraph no. 34 of the judgment in the case of K.B. Tea Product Pvt. Ltd. & Anr. –vs- Commercial Tax Officer, Siliguri & Ors reported in 2023 SCC OnLine SC 615 which is quoted

hereunder:

> ***"34. Now, so far as the submission on behalf of the appellants on legitimate expectation and/or promissory estoppel and the submission on behalf of the appellants that the "vested right" cannot be taken away is concerned, the aforesaid has no substance. There cannot be any promissory estoppel against the statute as per the settled position of law. As rightly observed and held by the High Court, this is not a case of "vested right" but a case of "existing right", which can be varied or modified and/or withdrawn. In the present case, as per amendment in the definition contained in Section 2(17) of the Act, 1994 w.e.f. 01.08.2001 by which "tea blending" activity is excluded from the definition of "manufacture" and therefore, on and from that day itself, the appellants ceased to be the manufacturers and shall not be entitled to the benefit of exemption from payment of sales tax as was available to them as manufacturers."***

Respondents have relied on the relevant paragraph no. 17 of the judgment in the case of Sedco Forex International Drill. Inc. & Ors. –Vs- Commissioner of Income Tax, Dehradun & Anr. reported in (2005) 12 Supreme Court Cases 717 which is quoted hereunder:

> ***"17. As was affirmed by this Court in Goslino Mario (supra), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also Reliance Jute and Industries vs. CIT]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'."***

Respondents have relied on the relevant paragraph no. 53 of the judgment in the case of S. Sundaram Pillai & Ors. –vs- V.R. Pattabiraman & Ors reported in (1985) 1 Supreme Court Cases 591 which is quoted hereunder:

"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so a- to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

Respondents have relied on the relevant paragraph nos. 38 and 56 of the judgment in the case of Indian Aluminium Co. & Ors. –Vs- State of Kerala & Ors reported in (1996) 7 Supreme Court Cases 637 which are quoted hereunder:

"36. The validity of the validating Act is to be judged by the following tests:

[i] whether the legislation enacting the validating Act has competence over the subject matter;

[ii] whether by validation, the legislature has removed the-defect which the court had found in the previous law

[iii] whether the validating law is inconsistent with the provisions of Chapter III of the Constitution. If tests are satisfied, the Act can confer jurisdiction upon the Court with retrospective effect and validate the past transactions which were declared to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a Court without properly removing the base on which the judgment is founded."

"56. From a resume of the above decisions the following principles would emerge:

[1] The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will

govern the parties and the transaction and require the court to give effect to them;

[2] The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary;

[3] In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.

[4] Courts in their concern and endeavor to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free-play in their joints so that the march of social progress and order remain unimpeded. The smooth balance built with delicacy must always maintained;

[5] In its anxiety to safeguard judicial power, it is unnecessary to be overjealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

[6] The Court, therefore, need to carefully scan the law to find out: (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

[7] The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court or the direction given for recovery thereof.

[8] In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such

character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorize its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

[9] The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."

Considering the facts and circumstances of the case, relevant provisions of law, submission of the parties and judgment cited by them, I am of the considered opinion that principle of legitimate expectation is not applicable to the case of the petitioner and Explanation after Sub-section (1) of Section 10AA of the Income Tax Act, 1961, inserted by amendment with prospective from 1st April, 2018, applicable in respect of the assessment year 2018-19 and subsequent years is constitutional and is a valid piece of legislation and is not arbitrary, discriminatory and is not violative of Articles 14, 19 & 265 of the Constitution of India.

Accordingly the Writ Petition being WPO No. 544 of 2019 is dismissed. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

MOHAMMAD NIZAMUDDIN
Digitally signed by MOHAMMAD NIZAMUDDIN
Date: 2023.10.03 17:42:12 +05'30'

[MD. NIZAMMUDDIN, J.]