

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 12175 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE DR.JUSTICE A. P. THAKER**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

KHUSHBU VINYL PVT LTD**Versus****STATE OF GUJARAT****Appearance:****UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2****MR UTKARSH SHARMA, ASSISTANT GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2,3****CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE DR.JUSTICE A. P. THAKER****Date : 25/02/2019****ORAL JUDGMENT****(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. By this petition, under Article 226 of the Constitution of India, the petitioners seeks the following substantive reliefs:-

“A. This Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside order dated 12.12.2017 (annexed at Annexure-A) passed by the learned Respondent No.2

B. This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ or order or directing the learned Respondents to forthwith release refund due to the Petitioners under the Textile Policy.”

2. The petitioners are engaged in the business of manufacture and sale of cotton fabrics. The Industries and Mines Department of the State of Gujarat vide Resolution No.TEX/10212/65117/T dated 25.6.2013 declared the Textile Policy which was amended by Resolution No.TEX/10213/432/T dated 11.10.2013 so as to give incentive to the textile industry in the State of Gujarat. Paragraph 5.5.1 of the resolution dated 25.6.2013 of the Industries and Mines Department which is relevant of the present purpose reads as under:-

“5.5.1 Refund of VAT paid by the unit on purchase of intermediate product/raw material except for certain goods and certain transactions which are not eligible for tax credit under the Gujarat VAT Act, 2003 and remission of VAT/CST collected on end product/intermediate product within entire value chain from cotton to Garment and on end made ups to the extent of 100% the eligible fixed capital investments in plant & machinery made within one year (two years in case of investment more than 500 crores) from the date of production or during the operative period of the scheme whichever is earlier.”

2.1 By an amendment dated 11.10.2013, the word “remission” was replaced by the word “reimbursement”. In nutshell, the scheme is that a dealer is entitled to the benefits of the policy on the basis of eligible investment made in the textile industry. While the dealer is entitled to refund of tax paid on purchase of raw material and intermediate products, he is entitled to claim reimbursement from the Industries Department of output tax paid on sales.

2.2 The Finance Department of the State of Gujarat issued a notification dated 11.10.2013 to implement the Textile Policy as declared by the Industries and Mines Department. The petitioners established a new unit for manufacture and sale of technical textiles for which investment of Rs.20.11 crore was made in plant and machinery and other assets considered to be eligible under the textile policy. While the petitioners have actually started production on 14.7.2013, they were granted eligibility certificate for the period from 14.7.2013 to 13.7.2021 on 23.12.2014. On the basis of the said eligibility certificate, the Deputy Commissioner of Commercial Tax granted Certificate of Entitlement to the petitioners under the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as the “GVAT Act”) on 7.3.2015 for the period from 2013-14 to 2020-21.

2.3 Since the eligibility certificate as well as the certificate of entitlement was granted to the petitioners rather belatedly, the petitioners were discharging tax liability under the GVAT Act as a normal dealer by claiming input tax credit on tax paid on purchases and adjusting the same against output tax

liability.

2.4 The Commercial Tax Officer issued show cause notice dated 1.10.2015 to the petitioners alleging that as per the textile policy, the petitioners being eligible units from 14.7.2013 were required to claim refund of tax paid on purchases from the Value Added Tax Department and pay full output tax liability and claim refund of such amount from the Industries Department. Since the petitioners had claimed and adjusted input tax credit against output tax liability, they were defaulters of tax and, therefore, their registration certificate was liable to be cancelled.

2.5 Simultaneously, on the same date, the petitioners were issued notice in Form 401 requiring production of accounting and registration records as well as bank account details. The petitioners provided on-line bank details to the Value Added Tax Authorities by a letter dated 6.10.2015.

2.6 In response to the show cause notice, the petitioners gave their reply dated 8.12.2015 pointing out that they were initially not aware that the textile policy required payment of tax at the first instance and thereafter, claim of refund and, therefore, they had discharged tax liability as a normal dealer. It is the case of the petitioners that this was more particularly because the eligibility certificate and certificate of entitlement were granted to the petitioners belatedly. They, however, submit that they were in any case entitled to refund of Rs.97,07,397/- under the textile policy and if such refund was forthwith granted to the petitioners then they would be in a position to immediately discharge their tax liability under the

GVAT Act.

2.7 The Commercial Tax Officer, however, issued recovery notice dated 9.10.2015 for recovery of alleged dues of Rs.2,09,45,536/- under section 44 of the GVAT Act. A further show cause notice dated 30.10.2015 came to be issued by the Commercial Tax Officer alleging that since the petitioners had claimed input tax credit paid on purchases, they are not entitled to refund of such tax. Thus, while on the one hand refund was sought to be disallowed on the ground that input tax credit had been claimed by the petitioners, by the very same notice, the petitioners were asked to pay output tax liability without benefit of input tax credit since as per the respondents this was the requirement of the textile policy. The petitioners immediately responded by a letter dated 3.11.2015 pointing out that the entire situation had arisen because the certificate was actually granted to the petitioners only on 7.3.2015. The petitioners thereafter, made a representation in this regard to the State Government pleading that their only error was that they by bona fide mistake continued to pay tax as a normal dealer for a very short period from 1.4.2015 to 31.7.2015 after the issuance of certificate. The petitioners submitted that they were facing financial difficulty and requested to allow some time for making payment of tax for such short period. The petitioners also required the respondents not to cancel the registration certificate granted under the GVAT Act.

2.8 By an order dated 3.12.2015, the Commercial Tax Officer cancelled the registration of the petitioners under the GVAT Act on the ground of default in payment of tax dues. The

petitioners immediately preferred a first appeal before the Deputy Commissioner of Commercial Tax on 5.12.2015 challenging the said order dated 3.12.2015.

2.9 The petitioners thereafter approached the Commissioner of Commercial Tax requesting for grant of installments for paying the outstanding tax dues under the GVAT Act. By a letter dated 29.12.2015 addressed to the petitioners, the Additional Commissioner of Commercial Tax called upon them to pay 30% of the outstanding dues within seven days and thereafter appear in person before him for hearing on grant of installments. In the meantime, the Commercial Tax Officer issued recovery notice to the petitioners on 6.1.2016 for outstanding dues for the year 2013-14.

2.10 The petitioners immediately responded by a letter dated 16.1.2016 informing the said officer about the pending application for installments and requested him to keep the recovery proceedings in abeyance till such application was decided. In view of the application for installments filed by the petitioners, the Additional Commissioner of Commercial Tax instructed the subordinate officer to attach the property of the petitioners for protecting the interest of the revenue. Thereafter in compliance with the requirement of making pre-deposit of 30% of outstanding dues stipulated by the Commissioner, the petitioners made payment of Rs.93,85,271/-. On such basis, the petitioners were granted benefit of six monthly installments for the remaining dues for which the petitioners were required to give post-dated cheques. Accordingly, the petitioners deposited post-dated cheques on 20.1.2016. Keeping in view the order of the

Commissioner of Commercial Tax granting installments to the petitioners, the first appellate authority allowed the first appeal preferred against the order cancelling the registration certificate of the petitioners. Accordingly, the registration number was ordered to be restored with effect from the date of cancellation.

2.11 Immediately thereafter on 28.1.2016, the Commercial Tax Officer issued a garnishee notice under section 44 of the GVAT Act to the petitioners' bank for recovery of alleged dues of Rs.79,36,350/-. Thereafter another notice dated 28.1.2016 was issued to the petitioners once again proposing to cancel the registration certificate of the petitioners. The petitioners wrote a letter to the Commercial Tax Officer on 5.2.2016 informing him that they were entitled for refund under the textile policy for the years 2013-14 to 2015-16 for which they submitted necessary details and requested him to expedite the process of release of refund. The Commercial Tax Officer thereafter withdrew the bank attachment by an order dated 11.2.2016.

2.12 It is the case of the petitioners that apart from the refund of tax paid on purchases which was to be obtained from the Finance Department, the textile policy also required the Industries Department to reimburse the amount of output tax paid on sales by eligible units. At the instance of the petitioners, the Assistant Commissioner of Commercial Tax addressed a letter to the Additional Commissioner of Industries on 1.3.2016 setting out the details of the amount of tax paid by the petitioners for which reimbursement could be claimed. The Additional Commissioner of Industries responded by a

letter dated 19.3.2016 claiming that reimbursement could be given only on the basis of yearly certificates of entitlement and the Assistant Commissioner of Commercial Tax was requested to send such yearly certificates. Accordingly, the Assistant Commissioner of Commercial Tax submitted another statement dated 22.3.2016 to the Industries Department. Thereafter, by an order dated 30.3.2016, the Industries Department ordered release of 75% of the total refund claim of the petitioners.

2.13 Thereafter, the Government took a decision that in cases such as that of the petitioners wherein because of belated grant of certificate of entitlement, the eligible dealers had discharged liability as a normal dealer, the refund of input tax credit utilised for making payment of tax would be granted by the Industries Department. On the basis of such decision taken by the Government, on 11.5.2016, the Assistant Commissioner of Commercial Tax forwarded a statement to the Additional Commissioner of Industries showing refund of input tax credit which was due to the petitioners for the years 2013-14 and 2014-15 amounting to Rs.1,22,84,766/- and Rs.81,65,072/-. It is the case of the petitioners that they were anticipating immediate release of the refund claim since they were facing severe financial crunch because of which they were unable to pay the tax dues under the GVAT Act and the Central Sales Tax Act.

2.14 While on the one hand, the Industries Department did not process the refund claim of the petitioners, on the other hand, the Commercial Tax Officer again issued a notice proposing to cancel the registration certificate of the

petitioners on 24.5.2016 on the ground that tax dues totally amounting to Rs.1,58,09,073/- were outstanding. On 10.6.2016, the petitioners submitted an application claiming refund of input tax amounting to Rs.2,10,48,921/- for the period from 1.1.2016 to 31.3.2016. Since the petitioners were not able to immediately make payment of outstanding dues due to severe financial crunch and because of the fact that refund was not released in time by the Industries Department as well as the Finance Department, by an order dated 14.6.2016 the registration certificate of the petitioners came to be cancelled with effect from 1.6.2016.

2.15 Against the said order, the petitioners preferred a first appeal before the Deputy Commissioner of Commercial Tax on 23.6.2016, who required the petitioners to submit challan showing payment of outstanding tax. The petitioners conveyed to the first appellate authority that their refund claim was higher than the outstanding dues and, therefore, the registration certificate was eligible to be restored. The departmental authority, however, orally conveyed to the petitioners that the refund claim had been rejected. Since the petitioners had not received any order regarding such rejection, the petitioners addressed a letter dated 20.8.2016 to provide such order passed, if any.

2.16 It is the case of the petitioners that they had noticed that they had erroneously claimed input tax credit in the year 2015-16 which was not admissible to them as per the provisions of the textile policy and, therefore, on their own volition admitted such error because of which they would also become eligible to pay additional tax amount of

Rs.1,43,03,621/- and Rs.15,05,452/- under the GVAT Act and the Central Sales Tax Act respectively. It is the case of the petitioners that however, correspondingly they were entitled to an equivalent amount of refund. The petitioners submitted revised returns in this regard by a letter dated 24.8.2016.

2.17 The Additional Commissioner of Industries approached the Additional Commissioner of Commercial Tax on 3.11.2016 requiring some clarifications in respect of refund claim of input tax in the case of the petitioners. In the meantime, assessment orders were passed for the years 2011-12 and 2012-13 whereby further dues of approximately Rs.2.30 crore were assessed in the case of the petitioners. The Assistant Commissioner of Commercial Tax addressed a letter to the Additional Commissioner of Industries on 17.1.2017 intimating him that the petitioners were in default of certain admitted as well as assessed tax liability and since refund of approximately Rs.5 crore was due to the petitioners from the Industries Department the same may be disbursed to the Value Added Tax Department towards the outstanding liability of the petitioners.

2.18 On 10.2.2017, the petitioners submitted before the Commercial Tax Officer that the petitioners were unable to make payment of tax primarily because of non-release of refund from the Industries Department as well as the Value Added Tax Department because of which the petitioners were facing severe financial crunch. It was also submitted that insofar as the tax dues for the years 2011-12 and 2012-13 were concerned, the petitioners had challenged such dues in appeal and hence, they were yet to attain finality. The

petitioners requested that the matter be put to an end by adjusting the total refund claim against the crystallised tax liabilities.

2.19 The petitioners further submitted refund claim under the textile policy on 17.3.2017 by way of reimbursement of output tax liability from the Industries Department and the Commercial Tax Officer was requested to give certificate in this regard to the Industries Department. The petitioners further followed up with the Industries Department regarding the release of the old refund claims. A letter requesting release of refund was again addressed to the Commercial Tax Officer on 7.6.2017. The petitioners also requested the Deputy Commissioner of Commercial Tax to give necessary clarification in respect of query raised by the Industries Commissioner so that refund could be released to the petitioners at the earliest. On the same day, the Commercial Tax Officer gave clarification in this regard to the Deputy Commissioner, a copy of which was marked to the petitioners.

2.20 The Assistant Commissioner of Commercial Tax forwarded further claim of refund amounting to Rs.79,64,378/- admissible to the petitioners under the textile policy for the year 2015-16 to the Additional Commissioner of Industries vide a letter dated 23.6.2017. The Commercial Tax Officer again wrote a letter to the Commissioner of Industries on 31.7.2017 to adjust the refund of the petitioners towards the outstanding assessed dues of the petitioners for the years 2011-12 and 2012-13. It is the case of the petitioners that even though the Commercial Tax Department was aware that the petitioners were not able to discharge the tax liability under the GVAT Act

in time due to lethargy shown by the Industries Department in disbursing refund claim, on 27.9.2017, the Deputy Commissioner of Commercial Tax issued a show cause notice to the petitioners requiring the petitioners to show cause as to why the certificate of entitlement granted to the petitioners should not be cancelled *ab initio*. The petitioners responded to the show cause notice by a detailed reply dated 14.11.2017, wherein it was stated that the petitioners were unable to make payment of outstanding dues only because of non-release of refund by the Industries Department as well as the Value Added Tax Department. While it was conveyed by the Value Added Tax Department that the refund claim of the petitioners had been rejected, no order in this regard was served upon the petitioners. The petitioners, therefore, submitted that the certificate of entitlement to the petitioners was not liable to be cancelled. However, by order dated 17.11.2017 the certificate of entitlement of petitioners came to be suspended.

2.21 Thereafter, on 22.11.2017, another recovery notice was issued by the Commercial Tax Officer to the Industries Department for adjustment of refund dues from the Industries Department towards the petitioners' liability under the GVAT Act. By the impugned order dated 12.12.2017, the Commercial Tax Officer proceeded to cancel the certificate of entitlement on the ground of outstanding dues of the petitioners. In the said order, reference was made to an appeal order rejecting the appeal filed against cancellation of registration certificate though the petitioners had not received any such order. The petitioners, therefore, made inquiry with the departmental authorities in this regard. The departmental authorities, however, conveyed to the petitioners that such

order was served upon the petitioners. Thereafter upon an application made by the petitioners, a duplicate copy of the order cancelling registration certificate was served upon the petitioners on 14.5.2018. The first appellate authority dismissed the first appeal on the ground that the petitioners could not pay outstanding dues under the GVAT Act. In the meantime, the first appeals filed by the petitioners against the assessment orders for the years 2012-13 came to be summarily rejected by the first appellate authority. The petitioners filed second appeal against such rejection of first appeal. The appeal came to be admitted by the Gujarat Value Added Tax Tribunal and stay came to be granted against the assessed dues on condition of pre-deposit of Rs.7,00,000/-. The petitioners have complied with the condition of pre-deposit on the basis of which the stay order has come into operation.

2.22 It is the case of the petitioners that the Deputy Commissioner of Commercial Tax has erred in retrospectively cancelling the certificate of entitlement of the petitioners on the ground of outstanding dues under the GVAT Act. It is the case of the petitioners that the dues are outstanding only because of extreme lethargy and inaction on the part of the Industries Department in releasing refund due under the textile policy. According to the petitioners, in fact, refund is due even under the GVAT Act in respect of input tax in connection with which the petitioners had duly filed an application. It is the case of the petitioners that cumulatively the refund due to the petitioners from the Industries Department and Value Added Tax Department is higher than the outstanding dues of the petitioners and even if the outstanding dues are recovered, the same would ultimately be required to be reimbursed to the

petitioners under the textile policy and that part of the dues referred to under the impugned order was subsequently stayed by the Tribunal. In such circumstances, the retrospective cancellation of the certificate of entitlement of the petitioners is arbitrary and illegal.

2.23 It is further the case of the petitioners that the first appellate authority had only prospectively cancelled the registration certificate on the ground of pending dues of the petitioners, however, retrospective cancellation of certificate of entitlement on the basis of prospective cancellation of registration certificate has led to a catastrophic situation for the petitioners inasmuch as the petitioners were hoping to get the registration certificate restored on release of refund under the textile policy which will not be possible now because of retrospective cancellation of certificate of entitlement.

2.24 In the aforesaid backdrop and being aggrieved by the order dated 12.12.2017 cancelling their entitlement certificate, the petitioners have filed the present petition seeking the reliefs noted hereinabove.

3. Mr. Uchit Sheth, learned advocate for the petitioners submitted that the entire situation has arisen because of non-disbursement of refund validly due to the petitioners and that the retrospective cancellation of certificate of entitlement on the ground of alleged tax arrears is arbitrary and illegal. Elaborating upon the said submission, it was submitted that the petitioners had made investment of Rs. 20.11 crore relying on the promise of granting incentives by the Government of Gujarat under the Gujarat Textile Policy 2012. While the

commercial production of the petitioners started on 14.7.2013, the eligibility certificate was granted by the Industries Department on 24.12.2014 and the Finance Department granted certificate of entitlement on 7.3.2015 with retrospective effect from 14.7.2013. It was submitted that thereafter there was an impasse regarding the mode of operating the scheme for the interregnum period between effective date of certificate of entitlement and the actual date of issuance of such certificate inasmuch as the dealers had filed returns as normal dealers since eligibility/entitlement certificate was yet to be granted. Ultimately on 4.10.2017, by way of an addendum to the policy, it was formally declared that only net tax would be payable for such interregnum period and that refund of input tax credit as well as the net tax paid would be granted by the Industries Department. However till date, such refund has not been released by the Industries Department. It was urged that even for the subsequent period, the petitioners are clearly entitled to refund of tax paid on purchases of raw materials used in the manufacturing process; however, the Finance Department has not released a single rupee of such refund till date nor have they given any explanation for non-release of such refund. It was submitted that retrospective cancellation of certificate of entitlement by the impugned order on the ground of arrears of tax dues under the GVAT Act without taking into consideration the huge refund due to the petitioners under the GVAT Act is arbitrary, bad and illegal.

3.1 Next, it was submitted that in an investment linked incentive scheme, the Government is bound to give incentives

under principle of promissory estoppel and promise cannot be ordinarily resiled from. The petitioners made investment of Rs. 20.11 crore relying on the promise given by the Government that they would timely grant refund/reimbursement to the petitioners and acting on such promise, the petitioners made such huge investment. The petitioners arranged their affairs taking into consideration the fact that they would have practically no tax liability on purchases as well as sales. Thereafter for a substantial period of time the eligibility certificate/certificate of entitlement was not granted to the petitioners by the Government. Even after such certificate was granted, the Government failed to release any refund for the years 2013-14 and 2014-15. Even for the subsequent period, while the Industries Department has granted partial reimbursement, the Finance Department has yet not given any refund of tax paid on purchases. It was urged that because of pendency of such huge claim of refund, the petitioners suffered extreme financial duress because of which they were unable to make payment of outstanding tax. It was contended that in such facts and circumstances it is not permissible for the Government to retrospectively cancel the certificate of entitlement on the ground of tax arrears. It was contended that the Government is bound to act upon their promise of granting refund as per the incentive scheme. It was submitted that it was because of non-release of refund by the Government under the scheme that the petitioners were unable to make payment of tax. It was submitted that it is extremely inequitable on the part of the Government to resile from its promise of granting refund by retrospectively cancelling the certificate of entitlement on the ground of tax arrears when such arrears were a result of inaction and lethargy on the part

of the Government in releasing refund validly due to the petitioners. It was submitted that it is by now well settled that when the Government gives a promise on the basis of which a person alters his position then the Government cannot resile from its promise in the absence of any contention that public interest is likely to be grossly prejudiced if the promise is enforced. In support of such submission, the learned advocate for the petitioners placed reliance upon the decision of the Supreme Court in the case of **Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh**, (1979) 44 STC 73 (SC), wherein the court has held that the law is well settled that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. The court held that it is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception.

3.2 It was further submitted that the provisions of the textile policy and the notifications issued thereunder being investment linked incentive scheme have to be read liberally. It was submitted that the textile policy provides for investment based incentives scheme. Therefore, the provisions of the said

policy and the notifications issued thereunder have to be read liberally and for furtherance of the objectives of the textile policy which is to promote the textile sector. It was submitted that the principles of strict interpretation of an exemption provision are inapplicable in such a case. In support of such submission, reliance was placed upon the decision of the Supreme Court in the case of **State of Jharkhand and Others v. Tata Cummins Ltd.** (2006) 145 STC 44 (SC), wherein the court has held that a tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the Industrial Policy, we have to read the implementing notifications in the context of the Industrial Policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the Industrial Policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute. It was submitted that, therefore, if on overall facts and circumstances it is found that the Government was guilty of disobeying the mandate of granting timely refund to the petitioners because of which the petitioners defaulted in making payment of tax, then the Government cannot be allowed to use such default for denying the benefit of the incentive scheme to the petitioners and that too, with retrospective effect.

3.3 Next, it was contended that Para 7(i) and 7(ii) of the Notification dated 11.10.2013 issued by the Finance department for implementing the textile policy of the Industries Department has to be read in consonance with the provisions of the textile policy. It was submitted that the notification is subservient to the textile policy and in fact must yield to the provisions of the parent policy. In support of his submission, the learned advocate placed reliance upon the decision of the Supreme Court in the case of **State of Bihar v. Suprabhat Steel Ltd. and Others**, (1999) 112 STC 258 (SC), wherein the court held thus:-

"7. Coming to the second question, namely the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the Incentive Policy itself. The Industrial Incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the industrial policy itself. In this view of the matter, any notification issued by the Government order in exercise of power under Section 7 of the Bihar Finance Act, if is found to be repugnant to the Industrial Policy declared in a Government resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on April 4, 1994, has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly the policy engrafted in Clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of Clause 10.4(i) and

we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may over-ride the incentive policy itself. In our considered opinion the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated April 4, 1994."

3.4 It was, accordingly, submitted that paragraphs 7(i) and 7(ii) of the notification of the Finance Department which have been relied upon in the impugned order and which provide for suspension/cancellation of certificate of entitlement if the provisions of the GVAT Act are breached, have to be read in consonance with the provisions and objects of the textile policy. Therefore, paragraphs 7(i) and 7(ii) of the notification of the Finance Department can be invoked only if the breach of the provisions of the GVAT Act has the effect of frustrating the object and purpose of the textile policy. For example, if a fraudulent dealer tries to take undue benefit of the policy by issuing bogus bills and claiming refund/reimbursement, then the certificates of entitlement granted to such dealer can be revoked by relying upon paragraphs 7(i) and 7(ii). However in the facts of this case when the breach of payment of tax has occurred because of non-release by the Industries and Finance Department of refund of tax paid on purchases, the respondent authority has erred in retrospectively cancelling the certificate of entitlement on the ground of arrears of tax.

3.5 Next, it was submitted that it is an admitted position that the eligibility certificate issued by the Industries Department is still in force and, therefore, the Industries Department still considers the petitioner to be an eligible unit under the textile policy. According to the learned advocate for the petitioners, all the departments of the Government are required to speak in one voice. Since in the case of the present incentive scheme, the parent policy is floated by the Industries Department, the voice of the Industries department is paramount and, therefore, the Finance Department cannot take a contrary stand by retrospectively cancelling the certificate of entitlement even though the eligibility certificate is still in force. Reliance was placed upon the decision of the Supreme Court in the case of **Vadilal Chemicals Ltd. v. State of Andhra Pradesh**, (2005) 142 STC 76 (SC), wherein the court followed the principles settled in *M.R.F. Ltd.* (2006) 148 STC 225, and held that as the petitioner-company has made substantial investment and in fact enjoyed tax benefits for certain periods, the impugned action of the opposite parties holding that the petitioner's industrial unit is not entitled to the exemptions in terms of entry 43A of the Sales Tax Exemption Notification dated July 26, 1996 of the Finance Department is absolutely arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

3.6 The next contention advanced by the learned advocate for the petitioners was that the central sales tax liability cannot be taken into consideration for the purpose of cancellation of certificate of entitlement. Elaborating upon such submission, it

was submitted that the authorities while arriving at the figure of alleged demand for the purpose of passing the impugned order, have taken into consideration unpaid dues under the Central Sales Tax Act, 1956. Admittedly the Central Sales Tax Act is outside the purview of the textile policy and in fact reference to central sales tax appearing in the policy was expressly deleted by the amendment dated 11.10.2013. Even paragraphs 7(i) and (ii) of the notification of the Finance Department which have been relied upon for passing the impugned order refer to contravention of the provisions of the GVAT Act and the rules made thereunder and hence, the authorities have grievously erred in taking into consideration dues under the Central Sales Tax Act while passing the impugned order.

3.7 It was submitted that insofar as the value added tax dues are concerned, part of the alleged dues as computed in the impugned order have been admittedly stayed by Tribunal. The remaining dues are much lower than the refund due to the petitioners and, therefore also, the authority has grievously erred in retrospectively cancelling the certificate of entitlement of the petitioners.

3.8 It was submitted that even if the petitioners had paid the alleged tax liability they would have been entitled to reimbursement of such amount from the Industries Department under the policy. Hence, the petitioners had no reason to willfully commit default in payment as they had nothing to gain from the default. In fact, the Government never intended to recover any tax from dealers eligible under the

textile policy. The entire tax paid to selling vendors on purchases was to be refunded to the eligible unit by the Finance Department while the output tax paid was required to be reimbursed by the Industries Department. The procedure of refund/reimbursement was probably devised only for accounting purpose and the tax liability was practically only notional inasmuch as whatever tax was paid by the eligible unit was required to be refunded/reimbursed. It was submitted that the entire mechanism would however work only if refund of tax paid on purchases was given as promised since the eligible units such as the petitioners would not consider tax element as a cost while arranging their affairs relying on the promise of the Government. It was emphatically argued that the petitioners have landed in difficulty because of reluctance on the part of the authorities to disburse refund validly due to them. It was urged that cancellation of certificate of entitlement of the petitioners on the ground of tax arrears even though ultimately the said amount of tax was to be reimbursed to the petitioners is mechanical, arbitrary and illegal.

3.9 The learned advocate for the petitioners has put forth an alternative contention without prejudice to the contentions advanced hereinabove, to the effect that retrospective cancellation of the certificate of entitlement is arbitrary, bad and illegal. It was submitted that although the registration certificate under the GVAT Act was cancelled by an order dated 14.6.2016, second appeal against the same is pending before the Tribunal, and the effective date of cancellation of such registration is admittedly 1.6.2016. It was submitted that

retrospective cancellation of certificate of entitlement on the basis of prospective cancellation of registration certificate is mechanical, arbitrary, bad and illegal. In support of such submission, the learned advocate placed reliance upon the decision of the West Bengal Taxation Tribunal in the case of **PCM Tea Processing Pvt. Ltd. v. Assistant Commissioner of Commercial Taxes**, (2011) 43 VST 411 MBTT), wherein after referring to number of decisions of different courts, it was concluded that retrospective cancellation of eligibility certificate already issued to a dealer was illegal.

3.10 It was submitted that the petitioners are facing huge tax liability because of the fact that the Government did not grant refund as envisaged under the textile policy. The registration certificate of the petitioners under the GVAT Act was also cancelled with effect from 1.6.2016 because of such reason. The petitioners were hoping for release of such refund based on which they would seek restoration of registration certificate from the appellate forum. However, retrospective cancellation of certificate of entitlement by the impugned order has led the petitioners into a vicious circle inasmuch as now they no longer remain entitled to refund under the incentive scheme and hence, the petitioners will also not be in a position to get the registration certificate restored. It is for this reason that the petitioners seek intervention from this court under Article 226 of the Constitution of India.

3.11 Mr. Sheth further pointed out that in the affidavit-in-reply it has been repeatedly alleged that the petitioners filed erroneous returns under the GVAT Act and are, therefore,

guilty of misrepresentation. It was submitted that such allegation is contrary to the facts and that such allegation was never made in the show cause notice nor is it the basis of the impugned order. It was submitted that, therefore, the respondents cannot seek to improve upon the order passed on the basis of the averments made in the affidavit-in-reply. It was contended that in any case section 33 of the GVAT Act permits dealers to correct errors committed in the monthly returns while filing self assessment annual returns. The annual returns filed by the petitioners are in accordance with law and errors committed in some of the returns have already been rectified.

3.12 In conclusion, it was urged that the petition deserves to be allowed by granting reliefs prayed for therein.

4. Opposing the petition, Mr. Utkarsh Sharma, learned Assistant Government Pleader for the respondents, submitted that the petitioners have not cleared their dues and could not comply with the conditions of the policy and, therefore, the certificate of entitlement has been cancelled. It was further submitted that by an order dated 12.12.2017, the registration number of the petitioner has also been cancelled. It was submitted that the registration under the GVAT Act has been cancelled with effect from 2016, which indicates that there has been persistent breach of the provisions of the GVAT Act and, therefore, the impugned order which is passed on the basis of clauses 7(i) and 7(ii) of the Notification dated 11.10.2013 is duly substantiated. It was submitted that there is a breach in fulfilling the conditions under the scheme as well as the provisions of the GVAT Act.

4.1 The learned Assistant Government Pleader also placed reliance upon the averments made in the affidavit-in-reply of the second respondent, wherein it has been stated that to get the benefit of output tax, the dealer has to first pay the amount to the Government treasury and thereafter it will be reimbursed to him. Such reimbursement was given by the Industries Department after due certificate was given by the Value Added Tax Department. As per the policy to get refund on purchases it is a pre-condition that a dealer should not avail tax credit. Such refund was to be granted by the Value Added Tax Department and not the Industries Department. It is further averred that after revision, the policy came into force on 25.6.2013. The eligibility certificate was granted by the Industries Department on 24.12.2014 with effect from date of production, that is, 14.7.2013. Thereafter, the entitlement certificate was granted by the VAT Department on 7.3.2015. However, the certificates were from the date of production. Therefore, from 14.7.2013, the petitioner was eligible for benefit of incentives upto eight years. However, in the years 2013-14 and 2014-15, the petitioner filed the return as normal dealer. Therefore, a question arose as to how the benefit of incentive would be given for the interregnum period between the date of policy and grant of entitlement certificate. During such interregnum period, the petitioners had filed returns as normal dealer even though they were entitled for benefit of incentive under the policy. For such period, an addendum was made to the policy by the Industries Department on 4.10.2017, wherein, the dealer was supposed to get refund of ITC availed and reimbursement of difference of State tax. Further during such period the reimbursement as well as refund was to be

granted by the Industries Department. However, at this juncture when the amendment came, the registration certificate of the petitioner was already cancelled which is not restored till date. It is also averred that while the petitioner has demanded refund of input tax credit of Rs.2.04 crore for the year 2013-14 and 2014-15, the petitioner has not mentioned that there is a liability of Rs.49,22,047/- under the CST Act for the year 2013-14 and Rs.55,59,662/- for the year 2014-15 also under the CST Act. Such liability is as per self assessment returns wherein the tax is collected by the petitioner from various dealers but has not been paid in the Government treasury till today.

4.2 It is also averred in the affidavit-in-reply that for the year 2015-16, the petitioner had to file return as per incentive dealer; however, the petitioner had defaulted. After default, the petitioner was given option to make payment as per installments granted by the Commissioner of Commercial Tax, however, the total value added tax payable by the petitioner for claiming reimbursement was not at all paid. The petitioner had filed returns which were factually incorrect and that for the months of April 2015 to August 2015, the petitioner had adjusted input tax credit which comes to Rs.1,47,95,689/- and, therefore, the petitioner had breached the conditions of the policy. It is further stated that there is also a liability of CST of Rs.31,79,249/- for the year 2015-16 and that during the financial year 2015-16, there was a demand of Rs.26,93,440/- for assessment year 2011-12, Rs.49,22,047/- under the CST Act for the year 2013-14, Rs.55,59,662/- under the CST Act for the year 2014-15, Rs.31,29,397/- for the year 2015-16 under the CST Act. It is further averred that the petitioner was liable

to pay the dues which were crystallised amounts, however, by not making such payment, the petitioner has violated clause 7(i) of the textile policy. The petitioner was also liable to pay Rs.1,35,80,606/- under the GVAT Act for the year 2015-16 in order to get the benefit of reimbursement. The petitioner had to pay the crystallised dues before taking any benefit of reimbursement or refund and that it was incumbent upon the petitioner to make good the defects before taking any benefit under the policy. It is further pointed out that the registration certificate of the petitioner has been cancelled on 14.6.2016 and that if at all the petitioner wants to take benefit of the policy, the condition precedent is that the certificate should be revived. It is also stated that the petitioner has filed manual returns for the year 2016-17; however, there is no question of taking any benefit under the policy for the said period as the petitioner is an unregistered dealer.

4.3 The learned Assistant Government Pleader next submitted that the clarification for refund of input tax credit by the addendum came on 4.10.2017. However, to get the benefit of such refund, the petitioner would have to comply with two things. Firstly, the petitioner would have to revive its registration, and secondly, the petitioner would have to pay all crystallised dues under CST Act and the GVAT Act which are not related to the policy. It was submitted that to get such refund, the petitioner has to cure the defects by satisfying the above two conditions. In conclusion it was urged that the petition being devoid of any merit, deserves to be dismissed.

5. In rejoinder, Mr. Uchit Sheth, learned advocate for the petitioner submitted that the registration certificate of the

petitioner has been cancelled only with effect from 1.6.2016. Thus, for the period prior thereto, the petitioners are admittedly registered dealers. The addendum dated 4.10.2017 has effect of giving refund due to the petitioners for the period prior to the effective date of cancellation of registration and, therefore, the petitioners are definitely entitled to such refund. It was urged that the petitioners are caught in a vicious cycle, inasmuch as, the registration certificate cannot be revived without payment of outstanding dues, which is not possible because of non-release of refund by the Industries Department and the Finance Department under the textile policy, for which now recourse is taken by the Government to retrospective cancellation of certificate of entitlement. It was submitted that the petitioners will be able to revive the registration certificate and pay outstanding dues only if refund is released to the petitioners at least for the period prior to cancellation of registration certificate.

5.1 Mr. Sheth invited the attention of the court to the computation of Value Added Tax and Central Sales Tax payable/refundable to the petitioner year-wise as annexed along with the affidavit-in-rejoinder. It was submitted that the total payable outstanding amount as computed by the respondent is Rs.6,22,08,565/- out of which recovery of an amount of Rs.2,10,00,000/- has been stayed by the Tribunal. The central sales tax dues are to the tune of Rs.1,36,73,870/-. It was submitted that if this amount is deducted from the total amount, the outstanding value added tax dues come to around Rs.2.75 crore approximately. It was submitted that the Commercial Tax Officer in the communication to the Industrial Officer has asked him to pay over Rs.5 crore due and payable

to the petitioners to the Commercial Tax Department towards the tax dues of the petitioners. It was submitted that, therefore it is evident that the amount payable by the respondents to the petitioners by way of refund/reimbursement is far more than the tax dues payable by the petitioners. It was submitted that on account of the manner in which the textile policy has been operated by the respondents, the petitioners have been caught in a vicious circle. It was, accordingly, urged that the petition be allowed by granting the reliefs as prayed for in the petition.

6. From the facts and contentions noted hereinabove, it emerges that in terms of the textile policy, a dealer was entitled to refund of tax paid on purchase of raw material and intermediate products from the Commercial Tax Department and was entitled to claim reimbursement of output tax paid on sales from the Industries Department. In the case of the petitioners, actual production started on 14.7.2013, whereas the eligibility certificate was granted on 23.12.2014 for the period from 14.7.2013. Since the date when the actual production started, the petitioners did not have the eligibility certificate, they continued to discharge tax liability under the Gujarat Value Added Tax Act, 2003 as a normal dealer and claimed input tax credit by adjusting the same against output tax liability.

7. A show-cause notice dated 1.10.2015 came to be issued to the petitioners that since they were eligible unit since 14.7.2013 they were required to claim refund of tax paid on purchases from the Value Added Tax Department and pay full output tax liability and claim refund from the Industries

Department. In other words, for the period from 14.7.2013, the petitioners could not have adjusted the input tax credit against the output tax liability. A show cause notice was issued to the petitioners for outstanding tax for 14.7.2013 to 31.7.2015. The contents of the show cause notice to the extent the same are relevant for the present purpose, as translated into English reads thus:

“In accordance with the Notification dated 11.10.2013, refund is required to be paid to you of the input tax on the textile goods purchased by you from the registered dealers under tax invoices. Hence, credit of such tax is not required to be taken against tax payable by you. Besides you have made textile sales. You were required to pay VAT payable thereon. On which you are required to obtain refund from the Industries Department.

During the above period, you have availed of credit for tax paid on the purchased goods against the tax payable by you. Also you have not paid any tax during that period due to which you are also a defaulter in respect of challans for more than three weeks. Therefore, you are informed to pay the entire tax by 8.10.2015, failing which an ex parte decision shall be taken.”

8. Thus, by virtue of the above notice, the petitioners are called upon to discharge the output tax liability which was paid against the input tax credit on the goods purchased by it for the period 14.7.2013 to 31.8.2015, which the petitioners would otherwise not have been liable to pay under the normal

provisions.

9. According to the petitioners, at the time when the show cause notice was issued they were entitled to refund of Rs.97,07,397/- under the textile policy and if such refund would have been granted forthwith, they would have been able to discharge the tax liability immediately. The Commercial Tax Officer issued a recovery notice dated 9.10.2015 for recovery of Rs.2,09,45,536/- under section 44 of the GVAT Act. Subsequently, a show cause notice dated 30.10.2015 came to be issued by the Commercial Tax Officer alleging that since the petitioners claim input tax credit paid on purchases, they are not entitled to refund of such tax. The show cause notice dated 30.10.2015, as translated into English reads thus:

“Sub: Outstanding tax dues from 14.7.2013 to 31.8.2015.

In accordance with the notification dated 11.10.2013 refund is required to be paid to you of the input tax on the textile goods purchased by you from registered dealers under tax invoices. Hence, such credit of tax is not required to be taken against tax payable by you. Besides you have made taxable sales. You were required to pay VAT payable thereon, on which you are required to obtain refund from the Industries Department.

By your reference letter No.2 you have requested for refund of Rs.97,07,397/- for 2013-14 which you have still not received. In this regard, you are informed that under the said policy input tax credit cannot be adjusted

against output tax liability. However, this office is required to make scrutiny before making refund of the tax. In terms of all the statements for 14.7.2013 to 31.7.2015 against the input tax payable to you have adjusted the output tax payable by you, hence, no refund is payable to you. Moreover, you have received the eligibility certificate under the scheme on 7.3.2015. Thereafter also, you have adjusted the input tax credit against the output tax liability and have not paid output tax liability, due to which there is a breach of the Gujarat Textile Policy 2012.

Moreover, you have submitted that you will pay outstanding tax payable by you within fifteen days, but till date you have paid only Rs.5,26,213/-.

You are informed to pay the entire outstanding tax dues together with interest by 5.11.2015 as a last chance, failing which your registration certificate shall be cancelled ex parte."

10. Thus, on the one hand by the show cause notice dated 1.10.2015, the petitioners are called upon to pay the output tax liability for the period prior to issuance of eligibility certificate for the reason that such certificate was given with effect from 14.7.2013 and, therefore, they were required to pay the full amount of output tax liability and then claim refund, on the other hand by an order dated 3.12.2015, the registration certificate came to be cancelled. Thereafter, the Additional Commissioner of Commercial Tax addressed a communication dated 29/31.12.2015 to the petitioner

providing facility for payment of installments whereby 30% was to be paid immediately together with interest and hearing on facility for installments after such payment was made, was granted. Thereafter, by a communication dated 19.1.2016 of the Commissioner of Commercial Tax addressed to the Assistant Commissioner of Commercial Tax, facility of payment by six installments was granted to the petitioners in accordance with which six post-dated cheques were required to be furnished by the petitioners. Accordingly, the petitioners issued post-dated cheques in terms of the said communication. Thereafter, by an order dated 21.1.2016, the registration of the petitioners came to be restored from the date on which it was cancelled. Soon thereafter, by a notice dated 28.1.2016 the petitioners were called upon to pay the pending dues of Rs.79,36,350/- with interest thereon within a period of seven days and to submit a receipt/challan evidencing payment thereof. Simultaneously, another notice dated 28.1.2016 came to be issued to the petitioners in Form-104 under sub-section (5A) of section 27 of the GVAT Act calling upon them to show cause as to why their registration certificate should not be cancelled. By a communication dated 5.2.2016, the petitioners submitted all details of tax paid by them for the purpose of availing refund for the period 2013-14, 2014-15 and 2015-16. By a communication dated 1.3.2016, the Assistant Commissioner of Commercial Tax forwarded the refund claim of the petitioners for the period 2014-15 to 2015-16 to the Additional Commissioner of Industries in terms whereof the amount payable as reimbursement was to the tune of Rs.92,77,558/- for 2014-15 and Rs.1,13,89,237/- for 2015-16. By an order dated 30.3.2016 passed by the Additional Industries Commissioner (Expansion), reimbursement of

Rs.80,95,305/- was granted to the petitioners which was part of the refund claim. By a communication dated 11/16.4.2016 of the Additional Commercial Tax Officer (Administration) addressed to the Joint Commissioner of Commercial Tax, it was stated that the reimbursement of ITC shall be made by the Industries Commissioner. By a letter dated 11.5.2016, the Assistant Commissioner of Commercial Tax forwarded details of the amount that the department was liable to reimburse to the petitioner to the Industries Commissioner. Accordingly, a statement showing the amount of input tax credit claimed by the dealer during the period from the date of commencement of production and date of receipt of eligibility certificate/entitlement certificate under the textile policy came to be enclosed. In terms of such statement, a total amount of Rs.1,22,84,766/- was payable as reimbursement as per the eligibility certificate for the period 14.7.2013 to 30.6.2014 and an amount of Rs.81,65,072/- was payable as reimbursement as per the eligibility certificate for the period 1.7.2014 to 6.3.2015.

11. Thereafter, by another notice in Form 104 issued on 24.5.2016 under sub-sections (5) and (5A) of section 27 of the GVAT Act, the petitioners were once again called upon to show cause as to why their registration certificate should not be cancelled on account of outstanding dues of Rs.1,43,03,621/- towards GVAT dues and Rs.15,05,452/- towards central sales tax dues for the period from 1.10.2015 to 31.3.2016. By a communication dated 10.6.2016 addressed to the Deputy Commercial Tax Commissioner, the petitioners informed him that their company had filed an application for refund for the period January 2016 to March 2016 under textile incentive

scheme for input tax of local purchases. The petitioners also enclosed therewith a local purchase statement with invoice copies for the refund application period and requested him to take note of the same and finalise their refund application. By an order dated 14.6.2016 which appears to have been received by the petitioners on 18.6.2016, the registration certificate of the petitioner came to be cancelled with effect from 1.6.2016. Thus, the cancellation of registration certificate was with prospective effect.

12. Along with a letter dated 21.6.2016, the petitioners forwarded the documents required for process of refund of commercial tax paid for the financial year 2015-16 to the Deputy Commissioner, Range – 1.

13. It appears that the petitioners had filed an appeal/application dated 23.6.2016 for restoration of their registration number, in response to which, by a communication dated 27.7.2016, the Deputy Commissioner of Commercial Tax informed the petitioners to submit the statements/challans of tax paid, interest and penalty together with the necessary accounts and remain present on 5.8.2016, failing which the application would be filed.

14. By an application dated 24.8.2016 addressed to the Commercial Tax Officer, the petitioners through their advocate informed him that as they hold an eligibility certificate under the Gujarat Textile Policy, 2012. By mistake they had credited the input tax on the purchases made by them in the statements for the year 2015-16. In terms of the textile policy such input tax cannot be credited against purchases. But along

with manufacture they also have a business of selling raw materials in respect of which they are entitled to avail of input tax credit and in their returns they have not shown the turnover of trading and manufacturing separately. In terms of the sample received from them, they are liable to pay VAT of Rs.1,43,03,621/- and CST of Rs.15,05,452/-. This situation has arisen on account of wrong returns filed by them. However, they have submitted new statements along with their application wherein they have shown the transactions of manufacturing and resale separately and that they have claimed ITC only on the goods resold. The balance ITC has been claimed against refund. In terms of the amended statement the tax liable to be paid by them is less. It was further stated that the mistake in filing return being their first mistake, their new statements may be taken into consideration and necessary orders may be passed.

15. By a communication dated 17.1.2017 of the Assistant Commissioner of Commercial Tax informed the Additional Industries Commissioner that an amount of Rs.5 crore is payable by way of refund by the said Department to the dealer and calling upon him to forthwith send such amount to the said office by issuing a cheque in this regard.

16. By a communication dated 10.2.2017 of the petitioner addressed to the Commercial Tax Officer, it is stated that the petitioner sought refund from the Industries Department under the textile policy stating that their accounts department had uploaded incorrect on-line statements and as the time of filing revised statements had lapsed, they could not file revised on-line statements. Therefore, they had asked the Commercial

Tax Officer-1, Unit-2, Ahmedabad, in this regard and he had told them to file manual revised statements which they had submitted. Despite the aforesaid representation, the Deputy Commissioner of Commercial Tax has rejected their on-line refund application. Moreover, the Commercial Tax Officer has raised a demand of Rs.2,60,93,445/- for local sales for assessment year 2011-12 and Rs.2,10,52,600/- for assessment year 2012-13 and Rs.14,201/- towards CST. Against the said assessment order, they had preferred appeal before the Deputy Commissioner of Commercial Tax, Circle-1, Ahmedabad, which is pending adjudication. They have further stated that due to financial hardship, they are not able to discharge their tax liability and that they are entitled to get refund of approximately Rs.4 crore from the Sales Tax Department but on account of non-receipt of the same, the company is in doldrums. The petitioner also addressed a communication to the Assistant Commercial Tax Officer to furnish a certificate of the outstanding refund in respect of the output tax paid by them.

17. On 31.7.2017, the Assistant Commissioner of Commercial Tax once again addressed a communication which is in the nature of the garnishee order to the Industries Commissioner informing him that an amount of Rs.2,37,67,241/- was due and payable by the petitioner for assessment years 2011-12 and 2012-13 and calling upon him to pay over such amount to the said department.

18. A show cause notice dated 27.9.2017 came to be issued by the Deputy Commissioner of Commercial Tax to the petitioner to the effect that the petitioner has not paid VAT and

Central Sales Tax dues of Rs.6,22,08,515/- and their appeal for restoration of registration number has been rejected on 2.8.2017. Therefore, their registration stands cancelled from 1.6.2016 for non-payment of the above dues. The petitioner has not complied with the provisions of sections 29 and 30 of the GVAT Act and rules 19 and 26 of the Gujarat Value Added Tax Rules, 2006 (hereinafter referred to as the "rules") and that they have continued to violate paragraphs 7(i) and 7(ii) of the Finance Department Notification dated 11.10.2013 as an eligible unit and they continue to violate the provisions of the GVAT Act and rules and hence, they should show cause as to why their certificate of entitlement should not be cancelled from the effective date. By a reply dated 14.11.2017, the petitioner responded to the said show cause notice. By an order dated 17.11.2017, the petitioners were granted fifteen days time to pay the outstanding tax dues, failing which the certificate of entitlement which had been suspended would be cancelled under clause 7(ii) of the notification. By an order dated 2.8.2017 made under section 73 of the GVAT Act read with section 9(2) of the Central Sales Tax Act, the Deputy Commissioner of Sales Tax, rejected the application of the petitioner for restoration of its registration number. By an order dated 12.3.2018, the Gujarat Value Added Tax Tribunal stayed the recovery proceedings upon the petitioner making pre-deposit as directed.

19. By an order dated 26.3.2018, the Tribunal allowed the second appeal by setting aside the order dated 5.10.2017 of the Deputy Commissioner of Commercial Tax and restored the appeal to the file of the first appellate authority and further directed that the stay against recovery proceedings shall

continue till the final disposal of the appeal. Thereafter, by the impugned order dated 12.12.2017, the certificate of entitlement of the petitioner has been cancelled under Para 7(2) of the Notification dated 11.10.2013 with effect from 14.7.2013.

20. The relevant contents of the impugned order dated 12.12.2017, as translated into English read thus:-

“As the petitioner has not complied with the provisions of Para 7(1) and 7(2) of the Notification dated 14.7.2013 whereby the Certificate of Entitlement was issued in favour of the petitioner, its Certificate of Entitlement is required to be cancelled. For nonpayment of more than three installments of tax, the dealer's registration number had been cancelled under section 27(5) of the Gujarat Value Added Tax Act, 2003 with effect from 1.6.2016. Thus, the dealer has not paid taxes within time. Thereafter, the dealer had filed an appeal before the said office on 23.6.2018 against the cancellation of registration number. Despite adequate opportunities having been granted to the dealer, the dealer has not paid the tax payable on the statements filed for the years 2013-14 to 2016-17 and has also not paid the assessed tax for the years 2011-12 and 2012-13 of Rs.6,22,08,565/- and the interest thereon. Since the defect had not been removed, the appeal for restoration of registration number had been dismissed vide order dated 2.8.2017. The dealer has also not complied with the provisions of sections 29 and 30 of the GVAT Act and rules 19 and 26 of the GVAT Rules. For non-compliance of

the provisions of para 7(1) of the above notification, after complying with the principles of natural justice, by an order dated 17.11.2017, the Certificate of Entitlement has been cancelled for a period of fifteen days with effect from 17.11.2017 under the provisions of para 7(1) of the above notification.

The dealer in their written statement dated 29.11.2017 had requested for thirty days' time to produce necessary details in the context of the order suspending the Certificate of Entitlement; however, the defects of challan and statements have not been cured and the dealer has neither paid the outstanding amounts nor shown willingness to do so. Thus, the dealer has continued to violate the provisions of the GVAT Act and the rules framed thereunder. In these, circumstances, in terms of para 7(2) of the Finance Department Notification dated 11.10.2013, "if the eligible unit continues such contravention for which the Certificate of Entitlement has been suspended, then the Certificate of Entitlement shall be liable to be cancelled and on such cancellation, the incentives under this notification shall cease to operate. Accordingly, the entire amount of tax that would have been payable on sales and purchases effected by the eligible unit but for the incentives given under this notification, shall be paid by the eligible unit into the Government Treasury within a period of sixty days from the date of contravention, and on failure to do so, said amount shall be recovered from the eligible unit as an arrears of land revenue". Which means that on the very grounds on which the Certificate of Entitlement was

suspended, the dealer has continued with such violation, as a result in terms of Para (2) of the notification, the Certificate of Entitlement is ordered to be cancelled with effect from 14.7.2013."

Thus, while the Certificate of Registration has been cancelled with prospective effect from 1.6.2016, the Certificate of Entitlement has been cancelled with retrospective effect from 14.7.2013.

21. The case of the petitioners is that the refund amount due to the petitioners under the textile policy is more than the outstanding dues of the petitioner. From the outstanding dues as shown in the statement at page 487 of the petition, it emerges that the total outstanding dues payable by the petitioners are to the tune of Rs.6.22 crore, out of which, recovery of Rs.2.10 crore has been stayed by the Tribunal. Therefore, the balance amount comes to Rs.4.12 crore. Out of this amount, Rs.1,36,73,870/- is payable towards CST dues, upon deducting the same, the balance amount comes to Rs.2,75,26,130/-. Thus, it appears that approximately Rs.2.75 crore is outstanding and payable by the petitioners towards VAT dues to the respondents. The petitioner is also entitled to refund from the respondent which from the communication addressed by the Commissioner of Commercial Tax to the Industries Department appears to be to the tune of Rs.5 crore.

22. In the facts of the present case, on account of the circumstances narrated hereinabove, the petitioners have landed into a vicious circle where there is no way out unless the respondents find out a way to resolve the issue. The entire

problem has arisen mainly on account of retrospective grant of eligibility certificate after a period of almost two years as during the period prior to the grant of certificate, the petitioners had filed returns like normal dealers and claimed input tax credit and used the same for payment of output tax liability. After the grant of eligibility certificate, the petitioners were called upon to pay the total amount of output tax and claim reimbursement thereafter. Therefore, though ordinarily the petitioners would not have been liable to pay such amount, as they were covered under the scheme, they were liable to pay such amount. While recovery of such amounts was sought to be made forthwith, the refund and reimbursement were not forthcoming. While the petitioner was called upon to pay the output tax liability, the refund of input tax was denied on the ground that the petitioner had availed of input tax credit. Thus, while huge demands were raised against the petitioner, the amount of refund was not forthcoming though reimbursement of some amount was made by the Industries Department. As a consequence of the petitioner's inability to pay the tax dues demanded by the respondents, the registration certificate came to be cancelled.

23. The textile policy was framed as an incentive scheme to attract investments. Therefore, the dealer should not be worse off for having taken the benefit of the policy. In the present case on account of the manner in which the respondents have operated the scheme, the petitioners have been put to undue hardship, which has ultimately resulted in the cancellation of registration certificate and cancellation of certificate of entitlement granted to it under the policy. The consequence of the above action taken against the petitioners would be that

the petitioners would not be granted any refund/reimbursement under the scheme and any benefit availed under the scheme would also be sought to be withdrawn.

24. In the impugned order, the authority has proceeded on the footing that the petitioner was liable to pay Rs.6,22,08,565/- by way of tax under the GVAT Act which is factually incorrect as recovery of part of such amount has been stayed by the Tribunal and part of the amount is in respect of the Central Sales tax dues. Insofar as non-payment of CST dues is concerned, the same cannot be treated as violation of the provisions of section 29 and 30 of the Act and rules 19 and 26 of the rules, all of which relate to compliance of the provisions of the GVAT Act. Thus, impugned order dated 12.12.2017 passed by the Deputy Commissioner of Commercial Tax whereby he has cancelled the entitlement certificate of the petitioners with retrospective effect from 14.7.2013 suffers from the vice of non-application of mind to the relevant factors and stands vitiated as being based on incorrect facts, which renders the same unsustainable.

25. In this case, even after the entitlement certificate was granted, the Government has not released any refund for the year 2013-14. Even for the subsequent period, while the Industries Department has granted partial reimbursement, the Finance Department has not given any refund on the tax paid on the purchases. It cannot be gainsaid that when a dealer avails of benefit of an incentive scheme, he would manage his affairs accordingly. In the present case, in view of the manner in which the respondents have operated under the scheme,

the petitioners were saddled with liability of tax and interest which in the ordinary course of business they would not have been liable to pay. Thus, the petitioner appears to be worse off for having availed of the benefit under the scheme.

26. From the facts as emerging from the record it is crystal clear that the mighty Government insists on the petitioners paying all the dues for the different periods prior to availing of the benefit of refund from them. On account of the fact that the respondents have issued the eligibility certificate for the period 14.7.2013 to 13.7.2021 on 23.12.2014, the petitioners who till they were granted such certificate had discharged their tax dues as normal dealers were now saddled with the liability of discharging the output tax liability which they had paid by taking credit of input tax paid on purchases. The petitioners, on account of being called upon to pay unanticipated tax dues are in financial straits and not in a position to pay such amount unless the amount payable to them under the scheme by the Government is also paid over to them. On the one hand the petitioners are called upon to pay the entire tax liability and on the other and they are denied reimbursement of the output tax on the ground that they had paid the same by adjusting the input tax credit. Thus it is a no win situation for the petitioners.

27. The difficulties faced by dealers on account of retrospective grant of eligibility certificate has been taken cognizance by the Government and by an addendum dated 4.10.2017 to the Gujarat Textile Policy-2012 after clause 5.6; General Conditions, the following has been added:

"If a unit enjoyed Input Tax Credit during the period of approval process of the incentives application, such refund of

ITC is not paid by the Commissioner of Commercial Tax Office. In such case, if such unit has paid amount on Net VAT to the office of Commissioner of Commercial Tax, then the office of the Industries Commissioner will reimburse such amount of Net VAT paid by the unit plus amount equal to Input Tax Credit availed on the eligible products by the unit to the extent eligible under the scheme within the limit of 1/8th of the VAT eligible amount every year."

However, the benefit of such addendum is sought to be denied to the petitioners on the ground that prior to such addendum being introduced, the registration certificate of the petitioner had been cancelled.

28. In the opinion of this court, under the Gujarat Textile Policy which is in the nature of an incentive scheme, there is also an obligation cast upon the Government to grant refund/reimbursement of the amount due and payable to the dealers. However, for the purpose of considering as to whether there is due compliance with the provisions of the scheme, it is only the obligation cast upon the dealer which has been taken into consideration, ignoring the fact that such failure has occasioned on account of the non-fulfillment of the reciprocal obligation cast upon the Government authorities to refund/reimburse the amounts due to the dealers. All the dice are loaded against the dealers inasmuch as it is the Government authorities who decide whether the dealer has complied with the provisions of the scheme, while turning a blind eye to the reciprocal obligations cast upon them under the scheme. Now, they take shelter behind the cancellation of the certificate of registration of the petitioners for the purpose of denying them the benefit of the addendum, which if applied in the case of the petitioners, may absolve them of the liability to pay any amount at all.

29. In **Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.** (supra), the Supreme Court has held that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise or the promise is not recorded in the form of the formal contract. The court observed “Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of “honesty and good faith”? Why should the Government not be held to a high “standard of rectangular rectitude while dealing with its citizens”?

30. In **State of Jharkhand v. Tata Cummins Ltd.** (supra), the Supreme Court held that a tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, we have to read the implementing notifications in the context of the industrial policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the industrial policy and not in a strict sense as in the case of exemptions from tax

liability under the taxing statute.

31. The Government framed the Gujarat Textile Policy, 2012 whereby the State Government had decided to come out with a comprehensive textile policy to strengthen the whole value chain in textile sector. Under the scheme only those enterprises which complete and make operational fully their projects during the operative period would be eligible for the benefit mentioned under the respective scheme, as applicable. Based upon the promise held out under the scheme, the petitioners set up a new unit for manufacture and sale of technical textiles for which investment of Rs.20.11 crore was made in plant and machinery and other assets considered to be eligible under the textile policy. However, certain unanticipated problems arose due to grant of certificate of eligibility with retrospective effect and the manner in which the respondents sought to implement the same as discussed hereinabove. Now things have come to such an impasse that unless the petitioners pay the outstanding dues, its registration certificate would not be restored and unless its registration certificate is restored the petitioners would not be entitled to refund/reimbursement under the scheme. Thus, while it appears that the amount of refund/reimbursement due to the petitioners exceeds the outstanding dues payable by them, it is the petitioners who are first required to clear the outstanding dues for getting the certificate of registration restored. The ultimate effect is that the petitioners who are financially not in a position to discharge the tax dues unless they receive the refund/reimbursement under the scheme, would be ruined, all because they sought to avail the benefit of the textile policy. In the opinion of this court, the officers who

man the offices of the Government are required to adopt a more humane approach and endeavour to see that while taxes are duly recovered, the business also continues. If the petitioners are put in such a position that it is no longer possible for them to run the business, it is ultimately the State which will suffer loss of taxes. Therefore, the approach of the officers should be such as would advance the interest of the Government. A short-sighted approach on the part of the Government officers to first recover all dues of the Government before making refund/reimbursement, in the ultimate end would result in loss of revenue to the Government. Nonetheless, the concerned officers continue with their adamant approach as is evident in the facts of the present case.

32. The controversy in the present case is therefore, required to be amicably resolved by ensuring that while the Government does not have to compromise insofar as recovery of taxes is concerned, a balance is maintained, whereby the petitioners are also in a position to continue with the business to fulfil the object of the textile policy. Since the registration certificate of the petitioners has been cancelled with effect from 1.6.2016, the respondents should work out the benefit that the petitioners would be entitled to till that date under the addendum and ascertain whether any amount is due and payable by the petitioners after they are extended the benefit thereof.

33. From the facts as emerging from the record, it appears that the amount due and payable by the petitioners works out to approximately Rs.2,75,26,130/- and in terms of the

garnishee order issued by the Commercial Tax Department to the Industries Department, the petitioners are entitled to a refund of approximately Rs.5 crore. Thus, if the Commercial Tax Department and the Industries Department work out the outstanding amount payable by the petitioners and the refund/reimbursement to which they are entitled and adjust the same, by and large the entire controversy could be resolved.

34. In the light of the above discussion, the petition partly succeeds and is accordingly allowed to the following extent:

The impugned order dated 12.12.2017 passed by the Deputy Commissioner of Commercial Tax, Circle-1, Ahmedabad (Annexure-A) to the petition is hereby quashed and set aside. Consequently, the certificate of entitlement stands restored. The respondents are directed to forthwith work out the amount of refund that the petitioners would be entitled to till 1.6.2016, that is, the date with effect from which its registration certificate is cancelled and the amount outstanding payable by the petitioners and adjust the same towards the outstanding dues of the petitioners. In case any amount remains to be paid, it goes without saying that the petitioners would be liable to pay the same.

(HARSHA DEVANI, J)

(A. P. THAKER, J)

Z.G. SHAIKH