

CASE NO.:
Appeal (civil) 7147 of 2004

PETITIONER:
M/s. Jai Beverages Pvt. Ltd.

RESPONDENT:
State of Jammu & Kashmir and others

DATE OF JUDGMENT: 12/05/2006

BENCH:
B.P. SINGH, TARUN CHATTERJEE & ALTAMAS KABIR

JUDGMENT:
J U D G M E N T

B.P. SINGH, J.

The appellant herein claiming to be a "prestigious unit" having a capital investment of over Rs.25 crores claimed exemption from payment of General Sales Tax and Central Sales Tax under Notification No. SOR 247 of August 20, 1998 issued by the Government of Jammu & Kashmir pursuant to its Industrial Policy of 1998-2003. Under the said Industrial Policy, a package of incentives was offered to industrial units, and in particular to "prestigious units" having a capital investment of Rs.25 crores or more. The appellant Company set up a soft drink manufacturing unit in Jammu. The claim of the appellant was negated by the State Government, which led to the filing of two writ petitions before the High Court of Jammu and Kashmir. A learned single Judge of the High Court dismissed the writ petitions holding that the petitioner was not entitled to the incentives claimed under the aforesaid Industrial Policy, as it did not validly acquire the status of a "prestigious unit". Aggrieved thereby the appellant preferred a Letters Patent Appeal which was dismissed in limine by the judgment and order of the High Court dated October 4, 2004.

To appreciate the issues involved. it would be necessary to notice the background facts giving rise to this controversy. The facts are as under :-

Pursuant to the Cabinet decision of May 15, 1998, sanction was accorded to the new Industrial Policy 1998-2003 as per Annexures 'A' and 'B' to the package of incentives appended to GO No.202 IND of 1998 dated May 27, 1998. A package of incentives was offered for the development of large/medium/small and tiny industries in the State of Jammu and Kashmir. Paragraph 6 of GO No.202 of 1998 provided that the Industries and Commerce Department shall notify negative lists referred to in the new package of incentives, in consultation with Finance Department.

The relevant part of the package of incentives contained in Annexure 'B' relates to exemption from payment of General Sales Tax etc. and is as follows :-

"8. General Sales Tax

i. There will be no GST on sales of finished goods by the existing local SSI units till 31.3.2003 and for a period of 5 years from the

date of production in case of new SSI units except on items brought on negative list.

ii There will be no GST on the raw material procured by the local SSI, Medium and Large units except on items brought on the negative list.

iii There will be no GST on the sale of finished goods manufactured by the new Medium and Large industrial units upto a ceiling on such amount of GST which would have been otherwise payable equivalent to 150% of the total capital investment made in the unit or for a period of 5 years from the date of production whichever occurs earlier, except on items brought on the negative list.

iv There will be no GST on purchase of machinery and equipment for construction of the factory for a period of 5 years from the date of provisional registration by the SSI units.

v The above concessions shall also be available to SICOP while acting on behalf of local registered SSI units.

9. Central Sales Tax

The local existing SSI units shall be exempt from charging and payment of CST on sale of their finished goods outside the State upto 31.3.2003 and the new SSI units for a period of 5 years from the date of production.

10. Special provision for "prestigious unit"s

(1) Notwithstanding anything contained in paras 7, 8 and 9 above, prestigious units i.e. those having capital investment of Rs.25 crores or above shall have the option to avail of full exemption from payment of GST, CST and special/additional toll tax for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150% of capital investment in the project whichever occurs earlier.

(2) Notwithstanding anything contained in para 7, 8 and 9 above those prestigious units which come into commercial production in the year 1998, shall have the option to avail a power tariff freeze at the rate of Rs.1.50 per unit for a period of five years from the date of commercial production.

For purposes of paras 7, 8, 9 & 10 above, all the new units shall also have the option to count the period of 5 years from the date of production or from the succeeding financial year".

On August 20, 1998 a Notification was issued by the Government of Jammu and Kashmir exempting "prestigious units" from payment of General Sales Tax and Central Sales Tax for a period

of 5 years from the date of production or until such amount of exemption reaches the level of 150% of capital investment in the project, whichever occurs earlier. The Notification is re-produced below for the sake of convenience.

"SRO-247. In exercise of the power conferred by Section 5 of the Jammu and Kashmir General Sales Tax Act, 1962 (XX of 1962) and read with sub-section (5) of Section 8 of the Central Sales Tax Act, 1956 (Act No. 74 of 1956), the Government of Jammu & Kashmir hereby direct that the prestigious units, i.e., those having capital investment of 25 crores or above shall have the option to avail of full exemption from payment of general sales tax and Central Sales Tax for the period of 5 years from the date of production or until such amount of exemption reaches the level of 150% of capital investment in the project, whichever occurs earlier."

On the same date, Notification No. SRO 249 was issued regarding exemption of General Sales Tax on sale of finished goods manufactured by medium and large scale industries. It is worth noticing that this Notification refers to the exemption from the payment of General Sales Tax granted to medium and large scale industrial units. It makes no reference to small and tiny units as also to "prestigious units". Moreover, a separate Notification was issued on the same day relating to grant of such exemption to "prestigious units". It is the case of the appellant that this Notification related only to medium and large scale industries and did not in any manner curtail exemptions granted to "prestigious units" by Notification SRO 247 issued on the same date. The proviso to Clause 6 of the Notification provided that the incentives granted shall not apply to goods specified in the Schedule. There is no dispute that "soft drinks" has been shown as item No.VIII in the Schedule to Notification SRO 249 dated August 20, 1998.

In the mean time having regard to the Industrial Policy announced by the Government of Jammu and Kashmir, the appellant, whose unit was registered as a medium scale industry, applied to the Government making a proposal for investment of Rs.25 crores or more pursuant to the Industrial Policy of the Government so that it could acquire the status of a "prestigious unit" and be entitled to all the incentives provided in the Industrial Policy for such a unit. The proposal was discussed in a meeting attended by the Chief Minister, Finance Minister, the Minister for Industries and Commerce, Chief Secretary, Principal Secretary, Managing Director SIDCO, and the Chairman of the appellant Company. The revised proposal was considered and it was observed that no departure from the new industrial policy was involved if the investment materialised concurrently with the availment of incentives. However, it was felt that a liberal view needed to be taken of the policy to the extent that if the investment of Rs.25 crores or more materializes within the maximum period of six months from the date of commercial production, the company should be given the benefit of incentives. A Memorandum of Understanding (for short 'MOU') for this purpose had to be executed by and between J&K SIDCO and the appellant Company. The proposal had the concurrence of the Finance Minister whereafter a Memorandum was submitted to the Cabinet which was approved vide Cabinet decision No.7/2 dated January 19, 2000. Accordingly, SIDCO respondent No.7, signed a MOU with the appellant Company on the above lines.

The MOU signed on February 1, 2000 recites the fact that the appellant Company had applied to the State Government to give

permission to set up a Soft Beverages bottling plant and that the State Government had agreed to grant permission to it and authorize its nodal agency respondent No.7 SIDCO to enter into a Memorandum of Understanding. It is also noticed that the unit proposed to be set up by the appellant involved capital investment of around Rs.27.50 crores. The other relevant parts of the MOU read as under:-

"AND WHEREAS the State Government has agreed to grant incentives and subsidies to JBPL which are applicable to the prestigious units as per new Industrial Policy (1998-2003) right from the date of commercial production which is expected to start from the end of March 2000 so as to make huge capital investment viable. SIDCO and JBPL are desirous of recording the terms and conditions agreed between and by the parties, which are appearing hereinafter in this Memorandum of Understanding.

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JBPL shall start manufacture of soft beverages in the existing built up accommodation at Bari Brahmana Jammu premises of erstwhile Hindustan Lever Ltd. by end of March, 2000 and complete the minimum capital investment of Rs.25 crores or more latest by 30.9.2000.

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M/s JBPL shall become eligible to avail and be entitled to all incentives and subsidies currently applicable to prestigious units in pursuance of the Industrial Policy in vogue as published vide Govt. order No.202-IND of 1998 dt. 27th May, 1998 right from the date of commercial production against to the condition that JBPL makes an investment of not less than Rs.25 crores as capital investment which is a pre-requisite for qualifying as a prestigious unit.

JBPL undertakes to start commercial production by end of March 2000 in the existing available infrastructure and complete the minimum investment of Rs.25 crores with a period of six months i.e. by end of Sept. 2000. In the event of failure of JBPL to make investment of at least Rs.25 crores (prestigious unit) JBPL undertakes to refund the incentives, if any, availed as prestigious unit alongwith interest at Bank rates, besides entailing other consequences as laid down in the relevant laws".

A reading of the Memorandum of Understanding leaves no manner of doubt that the industrial unit to be set up involved a minimum capital investment of Rs.27.50 and was an industrial unit for the manufacture and bottling of Soft Beverages. It was also clearly understood that the commercial production was to start by end of March, 2000 and the minimum investment of Rs.25 crores must be made within a period of six months i.e. by end of September, 2000. In the event of the failure of the appellant to make investment as agreed, the appellant undertook to refund the incentive, if any availed of, as a "prestigious unit" together with interest. It was also clearly understood that the appellant shall become eligible to avail and be entitled to all incentives and subsidies currently applicable to

"prestigious units" in pursuance of the Industrial Policy as published on May 27, 1998 from the date of the commercial production.

Pursuant to the MOU, on February 17, 2000 the SIDCO executed a Deed of Lease in favour of the appellant Company granting to it lease hold rights in respect of land measuring 133.6 kanals for a period of 90 years.

On April 25, 2000 SIDCO issued a certificate to the effect that the appellant was entitled to avail of incentives as a prestigious industry from the date of its commercial production in accordance with the Industrial Policy 1998 \0262003. The certificate reads as under:-

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that a Memorandum of Understanding has been signed by J&K State Industrial Development Corporation (SIDCO) with M/s Jai Beverages Pvt. Ltd. (JBPL) to set up a bottling plant having an installed capacity of 800 BPM with a capital investment of more than 25 crores. This is pursuant to the cabinet decision No.7.2 dated 10-1-2000. As per Memorandum of Understanding, executed with J&K SIDCO on 1st February, 2000 JBPL will avail incentives as prestigious industry right from the date of commercial production in accordance with the new Industrial Policy 1998-2003 (in vogue), subject to the condition that the company completes the investment before 30th Sept. 2000 failing which they will refund the incentives availed with interest. The SRO 247 dated 20-8-98 issued vide No.FD-ST/163.98 governing release incentives to prestigious units reads as under:-

"The Govt. of J&K hereby direct that the prestigious unit i.e. having capital investment of Rs.25.00 crores or above shall have the option to avail exemption from payment of GST/CST for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150% of capital investment of the project which ever occur earlier".

In the light of the above JBPL is entitled to avail incentives as a prestigious unit from the date of commercial production.

(Raman Soni)
General Manager"

On April 25, 2000, the Officer on Special Duty in the Department of Industries and Commerce, Government of Jammu and Kashmir wrote to the Principal Secretary and Secretary to Finance Department that in view of the MOU signed with the appellant \026 Company pursuant to the Cabinet decision of January 1, 2000, a SRO be issued permitting the appellant to avail of incentives as "prestigious unit" from the date of commercial production.

On June 14, 2000 the Directorate of Industries and Commerce also granted a certificate substantially to the same effect as the one granted by SIDCO which reads as follows:-

"TO WHOMSOEVER IT MAY CONCERN

As certified by General Manager, J & K State Industrial Development Corporation Limited, Regional Office, Vir Marg, Jammu vide NO.:IDG/ROJ/99/803 dated 25-04-2000, it is further certify that a Memorandum of Understanding has been signed by J & K State Industrial Development Corporation (SIDCO) with M/s. Jai Beverages Pvt. Ltd. (JBPL) to set up a bottling plant having an installed capacity of 800 BPM with a capital investment of more than 25 crores. This is pursuant to the cabinet decision No.7/2 dated 10-01-2000. JBPL will avail incentives as prestigious industry right from the date of commercial production in accordance with the new Industrial Policy 1998-2003 (In vogue), subject to the conditions that the company completes the investment before 30th September, 2000 failing which they will refund the incentives availed with interest. The SRO 247 dated 20-08-1998, issued vide No.FD/ST/163/98 governing release incentives to prestigious units reads as under:-

"The Govt. of J & K hereby direct that the prestigious unit i.e. having capital investment of Rs.25 crores or above shall have the option to avail exemption from payment of GST/CST for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150% capital investment of the project whichever occur earlier."

In the light of the above JBPL is entitled to avail incentives as a prestigious unit from the date of commercial production.

(DEVINDER K. N.) IAS
Director of Industrial & Commerce,
J & K Govt., Srinagar".

By order of December 12, 2000, the Director of Industries and Commerce, Government of Jammu and Kashmir declared the appellat Unit a "prestigious unit". The relevant part of the order is as follows:-

"Whereas M/s. Jai Beverages Pvt. Ltd. have submitted a certificate from the Chartered Accountants M/s. O.P. Bagla & Co., Kalkaji Extn. New Delhi regarding capital investment ending 30-09-2000, certifying that an investment of Rs.2711.59 Lacs has been made by the company.

Whereas the details incorporated in the Chartered Accountants certificate have been authenticated by the General Manager, District Industries Center, Jammu, vide his letter No.DICJ/MD/12875 dated 24-11-2000.

Whereas the J&K State Industrial Development Corporation have inspected the Unit and verified the investment made to the tune of Rs.27.12 crores and conveyed vide their letter No.IDC/CO/PROJ/803-II/1136 dated 9-12-2000.

Now, therefore, on the basis of documents submitted by M/s Jai Beverages (P) Ltd. and as certified by the General Manager, District Industries Centre, Jammu and J&K State Industrial Development Corporation Ltd., M/s. Jai Beverages (P) Ltd., located at Industrial Complex, Bari Brahamana, Jammu is declared as a prestigious Unit defined in terms of new Industrial Policy dated 27-5-1998 thereby qualifying for incentives enshrined in the policy and the SRO NO.247 of 20-8-1998 issued by the Finance Department".

This order clearly states that on verification it has been found that the appellant has made investment to the tune of Rs.27.12 crores by September 30, 2000.

It would thus appear from the Notifications, Orders and Certificates noticed above that the appellant signed a MOU with SIDCO pursuant to a Cabinet decision to set up an industry with a capital investment of more than Rs. 25 crores for the manufacture and bottling of soft beverages. As between the parties, it was clearly understood that the unit to be set up by the appellant shall be entitled to avail of the package of incentives offered by the Industrial Policy to the "prestigious units". The commercial production was to commence by March 30, 2000 and the investment of Rs.25 crores or more was to be made on or before September 30,2000. The certificates issued by the authorities establish that commercial production had commenced as agreed and that investment of over Rs.27 crores by way of capital investment had been made by September 30, 2000.

By a communication dated July 4, 2002 addressed by the Under Secretary to the Government in the Department of Industries and Commerce to the Director, Industries and Commerce, it was conveyed that the competent authority had not agreed to grant exemption from payment of Sales Tax/Toll Tax to the appellant. Aggrieved thereby, the appellant filed the first Writ Petition before the High Court being OWP No.613 of 2002 praying for quashing of the letter dated July 4, 2002 and for issuance of a Writ of Mandamus commanding the respondents to allow exemption from payment of Sales Tax and Toll Tax to the appellant in respect of its prestigious industrial unit in accordance with the Government Order dated May 27, 1998, SRO 247 dated August 20, 2000 and MOU dated February 1, 2000. The appellant also prayed for other ancillary reliefs .

On October 25, 2002 a communication was issued by the Department of Industries and Commerce to the effect that the orders issued by the Directorate of Industries and Commerce according prestigious status to the units named therein had been kept in abeyance till the cases were considered by the competent authority i.e. State Level Committee-I. One of the units mentioned therein is that of the appellant.

This decision of the Government was also challenged before the High Court in OWP No.1166 of 2002.

Both the writ petitions were heard together and disposed of by a common judgment and order dated July 30, 2004 dismissing the writ petitions.

Before the learned Judge, who disposed of the two writ petitions, it was urged on behalf of the respondents that in terms of SRO 247, an industrial unit accorded the status of a "prestigious unit" was one in which a capital investment of Rs. 25 crores or more was made. This investment was to be made as the initial investment, i.e.

the investment of Rs.25 crores was to be made at the time when the unit went into commercial production, and not at a later stage of its development. It was, therefore, urged that since the unit of the appellant commenced its production on April 24, 2000 and by this date an investment of Rs. 25 crores or more had not been made, it was not entitled to the incentives offered to a "prestigious unit" under the provisions of Notification No. SRO 247 issued pursuant to the Industrial Policy. Secondly it was urged that the negative list applied to large and medium scale industrial units and, therefore, the appellant which was registered as a medium scale industrial unit could not avail of incentives if it was involved in the manufacture of goods specified in the schedule to Notification SRO 249. "Soft drinks" being one of the goods specified in the schedule, the appellant was not entitled to any incentive in terms of SRO 249. Thirdly it was argued that any decision of the Industries Department declaring the unit of the appellant as a "prestigious unit" could not supercede Notification SRO 249, and in any case the same was not binding on the Sales Tax Department. The Finance Department could grant the exemption only if it found the unit eligible for such incentives in terms of SROs 247 and 249. Fourthly it was argued that since the Cabinet had reconsidered its decision and refused the exemption claimed, the Finance Department and the Sales Tax Department were justified in denying such incentives to the appellant, and in insisting upon payment of tax in accordance with the provisions of the Jammu & Kashmir General Sales Tax Act, 1962.

On the other hand the appellant contended that there was no separate registration of a "prestigious unit". A medium or large scale unit was different from a "prestigious unit" in the sense that if the capital investment made in a particular industrial unit was Rs. 25 crores or more, it was granted the status of a "prestigious unit" and was eligible for the incentives available to a "prestigious unit". The appellant had invested a sum of over Rs. 27 crores within the period prescribed in the Memorandum of Understanding and, therefore, it was entitled to be regarded as a "prestigious unit". So far as the negative list was concerned, it was the case of the appellant herein that the negative list was only applicable to medium and large scale industrial units and not to "prestigious units" having a capital investment of Rs.25 crores or more. It was also submitted that the decision to enter into a Memorandum of Understanding was taken at the highest level, namely at the Cabinet level, and the period for making the investment of Rs.25 crores or more was prescribed in the said Memorandum of Understanding, Factually it could not be disputed that by September 30, 2000 the investment made by the appellant was more than Rs.27 crores. The appellant had, therefore, fulfilled all the conditions laid down by the Government for acquiring the status of a "prestigious unit". Necessary certificates had been issued by the concerned departments of the Government and it was also certified, after verification, that the appellant had invested a sum of Rs.27.12 crores by way of capital investment by September 30, 2000. It is the case of the appellant that if the terms and conditions laid down in the Notifications issued by the State of Jammu and Kashmir pursuant to its Industrial Policy decision are fulfilled the appellant is entitled to be treated as a "prestigious unit". It was not of much significance that such a declaration had not been issued by the Department of Finance but was issued by the Department of Industries and Commerce and J&K SIDCO.

The learned Judge held that in terms of SRO 247 an investment of Rs. 25 crores was required to be made by way of initial investment in the case of a "prestigious unit". Any investment made at a subsequent stage was immaterial and, therefore, since on the date of commencement of commercial production i.e. 24th April, 2000 a sum of Rs. 25 crores had not been invested, the appellant could not be declared to be a "prestigious unit" entitled to the incentives provided

under SRO 247 dated August 20, 1998. The High Court further held that the Government had not issued any SRO declaring the appellant unit as a "prestigious unit". The appellant unit was registered as a medium scale unit and, therefore, it was for the Government to take a decision as to whether the industrial unit fulfilled the eligibility conditions specified and indicated in SROs 247 and 249. Negative list appended to SRO 249 had to be kept in mind while declaring a unit as "prestigious unit" under SRO 247. Though not so clearly spelt out, the learned Judge, came to the conclusion that SROs 247 and 249 had to be read together and any medium scale or large scale industrial unit producing goods specified in the schedule were not entitled to the incentives under those Notifications.

It was further held that the Director Industries and Commerce was not competent to declare the unit as a "prestigious unit", as it was only the Government which could take a decision in this regard by issuing a SRO on being satisfied that the industrial unit was eligible to claim the incentives.

On such findings the learned Judge by his judgment and order of July 30, 2004 dismissed both the writ petitions.

The Letters Patent Appeal preferred by the appellant was dismissed in limine by order dated October 4, 2004.

Having regard to the facts and circumstances of the case and the findings recorded by the High Court, principally two questions fall for our consideration. Firstly, whether the industrial unit set up by the appellant fulfilled all the necessary conditions for being declared a "prestigious unit". In this connection it has to be considered whether the appellant had made the necessary investment of Rs. 25 crores or more within the period prescribed. Secondly, whether the negative list appended to SRO 249 applies to "prestigious units" as well. If it is held that the industrial unit set up by the appellant fulfilled all the conditions of eligibility for being considered to be a "prestigious unit", and if the negative list appended to SRO 249 is not applicable to the "prestigious units", it must follow that the appellant is entitled to the package of incentives promised to the "prestigious units" under the Notifications issued by the State pursuant to its industrial policy. It is not of much consequence as to whether the declaration, that the industrial unit set up by the appellant is a "prestigious unit", was issued by SIDCO or by the Department of Industries and Commerce, or that it should have been issued by the Department of Finance or the Government of Jammu and Kashmir.

Mr. K.K. Venugopal, learned senior counsel appearing on behalf of the appellant, submitted that the package of incentives announced by the State included certain benefits relating to payment of General Sales Tax and Central Sales Tax. Annexure 'B' appended to GO No. 202 of May 27, 1998 provided for certain concessions to small scale industrial units as well as medium and large scale units except on items brought on the negative list. The package is contained in paragraphs 8 and 9 of Annexure 'B' which we have quoted earlier in this judgment. Paragraph 10 of Annexure 'B' relates to special provisions for "prestigious units" and it begins with the words "Notwithstanding anything contained in paragraphs 7, 8 and 9 above". Thus the provision in regard to "prestigious units" is a special provision confined to "prestigious units" i.e. those having capital investment of Rs. 25 crores or above. The benefit envisaged under paragraph 10 is full exemption from payment of General Sales Tax and Central Sales Tax and Special/Additional Toll Tax for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150 % of capital investment in the project, whichever occurs earlier.

SROs 247 and 249 were both issued on the same date, namely on August 20, 1998. SRO 247 provides that the "prestigious units" shall have the option to avail of full exemption from payment of General Sales Tax and Central Sales Tax for a period of 5 years from the date of production or until such amount of exemption reaches the level of 150 % of the capital investment in the project, whichever occurs earlier. This exemption which was granted by the State Government in exercise of powers conferred by Section 5 of the Jammu & Kashmir General Sales Tax Act, 1962 read with sub-section (5) of Section 8 of the Central Sales Tax Act, 1956, does not refer to any negative list.

On the other hand SRO 249 issued on the same date provides that finished goods manufactured by newly established medium and large scale industrial units registered with the Department of Industries and Commerce shall be exempted from payment of General Sales Tax, which would have been otherwise payable, equivalent to 150 % of the total capital investment made by the unit or for a period of 5 years from the date of production whichever occurs earlier subject to the conditions specified therein. It is not necessary for us to notice the conditions specified therein, but the proviso to paragraph 6 of the Notification is to the effect that the exemptions granted under SRO 249 shall not apply to goods specified in the Schedule. Thus no exemption was permissible to medium and large scale industrial units for the manufacture of goods mentioned in the Schedule, which includes "Soft Drinks". It was, therefore, submitted by Mr. Venugopal that the negative list contained in SRO 249 is applicable only to "medium and large scale industrial units" and not to "prestigious units" contemplated by SRO 247. Both the SROs, namely 247 and 249 were issued on the same date i.e. August 20, 1998. Whereas SRO 249 contains the negative list and confines its application to medium and large scale industrial units, there is no such limitation in SRO 247. Moreover Annexure 'B' to Government Order No. 202 of 1988, particularly paragraphs 8 and 9 thereof refer to certain benefits conferred on small scale, medium scale and large scale units. Sub-paragraphs (i), (ii) and (iii) of paragraph 8 in terms provide that the benefits contained therein shall not be available to units which manufacture items brought on the negative list. Paragraph 10 begins with non obstante clause and in terms provides that notwithstanding anything contained in paragraphs 7, 8 and 9, "prestigious units" shall have the option to avail of full exemption from payment of General Sales Tax, Central Sales Tax etc.

Mr. Rohtagi, learned senior counsel appearing on behalf of the State, submitted that there is no reason why the negative list must not apply to all industrial units, whether small scale or medium scale or large scale or even "prestigious units". According to him the concept of negative list is the same and there is no reason why "prestigious units" should be treated on a different footing from other units in the matter of application of negative list.

Having perused Annexure 'B' to G.O. No. 202 of 1988 of May 27, 1998 ; SRO 247 and SRO 249 issued on August 20, 1998, we are of the view that the negative list concept is not applicable to "prestigious units". Paragraph 10 of Annexure 'B' to G.O. No. 202 of May 27, 1998 in terms provides a special package of incentives for "prestigious units" and begins with the words "notwithstanding anything contained in paragraphs 7, 8 and 9" above. In paragraphs 8 (i), (ii) and (iii) certain benefits are conferred on small scale units, medium scale units and large scale units in the matter of payment of General Sales Tax, except on items brought in the negative list. There is no mention of the negative list in paragraph 10 of the G.O. which clearly brings out the intention of the Government to treat "prestigious units" on a different footing altogether. Similarly, SRO 247 which grants exemption to "prestigious units" from payment of General

Sales Tax and Central Sales Tax does not refer to the negative list. Even SRO 249 to which the negative list is appended as a Schedule, only refers to finished goods manufactured by newly established, "medium and large scale" industrial units but does not refer to "prestigious units" which are treated as a separate class altogether.

It was sought to be argued before us that a "prestigious unit" also must fall in the category of medium or large scale industrial unit. Therefore, it was not reasonable to exclude the "prestigious units" while applying the negative list to medium and large scale industrial units. The submission is not tenable. This is a matter of policy, and if the Government decides as a matter of policy to treat the "prestigious units" on a different footing than medium and large scale industrial units, the Courts will not interfere unless it is shown that there is something arbitrary or unreasonable in such classification. Large industrial undertaking provides greater employment opportunities and makes a large contribution to the State exchequer by way of revenue, and this may very well be a reason for according a special status to "prestigious units". It is worth noticing that while the Government's Industrial Policy deals with tiny, small, medium and large scale industrial units, the negative list is made applicable by SRO 249 only to medium and large scale industrial units. Obviously tiny and small scale industrial units have been excluded so far as SRO 249 is concerned. Under paragraphs 8(i) and 8(ii) of GO. No. 202 of 1998, the negative list is made applicable to small scale industrial units in so far as sale of finished goods and purchase of raw-materials is concerned, but does not make it applicable to tiny units. It thus appears that wherever the negative list is made applicable it is so expressly provided. There is nothing in any of the Notifications which may lead us to hold that the negative list applies to "prestigious units" as well. On the contrary the language employed in paragraph 10 of G.O. No. 202 of 1998, which begins with the non obstante clause, support the conclusion to the contrary. We, therefore, hold that the negative list concept does not apply to "prestigious units". This is how the Government also understood its Industrial Policy and the Notifications issued thereafter. As we have noticed earlier the matter was considered at different levels by high powered committee presided over by the Chief Minister of the State himself and it was understood that the proposal of the appellant did not involve departure from the new Industrial Policy. The matter was thereafter considered by the Finance Department and lastly by the Cabinet which approved the proposal and permitted SIDCO to sign a Memorandum of Understanding with the appellant. It was known to the Government that the industrial unit being set up by the appellant was a soft beverages manufacture and bottling plant with a capacity of approximately 800 bottles per minute. It was also known to the Government that approximate capital investment for the project was around Rs.27.50 crores. Being fully informed of these facts, the Government agreed to grant incentives and subsidies to the appellant which were applicable to the "prestigious units" as per new Industrial Policy (1998-2003) from the date of commercial production i.e. from the end of March, 2000. Thus the Government also, after considering the proposal at various levels, came to the conclusion that the plant for manufacture and bottling of soft beverages being set up by the appellant with an investment of about Rs.27.50 crores was entitled to the package of incentives promised to the "prestigious units" in the new Industrial Policy. After the Memorandum of Understanding was signed and the industrial unit set up at a cost of over Rs. 27 crores, the Government appears to have changed its mind and, in our view unreasonably.

This takes us to the next question as to whether the industrial unit set up by the appellant qualifies as a "prestigious unit" in terms of SRO No.247 dated August 20, 1998. We have earlier reproduced the aforesaid Notification. The Notification contemplates a "prestigious

unit" as being one which has a capital investment of Rs.25 crores or more. Neither the aforesaid Notification nor the Industrial Policy itself prescribes the date by which the investment of Rs.25 crores must be made. It is not the case of the State that if the commercial production commenced by 30th September, 2000, by which date Rs. 27 crores and odd had been invested, the unit set up by the appellant would not have been entitled to be reckoned as a "prestigious unit". The objection taken is that on the date of the unit coming into production, the investment was below Rs. 25 crores, though the investment was to the tune of over Rs.27 crores by 30th September, 2000.

It will be seen from the Memorandum of Understanding that the appellant was to start manufacture of soft beverages in the existing built up accommodation by the end of March, 2000 and complete the minimum capital investment of Rs. 25 crores or more latest by 30th September, 2000. Mr. Rohtagi, learned senior counsel appearing on behalf of the State, also could not dispute the fact that the appellant had invested a sum of Rs.27.11 crores as on September 30, 2000. This fact is admitted in the order of the Director, Industries and Commerce dated December 12, 2000 which declared the appellant as a "prestigious unit". It also appears from the same order that the matter had been examined by the General Manager, District Industries Center, Jammu and J&K State Industrial Development Corporation Ltd. This was also supported by a certificate issued by the Chartered Accountants of the appellant which had been authenticated by the General Manager, District Industries Center, Jammu. This is also apparent from the two certificates issued by the General Manager, District Industries Center, Jammu and J&K State Industrial Development Corporation Ltd. as also from the communication dated April 25, 2000 of the Industries and Commerce Department recommending that SRO be issued permitting the appellant to avail of incentives as a "prestigious unit" from the date of commercial production. Thus it would appear that the Government took a conscious decision to permit the appellant to complete the minimum capital investment of Rs. 25 crores latest by September 30, 2000. It also appears from the letter of the Industries and Commerce Department dated April 25, 2000 that while discussing the proposal of the appellant it was felt that a liberal view needs to be taken of the policy to the extent that if the investment of Rs. 25 cores or more materializes within the maximum period of 6 months from the date of commercial production, the appellant should be given the benefits of the incentives. This proposal had the approval of the Finance department as also the approval of the Cabinet, which did not consider it as a departure from the policy announced.

All these facts, therefore, lead to the only conclusion that having considered its new Industrial Policy, and having considered the proposal made by the appellant, the Government took a conscious decision to grant the package of incentives to the industrial unit being set up by the appellant provided it went into commercial production by the end of March 2000 and made the necessary investment of Rs. 25 crores or more on or before September 30, 2000. The documents and material on record disclose that the Government took this decision after full discussion on all aspects of the matter, and in particular by reference to the date by which the appellant was required to invest Rs.25 crores in the industrial unit being set up by it. The State cannot be permitted to ignore its own conscious decision to permit the appellant to invest a sum of Rs. 25 crores or more by September 30, 2000. The appellant acted on the basis of the decision taken by the State Government and incorporated in the Memorandum of Understanding. The fact that Rs.25 crores was invested by September 30, 2000 was not disputed in the several counter-affidavits filed before the High Court. In view of the voluminous evidence on record the State cannot dispute the fact that over Rs.27 crores was

invested by the prescribed date i.e. by September 30, 2000. In this background, the State cannot be allowed to say that the incentives cannot be extended to the industrial unit set up by the appellant because the amount of Rs.25 crores or more was not invested by the date the unit went into commercial production, though the amount of Rs.27 crores was invested within the period prescribed by the Government as incorporated in the Memorandum of Understanding.

We, therefore, find no substance in the objection of learned senior counsel appearing on behalf of the State of Jammu and Kashmir that the appellant had not fulfilled the requirement of making the investment of Rs.25 crores or more by the date it went into commercial production. As we have noticed the Government itself was of the view that within the framework of the policy formulated by it, it was permissible to prescribe a time schedule within which the investment of Rs.25 crores or more was to be made. Accordingly it required the appellant to invest a sum of Rs.25 crores or more before September 30, 2000 which the appellant did. We have also not been shown anything in the Policy or in the Notifications issued pursuant thereto, prescribing any date for the capital investment of Rs.25 crores or that within the framework of the policy, the State Government was not entitled to prescribe a date by which the investment of Rs.25 crores or more should be made.

In view of our findings that the negative list concept does not apply to prestigious industrial units and that the industrial unit set up by the appellant fulfilled all the conditions laid down in the Government's new Industrial Policy and the notifications issued in connection therewith, it must be held that the appellant is entitled to the package of benefits promised by the new Industrial Policy of the State of Jammu & Kashmir read with various notifications issued pursuant thereto.

The question as to whether the certificates issued by the SIDCO or by the Department of Industries and Commerce are valid, or whether the declaration made by the Industries and Commerce Directorate by its order dated December 12, 2000 declaring the appellant a "prestigious unit" is binding on the State Government, has no significance. The appellant having fulfilled all the conditions which it was required to fulfil is entitled to the benefits promised to "prestigious units" under the State's new Industrial Policy (1998-2003).

We, therefore, set aside the judgment and order of the High Court of Jammu & Kashmir in L.P.A. No. 73 of 2004 and allow the writ petition filed by the appellant. It is declared that the appellant is entitled to all the incentives and subsidies applicable to "prestigious units" under the New Industrial Policy published vide Government Order No. 202-IND of 1998 dated May 27, 1998 and the notifications issued pursuant thereto from the date the aforesaid unit went into commercial production. This appeal is accordingly allowed without any order as to costs.