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PROMISSORY ESTOPPEL: A FADING ENIGMA IN FISCAL SPACE?

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ABSTRACT

Promissory estoppel is an equitable doctrine which has found roots in the Indian jurisprudence. Its application has witnessed a passionate contest in the discourse regarding the Government's power to curtail or deny fiscal exemptions promised to the citizens. The article attempts to sketch the five-decades of judicial opinion, which reveals a flip-flop and discordant treatment meted to the doctrine. On one hand, we have decisions such as Indo-Afghan, Motilal Padampat, Nestle, Manuelson Hotels, etc., which mark the high points of the doctrine's delineation and highlight its expansive scope. Conversely, the decisions in Kasinka Trading, Shrijee Sales, and more recent ones, such as Unicorn Industries, VVF, etc., reveal how the 'public interest' test overwhelmingly interjects and arrests the pragmatic application of this doctrine. This sketch also manifests the current trends which point towards dwindling fortunes of the doctrine. The underlying objective of the article is to picturise the struggles of a commentator attempting a coherent description of this doctrine and its concomitant variables. Presenting the prevailing dichotomy in the judicial approach to this doctrine, the article reinforces the imminent need for a categorical enunciation, lest the doctrine fades into obsolescence.

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I. INTRODUCTION: SETTING THE CONTEXT

It is an elementary proposition of law that a contract requires an exchange of promises between the parties. Unilateral promises, where consideration is not reciprocated by the other party, are not typically recognised as contracts. Does this imply that unilateral acts by one party do not carry any consequence for the other? The legal position on this aspect is unclear, for the formulation of this response depends upon the satiation of a variety of variables. Was the act uninspired, i.e., carried out without a shade of motivation by the other party? Was it a gift, a donation, or an act of charity? Was the benefit of the act perceived and enjoyed by the other party? Was the doer of the act persuaded, by act or omission of the other party, into the act? As evident, all these questions carry a subjective standard of appreciation, and more critically, from a legal standpoint, have distinct implications.

The Indian law treats statutory enforcement of contractual commitments *vis-à-vis* equitable claims differently. It is indeed true that certain equitable propositions have been legislated into enactments, such as the law governing gifts,[1] the codification of the quasi-contract doctrines,[2] the rule of estoppel,[3] etc., yet the realm of equity largely remains contingent upon judicial indulgence, being pedestal on common law standards and judicial precedents. This paper explores one such variant of the equity-

[1] The Transfer of Property Act, No. 4 of 1882 INDIA CODE (1882), § 122.
[2] The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 70.
[3] The Indian Evidence Act, No. 1 of 1872 INDIA CODE (1872), § 115.

driven response of the legal system, i.e., the doctrine of promissory estoppel and even within that space, a specific subset, i.e., application of the doctrine of promissory estoppel to governmental action in fiscal space.

The aim of this paper is manifold. *First*, given that there is no statutory basis for its application and instead that the doctrine of promissory estoppel has its *sui generis* paradigm, the paper traces the judicial exposition of this doctrine and its contours in the Indian fiscal context. *Second*, shaped by decades of disjointed and often conflicting judicial opinions, the paper attempts to highlight the varying judicial treatment meted to this doctrine in the last five decades. *Third*, the paper in its survey of judicial opinion sketches a position which is perhaps best described as a conundrum. The point at hand is the inconsistency in the judicial thought. On the one hand, it is espoused that there is no equity in tax[4] whereas in equal breath the doctrine of promissory estoppel, which is a quintessential equitable doctrine, is applied in fiscal space. *Fourth*, the paper juxtaposes the variables which arrest the application of the doctrine, thereby delineating its scope, coverage and limitations. Besides these larger objectives, in equal measure, the key underlying intent is to delineate the legal position on the subject and cull out the current standing of the doctrine of promissory estoppel in fiscal space in India.

At the outset, it is clarified that this paper does not undertake a comparative appraisal. Instead, the exposition of the judicial standard is

[4] Lakshmi Kant Jha v. Commissioner of Wealth Tax, (1974) 3 SCC 126 (India).

confined to the appreciation of Indian jurisprudence, that too only of the Supreme Court of India. The main reason for this approach is that, as would be evident, dissected from the perspective of the principles that emanate therefrom, virtually each decision adds a contrasting nuance to the doctrine such that it resembles a palimpsest with ill-defined contours and eluding a precedential setting. Perhaps, for this reason, the paper can also be characterized as a critique of the judicial disposition, which is singularly responsible for both, the birth and demise of this branch of law.

II. *INDO-AFGHAN* AND *MOTILAL PADAMPAT*: BIRTH OF THE PROMISSORY ESTOPPEL DOCTRINE IN FISCAL JURISPRUDENCE

The decision of the Supreme Court in *Union of India v. Indo-Afghan Agencies Ltd.* [*hereinafter* referred to as "***Indo-Afghan***"][5] is credited as the first decision to introduce the promissory estoppel doctrine in the tax jurisprudence.[6] In this case, the Court was concerned with an export promotion scheme which granted incentives to exporters of woollen goods and which was specifically extended to exports to Afghanistan. Despite such a scheme, the entitlement certificate was not issued to the Respondent for the full amount as specified in the scheme. This was challenged before the High Court which directed issuance of the entitlement certificate for the entire amount.

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[5] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[6] I.C. Saxena, *The Twilight of Promissory Estoppel in India: A Contrast with English Law*, 16 J. INDIAN L. INST. 187 (1974).

In an appeal before the Supreme Court, it was, *inter alia*, contended by the Government that the scheme was 'administrative' in character and thus, "*it created no rights in the public generally or in the exporters who exported their goods in pursuance of the scheme and imposed no obligations upon the Government to issue the import certificates*". Another plea was made that the "*import and export policy of the Government is based on availability of foreign exchange, requirement of goods of foreign origin for internal consumption, economic climate in the country, and other related matters, and has in its very nature to be flexible, and on that account the power of the Government to modify or adjust it as the altered circumstances necessitate, cannot be restricted on the ground that promises made by the Government in different situations are not carried out, however amoral that claim may appear to be*".[7]

Rejecting the claims made by the Government to absolve it from the obligations, the Supreme Court found itself "*unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment*". Elevating the rationale, and declaring that "*[u]nder our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law*", the Court declared that it is "*competent to grant relief in appropriate cases, if, contrary to the scheme, the authority declined to grant a licence or import certificate or the authority acted arbitrarily*".[8] In *Indo-Afghan*, the Supreme Court concluded that "*the claim of the respondents is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondents acting upon that*

[7] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[8] *Id.* ¶ 17.

representation under the belief that the Government would carry out the representation made by it".[9]

This decision was essentially based upon the doctrine of fair-play in Government action, which is a long-standing concept under the aegis of an administrative law inquiry. Nonetheless, the decision in *Indo-Afghan* is crucial from the perspective that it approved earlier decisions of the High Courts to build upon an estoppel doctrine, which was different from the estoppel as a legislated rule[10] of evidence. To this effect, it was, *inter alia*, observed in this decision that there was clear authority to conclude "*that even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution*".[11]

This premise was further developed by the Supreme Court in its decision in *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh* [*hereinafter* referred to as "***Motilal Padampat***"],[12] which is considered as the path-breaking moment introducing the promissory estoppel doctrine in the fiscal realm. In this case, the Supreme Court chose to frame for itself the question "*[h]ow far and to what extent is the State bound by the doctrine of promissory*

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[9] *Id.* ¶ 20.
[10] The Indian Evidence Act, No. 1 of 1872 INDIA CODE (1872), § 115.
[11] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[12] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

estoppel" to acknowledge that this "*doctrine [is of] comparatively recent origin but it is potentially so fruitful and pregnant with such vast possibilities for growth that traditional lawyers are alarmed lest it might upset existing doctrines which are looked upon almost reverentially and which have held the field for a long number of years*".[13] This decision, pragmatically, tested the bounds of executive action and the self-incurred obligations which may accrue to the Government *vis-à-vis* its dealings with the citizens.

The factual position in *Motilal Padampat* was that on the assurance of a three-year tax holiday to all new units established in the State, a hydro-generation plant was set-up. Initially, the State Government extended confirmation of entitlement but later resiled from the commitment. This action led to a challenge before the High Court of Allahabad but was rejected, which led to an appeal before the Supreme Court. Noting that the doctrine, which is[14] "*variously called 'promissory estoppel', 'equitable estoppel', 'quasi estoppel' and 'new estoppel' … a principle evolved by equity to avoid injustice … [is] neither in the realm of contract nor in the realm of estoppel*", the Supreme Court opined that the "*basis of this doctrine is the inter-position of equity [where e]quity has always, true to form, stepped in to mitigate the rigours of strict law*"[15]. Traversing through the judicial opinion, elucidating the English law and American law on the subject, the Supreme Court noted that it was in *Indo-Afghan* that "*the*

[13] *Id.* ¶ 1.
[14] Central London Property Trust Ltd. v. High Trees House Ltd., (1956) 1 All ER 256 (U.K.).
[15] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

doctrine of promissory estoppel found its most eloquent exposition".[16] In *Motilal Padampat*, the Supreme Court declared that "*[t]he law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution*". The decision of the Supreme Court in *Motilal Padampat* carries certain observations of seminal importance which require reproduction, undertaken hereafter;[17]

> "*It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. 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'? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot*

[16] *Id.* ¶ 22.
[17] *Id.* ¶ 24.

> *claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction.*" *(emphasis supplied)*

Having regard to the above and considering the constitutional declaration that the decisions of the Supreme Court are final and binding on all in the country,[18] one would be led to believe that through this decision the doctrine of promissory estoppel was firmly engrained in the tax jurisprudence to dislodge any mid-way retraction of commitments extended by the Government. This was, however, not the position, particularly in

[18] INDIA CONST., art. 141.

view of the *caveat* which was found to be rather elaborately set out in the decision in *Motilal Padampat* itself, as we discuss in the next section.

III. THE CAVEAT IN *MOTILAL PADAMPAT* AND THE CONSEQUENT FLIP-FLOP IN JUDICIAL OUTCOMES

After instituting the promissory estoppel doctrine as a relevant consideration in fiscal disputes, the Supreme Court in *Motilal Padampat* itself qualified the declaration by elaborating the situations where the doctrine, which was an outcome of equity, would find itself displaced. The touchstone warranting the dilution of the promissory estoppel doctrine was identified in *Motilal Padampat* as the 'public interest' test which purportedly rested on the premise that a citizen cannot be made to override a larger good. Though qualified and jointed with certain limitations, perhaps to ensure that the exception does not overwhelm the main principle, the Supreme Court in *Motilal Padampat* elucidated this exception in the following terms:[19]

> "*But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and would not enforce the promise against the Government.*

[19] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. … If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. … The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden."

From the above passage in *Motilal Padampat* decision, a number of inferences can be drawn which translate into legal propositions on the scope of the promissory estoppel doctrine.

- *First*, no matter the heightened role of equitable considerations, the promissory estoppel doctrine is a test to assess the validity of Government action rather than an unequivocal jurisprudential proposition.
- *Second*, because the doctrine of promissory estoppel is equitable in nature, its application is subject to the usual considerations and limitations which are attendant to such equitable considerations. Thus, its application requires a subject and a fact-driven inquiry before assuming centre-stage in a contest.
- *Third*, which is perhaps a natural extension of the above, the determination as to whether special equities exist in a fact-scenario which oblige the Government to perform its promise or, instead, whether the circumstances are such that the Government is justified in breaking-free of the obligations, is the determination to be made by the court in every case.
- *Fourth*, even though expressed as the sole limitation to the doctrine, the public interest exception is overwhelmingly wide such that it is beyond an exhaustive delineation. Thus, the limitation on the application of the promissory estoppel doctrine is indeed a wide one.

As a consequence, notwithstanding the decision in *Indo-Afghan* or the elaborate enunciation of its equitable foundations in *Motilal Padampat*,

the doctrine of promissory estoppel could, in hindsight, never attain a *sui generis* disposition capable of an axiomatic application. The subsequent decisions discussed in this part reveal how even the Supreme Court struggled in ensuring an unwavering application of the doctrine of promissory estoppel, as evident from a constant flip-flop and a fact-based enunciation. To exemplify, the Supreme Court in *State of Punjab v. Nestle India Ltd.* [*hereinafter* referred to as "***Nestle***"][20] culled out two of its limitations:

> (i) "*[S]ince the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires*"; and
> (ii) "*If the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute.*"[21] *Thus, the competence of the Government in extending a fiscal benefit was also subsequently added as a mandatory test to be satisfied.*"

The decision in *Nestle* is particularly relevant for our inquiry. It was a reaffirmation of the doctrine of promissory estoppel which had, subsequent to *Motilal Padampat*, found its fortunes dwindling. In this case, the Supreme Court was required to address the claim for purchase tax exemption by milk producers who claimed, invoking, *inter alia*, the doctrine of promissory estoppel, that the Government had decided to abolish such

[20] State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465 (India).
[21] *Id.* ¶ 30.

tax basis by relying upon the speech of the State Finance Minister. The Supreme Court went on to revisit the varying decisions on the subject post *Motilal Padampat* to acknowledge that there was indeed a subsequent "*aberrant note*"[22] in the application of the doctrine but that divergence had been disapproved subsequently.[23] The summation of the *Nestle* decision also indicates the legal position prevailing at that time. Here, the Supreme Court recounted the decision of *Bakul Cashew Co. v. Sales Tax Officer* [*hereinafter* referred to as "***Bakul Cashew***"][24] as an instance wherein relief on account of promissory estoppel doctrine was denied owing to the failure to establish that any prejudice was caused by acting upon the Government's representation. It was, however, underscored that the declaration in *Motilal Padampat* was not dead, and instead the application of the doctrine of promissory estoppel was extended even to other branches of law, such as the service law.[25] It was also recalled in *Nestle* that a number of decisions had indeed given effect to the doctrine of promissory estoppel in the fiscal realm.[26]

The decision in *Nestle* is also significant as it can be considered as a titling point, weighing the scales in favour of the promissory estoppel doctrine despite a clear acknowledgement by the Supreme Court that there

[22] Jeet Ram Shiv Kumar v. State of Haryana, (1981) 1 SCC 11 (India).
[23] Union of India v. Godfrey Phillips India Ltd., (1985) 4 SCC 369 (India).
[24] Bakul Cashew Co. v. Sales Tax Officer, (1986) 2 SCC 365 (India).
[25] Surya Narain Yadav v. Bihar State Electricity Board, (1985) 3 SCC 38 (India).
[26] State of Madhya Pradesh v. Orient Paper Mills Ltd., (1990) 1 SCC 176 (India); Delhi Cloth and General Mills Ltd. v. Union of India, (1988) 1 SCC 86 (India); Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188 (India); State of Orissa v. Mangalam Timber Products Ltd., (2004) 1 SCC 139 (India).

were indeed various decisions that had ruled against the application of this doctrine.[27] It is now firmly entranced in the Indian jurisprudence that in case of divergence of opinion against various earlier decisions, the differences must be referred to a larger bench of the Supreme Court for an authoritative pronouncement which would dispel the doubts by settling the law.[28] While the decision in *Nestle* duly acknowledged the cleavage in the judicial opinion as regards the application of the doctrine, instead of referring the issue for a categorical delineation by a larger bench of the Supreme Court, the decision in *Nestle* adopted a curious approach. It was concluded in *Nestle* that the Supreme Court would rather follow the decision of an earlier larger bench,[29] and therefore, the doctrine of promissory estoppel was considered as unreservedly applicable in terms of the principles laid out in *Motilal Padampat*.

In hindsight, a reference was apposite in *Nestle* for it would have quelled all doubts on the contours and continued relevance of the doctrine of promissory estoppel. As the subsequent decisions reveal, the inability of the Supreme Court to categorically adjudge the position of this doctrine in the judicial discourse led to flip-flop reflections. This trend continues till

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[27] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India); Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India); Sales Tax Officer v. Shree Durga Oil Mills, (1998) 1 SCC 572 (India); Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411 (India); ITC Bhadrachalam Paperboards v. Mandal Revenue Officer, (1996) 6 SCC 634 (India).

[28] Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673 (India); Union of India v. Raghubir Singh, (1989) 2 SCC 754 (India); National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 (India); Dr. Shah Faesal v. Union of India, (2020) SCC Online SC 263 (India).

[29] Union of India v. Godfrey Phillips India Ltd., (1985) 4 SCC 369 (India).

date notwithstanding the decades which have passed since the manifestation of the doctrine in the *Motilal Padampat*.

Post *Nestle* as well, the doctrine was held to apply in certain cases to hold that the fiscal exemption promised by the state actors would be available to the citizens.[30] However, an almost equal number of decisions held to the contrary denying similar claims.[31] A few years after *Nestle*, the issue regarding the application of the promissory estoppel doctrine and its concomitant legitimate expectation principle was indeed referred to a larger bench for consideration.[32] It was noted "*that there seems to be some difference of opinion in the various decisions by different Benches of this Court. Hence the matter needs to be decided by a larger Bench of this Court, on the issue as to whether the principles of promissory estoppel and legitimate expectation are applicable in this case. The larger Bench may also consider whether the undertaking given by the appellants acts as an estoppel against them*". This reference, however, did not yield the desired result

[30] State of Rajasthan v. J.K. Udaipur Udyog Ltd., (2004) 7 SCC 673 (India); Mahabir Vegetable Oils Pvt. Ltd. v. State of Haryana, (2006) 3 SCC 620 (India); MRF Ltd., Kottayam v. Assistant Commissioner (Assessment) Sales Tax, (2006) 8 SCC 702 (India); Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector, (2007) 5 SCC 447 (India); U.P. Power Corporation Ltd. v. Sant Steel & Alloys Pvt. Ltd., (2008) 2 SCC 777 (India); Pepsico India Holdings Pvt. Ltd. v. State of Kerala, (2009) 13 SCC 55 (India); State of Rajasthan v. Basant Agrotech India Ltd., (2013) 15 SCC 1 (India); SVA Steel Re-rolling Mills Ltd. v. State of Kerala, (2014) 4 SCC 186 (India); Devi Multiplex v. State of Gujarat, (2015) 9 SCC 132 (India).

[31] A.P. Steel Re-Rolling Mills Ltd. v. State of Kerala, (2007) 2 SCC 725 (India); Kusumam Hotels Pvt. Ltd. v. Kerala State Electricity Board, (2008) 13 SCC 213 (India); Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh, (2011) 3 SCC 193 (India); Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 134 (India).

[32] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2010) 14 SCC 615 (India).

as the decision of the larger bench[33] was confined to the facts of the instant case instead of a declaration of the legal position capable of resolving all ambiguities on the scope and contours of the doctrine.

This takes us to the decision in *Manuelsons Hotels Pvt. Ltd. v. State of Kerala* [*hereinafter* referred to as "***Manuelsons Hotels***"][34] which marks a significant event in the continuous evolution of the flip-flop trend and perhaps the last decision of the Supreme Court where the doctrine has been granted judicial reaffirmation. In this case, the question before the Supreme Court was the interplay of a Government Order issued by the State of Kerala which, *inter alia*, stated that eligible industries would be entitled to exemption from 'building tax'. Based on approvals granted to it, the Appellant began construction of a hotel within the State. Subsequently, the Government denied exemption to the Appellant stating that the statutory provisions did not permit grant of exemption. Emphatically re-endorsing its basis, the Supreme Court reaffirmed the underlying cause for the application of the doctrine to observe that "*we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject-matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster*".

[33] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 13 (India).
[34] Manuelsons Hotels Pvt. Ltd. v. State of Kerala, (2016) 6 SCC 766 (India).

The decision in *Manuelsons Hotels* is crucial from the perspective that it unreservedly concluded that the application of the doctrine of promissory estoppel did not depend upon the establishment of 'prejudice' by one party from acting upon a representation of the other party, and it was enough to demonstrate that a representation did exist and was acted upon. Referring to a decision of the Australian High Court,[35] the Supreme Court in *Manuelsons Hotels* declared the legal position, *inter alia*, in the following terms:

> "*The above statement, based on various earlier English authorities, correctly encapsulates the law of promissory estoppel with one difference—under our law, as has been seen hereinabove, promissory estoppel can be the basis of an independent cause of action in which detriment does not need to be proved. It is enough that a party has acted upon the representation made. The importance of the Australian case is only to reiterate two fundamental concepts relating to the doctrine of promissory estoppel—one, that the central principle of the doctrine is that the law will not permit an unconscionable departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of a course of conduct which would affect the other party if the assumption be not adhered to. The assumption may be of fact or law, present or future. And two, that the relief that may be given on the facts of a given case is flexible enough to remedy injustice wherever it is found. And this would include the relief of acting on the basis that a future*

[35] Commonwealth of Australia v. Verwayen, (1990) 170 CLR 394 (Aus.).

assumption either as to fact or law will be deemed to have taken place so as to afford relief to the wronged party." *(emphasis supplied)*

Adverting to the factual paradigm before it, the Supreme Court in *Manuelsons Hotels* decided against the State Government. The Supreme Court concluded that denial of exemption despite having represented to the citizens "*was an arbitrary act of the Government which must be remedied by the application of the doctrine of promissory estoppel … [t]he ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise*". The decision, therefore, reaffirmed that the promissory estoppel doctrine was indeed alive and kicking, and had not been exorcised from the judicial discourse. This aspect becomes acutely relevant considering that the decision in *Manuelsons Hotels* is fairly recent and confirms that the Supreme Court would indeed grant indulgence to enforce equitable remedies against the Governments resiling from their solemn assurances.

IV. THE ACCENTUATING ROLE OF 'INDUSTRIAL POLICY' AND 'PUBLIC INTEREST' TENETS: COMPETING AS HARBINGER VERSUS NEMESIS OF PROMISSORY ESTOPPEL DOCTRINE?

A. CONTEXTUALIZING THE TENETS

The debate on the doctrine of promissory estoppel would be incomplete without reference to the two variables which often, respectively, heighten or recede its flow. The state policy or industrial policy contentions

have often increased the chances of a claim based on promissory estoppel to be upheld wherein the doctrine has often found itself in adversary in an overriding public interest contention. It is, therefore, appropriate to address their respective roles.

The state policy or industrial policy perspective is based upon certain decisions that have refused to examine the claim for promissory estoppel versus the Government's prerogative to withdraw exemptions as a unidimensional debate. In such decisions, the Supreme Court has examined the larger paradigm to note the very basis on which such exemptions were extended and if there was a change in circumstances warranting their withdrawal. In other words, in this class of decisions, the Supreme Court refused to turn a blind eye to the fact that grant and withdrawal of exemptions was a mere policy prerogative of the Government and instead went on to adjudge the avowed intent of Government action manifested from their public policy pronouncements in the form of such state or industrial policies.

B. EXPOUNDING THE 'INDUSTRIAL POLICY' PERSPECTIVE

One of the leading decisions on this proposition is *State of Bihar v. Suprabhat Steel Ltd.* [*hereinafter* referred to as "***Suprabhat Steel***"][36] wherein the issue was similar, i.e., claim to fiscal exemption basis the representation of the Government. However, instead of relying upon the promissory estoppel doctrine, the claim was based upon the state industrial policy itself

[36] State of Bihar v. Suprabhat Steel Ltd., (1999) 1 SCC 31 (India).

which extended these exemptions. The Supreme Court opined that the power of the Government to act in individual cases, i.e., determining whether the exemption was available to a particular unit, was circumscribed by the policy which limited both the discretion as also the ability of the Government to deny benefit to the citizen.

The decision in *Suprabhat Steel* in itself did not turn the wheels for the emergence of an equitable doctrine. It was the subsequent decision in *State of Jharkhand v. Tata Cummins* [*hereinafter* referred to as "***Tata Cummins***"][37] wherein the Supreme Court propounded the proposition that where a citizen "*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*". Thus, without formally invoking the promissory estoppel doctrine, the Supreme Court did read its underlying rationale while upholding a claim based on the state policy contention.

Subsequent decisions of the Supreme Court in *State of Bihar v. Kalyanpur Cement Ltd.* [*hereinafter* referred to as "***Kalyanpur Cement***"][38] and *Lloyd Electric & Engineering Ltd. v. State of Himachal Pradesh* [*hereinafter* referred

[37] State of Jharkhand v. Tata Cummins Ltd., (2006) 4 SCC 57 (India).
[38] State of Bihar v. Kalyanpur Cement Ltd., (2010) 3 SCC 274 (India).

to as "***Lloyd Engineering***"][39] further refined this principle. The latter decision carried a remark which went beyond the regular considerations. In *Lloyd Engineering* it was observed that "*[t]he State Government cannot speak in two voices. Once the Cabinet takes a policy decision … the Notification … having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. The Government shall speak only in one voice. It has only one policy. The departments are to implement the government policy and not their own policy. Once the Council of Ministers has taken a decision to extend the 2004 Industrial Policy and extend tax concession beyond 31-3-2009, merely because the Excise and Taxation Department took some time to issue the notification, it cannot be held that the eligible units are not entitled to the concession till the Department issued the notification*". Thus, at least conceptually, the rationale for the decision in *Nestle* was reinforced by the Supreme Court in *Lloyd Engineering*, albeit without formally invoking the doctrine of promissory estoppel.

C. THE 'PUBLIC INTEREST' STANDPOINT

A related dimension of the promissory estoppel based claims was reliance placed in such contests upon the principle of legitimate expectation, which also received affirmation in various decisions of the Supreme Court.[40] However, even this principle, along with the

[39] Lloyd Electric & Engineering Ltd. v. State of Himachal Pradesh, (2016) 1 SCC 560 (India).

[40] Commissioner of Commercial Taxes v. Dharmendra Trading Co., (1988) 3 SCC 570 (India); Bannari Amman Sugars Ltd. v. Commercial Tax Officer, (2005) 1 SCC 625 (India); Bhushan Power and Steel Ltd. v. State of Orissa, (2012) 4 SCC 246 (India); Monnet Ispat and Energy Ltd. v. Union of India, (2012) 11 SCC 1 (India); State of Jammu & Kashmir v. Trikuta Roller Flour Mills Pvt. Ltd., (2018) 11 SCC 260 (India).

considerations attendant to the promissory estoppel doctrine, has been countered by the 'public interest' test. As discussed above, the origin of this exception to the promissory estoppel doctrine was well engrafted in *Motilal Padampat* decision itself. The leading decision in which this aspect was exemplified is *Kasinka Trading v. Union of India* [*hereinafter* referred to as "***Kasinka Trading***"][41]. This requires a closer examination in the wake of the widespread reliance placed upon it in the subsequent decisions.

The *lis* in *Kasinka Trading* concerned premature roll-back of a notification by the Government in terms of which certain exemptions were extended under the customs law. It was urged before the Supreme Court that such roll-back was impermissible in the wake of the promissory estoppel doctrine citing the fact that the Appellant had placed orders for import of the exempted goods on the assumption that the Government would honour the exemption contained by the notification. The Supreme Court referred to the well-settled position that the "*doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation*". This proposition is beyond cavil as it was even expounded in *Motilal Padampat*. The Supreme Court in *Kasinka Trading*, however, went much beyond.

In *Kasinka Trading*, it was emphasized that the exemption flowed from a notification issued by the Government, not in the exercise of its

[41] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India).

executive power, but instead by carrying out the legislative function of extending (and withdrawing) exemptions in the provisions of the customs law. The Supreme Court also gave due credence to the fact that the relevant statutory provision mandated that the Government exercised its power under 'public interest'. This was translated to mean that the exercise of the power under this provision could not be construed as a representation so as to create an inducement to any so as to be governed by the promissory estoppel doctrine. It was further added that there was an inherent element of public interest underlying the issuance and withdrawal of such notifications which overrides any equitable considerations constituting as the basis for invoking the promissory estoppel doctrine. These aspects emanate from the following observations in *Kasinka Trading*:

> "*21. … Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued on the Central Government 'being satisfied that it is necessary in the public interest so to do'. Strictly speaking, therefore, the notification cannot be said to have extended any 'representation' much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification*

> *issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption.*
>
> …
>
> *23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption 'in public interest' is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the 'public interest'. The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act." (emphasis supplied)*

The aforesaid extract clearly establishes that the Supreme Court equated 'policy decisions' with 'public interest'. This aspect, as the later

decisions will reveal, was to be further extrapolated, giving additional leeway to the Government, and thus, an upper hand to it so as to tilt the balance against the citizens in a promissory estoppel claim.

The reasoning in *Kasinka Trading* was confirmed by a larger bench of the Supreme Court in *Shrijee Sales Corporation v. Union of India* (*hereinafter* referred to as "***Shrijee Sales***")[42] which declared that there was no incongruity in the ratio emanating from *Kasinka Trading* contrasted from the *Motilal Padampat* declaration. Thereafter, the decision in *Kasinka Trading* was regularly followed to reject claims pivoted on the promissory estoppel doctrine, unsurprisingly, without a discussion on whether public interest actually existed in the factual matrix before rejecting such claims.[43]

There were indeed certain decisions wherein the application of the implied public interest principle in the context of statutory notifications emanating from the *Kasinka Trading* decision was indeed halted.[44] However, their occurrences were occasional. Consequently, there was no unifying

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[42] Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India).

[43] Union of India v. Godhawani Brothers, (1997) 11 SCC 173 (India); Union of India v. Bharat Commerce & Industries Ltd. (1999) 107 ELT 582 (SC) (India); State of Himachal Pradesh v. Kundan Lal Ahuja, (2000) 10 SCC 559 (India); Union of India v. Victory Plastics Pvt. Ltd., (1996) 8 SCC 41 (India); Darshan Oils Pvt. Ltd. v. Union of India, (1995) 1 SCC 345 (India); State of Rajasthan v. Mahaveer Oil Industries, (1999) 4 SCC 357 (India); Union of India v. Indian Charge Chrome, (1999) 7 SCC 314 (India); Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188 (India); Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 13 (India).

[44] Pawan Alloys & Castings Pvt. Ltd. v. Uttar Pradesh State Electricity Board, (1997) 7 SCC 251 (India); Dai-Ichi Karkaria Ltd. v. Union of India, (2000) 4 SCC 57 (India); Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector, (2007) 5 SCC 447 (India); Tamil Nadu Electricity Board v. Status Spinning Mills Ltd., (2008) 7 SCC 353 (India).

pattern or coherence in later decisions. As highlighted in the earlier section, *Nestle* and *Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board* [hereinafter referred to as "***Kothari Industrial***"][45] were lost opportunities to reconcile the varying notions and competing principles by referring the issue to a larger bench of the Supreme Court, and obtain a categorical pronouncement of the legal position. As the next section shows, the failure of the Supreme Court to enunciate the exact status of the promissory estoppel doctrine and the contours of its exceptions have led to a considerable diminution of the practical significance and erosion of the doctrine's sheen in contemporary jurisprudence.

V. TRENDS EMANATING FROM RECENT DECISIONS OF THE SUPREME COURT

A survey of the contemporary jurisprudence will reveal that the promissory estoppel doctrine may seem to have lost the benevolent indulgence of the Indian courts. An account of three recent decisions of the Supreme Court manifests such a trend.

The first is a rather elaborate decision rendered in the context of fiscal benefits available under India's Foreign Trade Policy. The Supreme Court in *Director General of Foreign Trade v. Kanak Exports* [*hereinafter* referred to as "***Kanak Exports***"][46] examined the contention whether the fiscal

[45] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 134 (India).
[46] Director General of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226 (India).

benefits already accorded could be taken back with retrospective effect. The Court addressed the issue, in the context of the promissory estoppel doctrine, in two parts. In the first stage, it held that the benefits could indeed be withdrawn where such withdrawal was a policy decision of the Government based on public interest.[47] On the second aspect, however, the Supreme Court in *Kanak Exports* concluded that the rights which had already become 'vested' in the citizens could not be taken away retrospectively absent a legislative enactment,[48] though the Court supplied additional legal reasons to conclude such.[49]

The decision in *Kanak Exports*, however, did not find the invocation of the promissory estoppel doctrine as the key issue before it. What laid at the periphery of consideration came to be tested as the main proposition in a subsequent decision in *Union of India v. Unicorn Industries* [*hereinafter* referred to as "***Unicorn Industries***"].[50] In this case, the sole issue framed by the Supreme Court was "*whether, by invoking the doctrine of promissory estoppel, can the Union of India be estopped from withdrawing the exemption from payment of excise duty in respect of certain products, which exemption is granted by an earlier notification; when the Union of India finds that such a withdrawal is necessary in the public interest*". This was answered in the negative. Opining that there was a larger public interest underlying the withdrawal of exemptions, it was concluded that the doctrine of promissory estoppel could not be invoked. Perhaps the same

[47] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India); Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India).
[48] R.C. Tobacco Pvt. Ltd. v. Union of India, (2005) 7 SCC 725 (India).
[49] Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India).
[50] Union of India v. Unicorn Industries, (2019) 10 SCC 575 (India).

considerations which were invoked by the Supreme Court in its earlier decisions to invoke the doctrine were relied upon in this decision to opine otherwise, *inter alia* observing thus:

> "*… this Court has clearly held that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to see all aspects including the objective to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principle of equity must forever be present in the mind of the Court while considering the applicability of the doctrine. It has been held that the doctrine of promissory estoppel must yield when the equity so demands and when it can be shown having regard to the facts and circumstances of the case, that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.*"

In *Unicorn Industries*, the Supreme Court went on to categorically affirm that from the earlier precedents it was now well established that "*where public interests warrants, the principle of promissory estoppel cannot be invoked*".[51] This trend was taken further in the 2020 decision of the Supreme Court in *Union of India v. VVF Ltd.* [*hereinafter* referred to as "***VVF***"][52] wherein, again, the sole issue for consideration was the extent of the promissory estoppel doctrine as a restriction on Government's prerogative

[51] Kasinka Trading; Indian Oil Corporation Ltd. v. Kerala State Road Trading Corporation, (2018) 12 SCC 518 (India).
[52] Union of India v. VVF Ltd., (2020) SCC OnLine SC 378 (India).

to withdraw an exemption granted earlier. For this reason, and also because this is the latest decision of the Supreme Court on the subject, the *VVF* decision requires a detailed appraisal.

The *lis* in *VVF* related to the central excise exemption extended by the Government as a measure to promote industrial activity in the earthquake-affected areas of Gujarat. Complete exemption for ten years was granted by way of statutory notification issued in 2001 by the Government. By a 2008 notification, the Government limited the exemption up to 34% of value addition made by the eligible industry. The High Court accepted a challenge based on the claim that the curtailment of the exemption violated the promissory estoppel doctrine, only to find its decision reversed by the Supreme Court.[53]

In its decision in *VVF*, the Supreme Court placed extensive reliance upon the observations in *Kasinka Trading* and other decisions[54] to conclude, *inter alia*, that the very nature of the statutory power extending the exemptions is such that it "*is susceptible of being revoked or modified or subjected to other conditions*" wherein the 'public interest' element was predominant. The decision in *VVF* went on to add another layer of exception to the promissory estoppel doctrine.

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[53] VVF India Ltd. v. Union of India, Special Civil Application No. 4418 of 2014 (India).
[54] Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India); Sales Tax Officer v. Shree Durga Oil Mills, (1998) 1 SCC 572 (India); State of Rajasthan v. Mahaveer Oil Industries, (1999) 4 SCC 357 (India); Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh, (2011) 3 SCC 193 (India).

It was concluded in *VVF* that the 2008 notification was 'clarificatory' as it sought to quell the doubts over the scope of the 2001 notification. Consequently, the Supreme Court gave a retrospective effect to the 2008 notification. This conclusion was justified by the Supreme Court relying upon the claim of the Government that complete exemption in terms of the 2001 exemption "*had prompted certain unscrupulous manufacturers to indulge in different types of tax evasion tactics*". This conclusion was based on the following reasoning:

> "*On a fair reading of the earlier notifications/industrial policies, it is clear that the object of granting the refund was to refund the excise duty paid on genuine manufacturing activities. The intention would not have been that irrespective of actual manufacturing/manufacturing activities and even if the goods are not actually manufactured, but are manufactured on paper, there shall be refund of excise duty which are manufactured on paper. Therefore, it can be said that the object of the subsequent notifications/industrial policies was the prevention of tax evasion. It can be said that by the subsequent notifications/industrial policies, they only rationalizes the quantum of exemption and proposing rate of refund on the total duty payable on the genuine manufactured goods. At the time when the earlier notifications were issued, the Government did not visualize that such a modus operandi would be followed by the unscrupulous manufacturers who indulge in different types of tax evasion tactics. It is only by experience and on analysis of cases detected the Excise Department the Government came to know about such tax evasion tactics being followed by the unscrupulous manufacturers which prompted the*

> *Government to come out with the subsequent notifications which, as observed hereinabove, was to clarify the refund mechanism so as to provide that excise duty refund would be allowed only to the extent of duty payable on actual value addition made by the manufacturer undertaking manufacturing activities in the concerned areas. The entire genesis of the policy manifesting the intention of the Government to grant excise duty exemption/refund of excise duty paid was to provide such exemption only to actual value addition made in the respective areas. As it was found that there was misuse of excise duty exemption it was considered expedient in the public interest and with a laudable object of having genuine industrialization in backward areas or the concerned areas, the subsequent notifications/industrial policies have been issued by the Government.*" *(emphasis supplied)*

From the aforesaid, it is clear that the Supreme Court in *VVF* was persuaded to restrict the scope of exemption on account of the instances revealing abuse of the underlying intent which prompted the Government to grant such exemption. This aspect merits a critical appreciation from variety of perspective enumerated below.

First, the Supreme Court failed to advert to the fact that abuse or misuse of exemptions and existence of unscrupulous elements is not a new phenomenon. Such instances have always existed. Thus, it was incumbent upon the Government to incorporate anti-abuse provisions and requisite safeguards in the original law itself. By permitting the Government to retrospectively modify the provisions the Supreme Court permitted the

Government to get over its failure without having to pay any price. Conversely, a number of genuine persons would suffer on account of the change of law notwithstanding that they would have satisfied all necessary conditions.

Second, the *VVF* decision amounts to holding that the conduct of other parties is relevant to determine the correctness of the Respondent's claim. Thus, the Supreme Court equated unscrupulous elements with honest citizens thereby denying them the benefit of the 2001 promise of complete exemption to only one-third of the promised amount.

Third, the Supreme Court in *VVF* also failed to observe that the claim for promissory estoppel could have been built only by genuine industries that would have been able to justify satisfaction of the conditions under the 2001 notification whereas the tax evaders were not even eligible to raise the claim of promissory estoppel.

Fourth, by permitting retrospective curtailment of the 2001 exemption in the year 2008, the Supreme Court in *VVF* not just followed *Kasinka Trading* principle in diluting the application of the promissory estoppel doctrine but went beyond to permit retrospective denial of the promised benefits. The endorsement of the practice to retrospectively modify the conditions of exemptions may come to haunt the Governments from time to time as investors would be forever sceptical in gauging the availability of exemptions. In other words, this judgement may have a

negative impact on all stakeholders, who would be hesitant about these exemptions being rolled back in the near future to their detriment.

Whether the *VVF* decision is correct on the point of retrospectivity forms a subject-matter of a different debate altogether, one which requires an interplay of various distinct jurisprudential inquiries, such as, the competence of the Government to issue notifications with retrospective effect,[55] the doctrine of fairness which guards against implied retrospectivity of fiscal instruments,[56] strict construction of exemption notifications,[57] etc. These aspects are beyond the scope of the present inquiry. Nonetheless, for our purpose, it would suffice to conclude that the declaration in *VVF* that the promised exemption could not only be taken away but also be taken away with retrospective effect marked a further downslide of the promissory estoppel doctrine. Thus, there is another compelling reason to revisit the exact scope and contours of the promissory estoppel doctrine in the fiscal space, lest the doctrine fades into obsolescence.

VI. BEYOND PROMISSORY ESTOPPEL: IS THERE AN ALTERNATIVE WAY TO BOLSTER TAX INCENTIVE CLAIMS?

The gradual erosion of the foundational tenets of the promissory estoppel doctrine compels one to explore newer horizons in the quest to

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[55] Tarun Jain, *Monetary Limits of Appeals: Retrospectivity of Departmental Instructions*, 400 INCOME TAX REP. 44-59 (2018).
[56] Tarun Jain, *Doctrine of 'Fairness': Countering 'Implied Retrospectivity' of Fiscal Enactments*, 397 INCOME TAX REP. 21-35 (2017).
[57] Tarun Jain, *Fiscal Incentives and Exemptions: Reflections on the New Interpretation Standard*, 5(2) NLUJ L. REV. 1 (2018).

validate the proposition that the Government must be held responsible for its representations and made accountable for the prejudice caused to others by relying on such representations. To this end, one may find an unexplored avenue in the Indian contract law wherein certain equitable propositions have been codified as statutory law.

Section 70 of the Indian Contract Act, 1872 [*hereinafter* referred to as "**ICA**"] stipulates that the doer of a non-gratuitous act is bound to be compensated by one who enjoys the benefit of such an act.[58] This is a facet of the principle of restitution and the doctrine of unjust enrichment as it now stands judicially approved that a "*claim for compensation by one person against another under Section 70 is not based on any subsisting contract between the parties; its basis is that something has been done by one party for the other which the other party has voluntarily accepted*".[59] Furthermore, the fact that this provision applies only where a contractual relationship does not exist between the parties reflects that the provision incorporates an equitable principle engrafted in the statute itself.[60] The effect of this provision is pervasive for it can be invoked even to oblige the State to compensate notwithstanding the lack of constitutional stipulations[61] necessary for a formal contract to

[58] The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 70.
[59] POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1377 (12th ed., 2001).
[60] State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779 (India).
[61] INDIA CONST., art. 299.

come into existence; thereby Section 70 prevents unjust enrichment even by the State.[62]

The Supreme Court, expounding the underlying tenet of this provision[63] has observed that "*in cases falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party*".

The limitation of Section 70, however, is that its application presupposes the other party to enjoy the benefit of an act carried out by its doer. This limitation is compounded by the fact that, where Section 70 applies, the obligation of the recipient is to compensate the doer or return/restore the benefit. In a pragmatic realm, therefore, as the decisions relating to its application also reveal, this provision has generally been

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[62] New Marine Coal Co. (Bengal) Pvt. Ltd. v. Union of India, AIR 1964 SC 152 (India); POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1383, 1386 (12th ed., 2001).

[63] Union of India v. Sita Ram Jaiswal, (1976) 4 SCC 505 (India).

applied where goods have been delivered by a person and whose benefit has been enjoyed by the recipient. In such cases, perhaps because it is comparatively easier to adjudge, the recipient is obliged to compensate for the benefit arising from the consumption of such goods. Conversely, where the doing of the act or delivery is difficult to establish, such as in case of intangibles or oral assurances, and where it cannot be established with certainty that another has indeed been benefitted by the act, Section 70 does not come to the rescue of the doer.[64]

To exemplify, the Supreme Court has declared that "*[t]he three ingredients to support the cause of action under Section 70 of the Indian Contract Act are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered 'not intending to do so gratuitously'. Third, the person to whom the goods are delivered 'enjoys the benefit thereof'. It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered*".[65]

The transposition of this principle in the context of fiscal incentive claims, therefore, is a factual exercise in which it must be established that (i) the person claiming the fiscal exemption (i.e., the claimant) carried out certain actions for the Government, (ii) such actions were lawful and not

[64] *Id.*
[65] *Id.*

gratuitous, and (iii) the Government enjoyed the benefit of such actions. It is only when these conditions can be satisfied that the Government would be obliged to compensate the claimant. In respect of these questions, it may be relatively expedient to establish that the claimant carried out certain acts by evidencing that it made investments and undertook other activities being persuaded by the fiscal incentive announced by the Government. For that matter, even a claim pedestaled on the promissory estoppel doctrine rests upon the factual foundation of such an assertion. It may also be relatively easier to demonstrate that the claimant's actions are lawful and non-gratuitous. For this purpose, the claimant would effectively be establishing (i) the rationale for making investments, (ii) the fact of carrying out business activities outlined in the Government announcements as the pre-condition for availing the fiscal benefit, and (iii) demonstrative that investments would not have been made and activity not carried out without the inducement of such benefits.

The issue, however, arises in establishing that the Government enjoyed the benefit of the actions of the claimant. This is because judicial opinion has established that for Section 70 to apply, the "*benefit must be direct and not indirect, i.e. directly derived by the person for whom the work is done*" meaning thereby that, for example, "*[w]here certain works done by a railway company benefitted owners of land and building, it could not be said that the municipality was benefitted merely because it recovered taxes from the owners or occupiers of the property*".[66] Transposing this requirement in our context implies that the claimant

[66] POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1401 (12th ed., 2001).

would have to establish that by its act of making the investment, generating employment or undertaking such activity which was the precondition for availing the fiscal benefit, the Government has indeed obtained a direct benefit. To this end, the eligibility certificate issued by the Government may be relied upon as documentary evidence to establish that the Government has also acknowledged the receipt of the benefit on account of which it has endorsed the availability of the fiscal benefit to the claimant. Nonetheless, these are factual questions as it is the subjective determination of the court whether the Government 'enjoyed' the benefit of the claimant's activities.

It may be contended that the Government is merely the representative of the citizens and therefore the benefits enjoyed by the citizens (on account of increase in industrial activity, employment generation, etc., being the attainments identified in the Government's policy itself) could be considered as benefits enjoyed by the Government itself. This proposition may be further developed by drawing upon the modern jurisprudential trends which do not view Government in isolation from the citizenry. This aspect may particularly apply to those exemptions which are linked towards the attainment of societal welfare objectives, and thus the benefits could be considered as enjoyed by the Government where the society benefits at large.

Subject to the above factors being established, obviously based on documentary evidence, a claim under Section 70 may very well turn out to be a potent ground for a claimant to sue the Government for failure, whether partial or in full, to abide by its commitment of the fiscal

exemption. Indeed, if the elementary conditions stand satisfied, the Government would be 'bound to' compensate the claimant in the event it is not in a position to 'restore' the benefit to the claimant. Such relief is similar to what has been secured by the citizens by successfully invoking the promissory estoppel doctrine.

The difference, however, would be that while a claim for promissory estoppel has traditionally been made by way of a writ petition before the High Court, the claim under Section 70 would have to be pursued like regular civil proceedings. Thus, the trappings of civil litigation, such as, the requirement to serve notice before initiating the suit against the Government,[67] the territorial and other limitations of the civil courts unlike the unrestricted and untrammelled extraordinary jurisdiction of the High Court, etc., would have to be factored while manoeuvring the contest. Nonetheless, these are only practical aspects which neither influence the merit of the claim nor dilute the potency of Section 70 challenge to actions of the Government withdrawing the fiscal benefit.

VII. CONCLUSION

Five decades of judicial opinion set the context of the promissory estoppel doctrine in the Indian fiscal space. The doctrine, seeking to obviate the hardships to the citizens arising on account of flip-flops in executive policy and the varying economic priorities of the Government, saw a modest start in the *Indo-Afghan* decision in the late 1960s. It received firmer

[67] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 80.

elocution in *Motilal Padampat* in the late 1970s to be instituted as a *sui generis* equitable force shielding the citizens from the wrath of the State withdrawing from its prior fiscal commitments. The contemporary relevance of the doctrine, however, cannot be stated with such precision.

Multiple caveats, expansive interpretation of what constitutes 'public interest', greater latitude to the Government in framing policies, limited judicial review of such policies and their impact on the past assurances extended to the citizens, etc., have relegated the status of this doctrine from an overriding consideration at some point to a mere variable in the zone of consideration of the *lis*. The inconsistent judicial treatment meted to the doctrine also does not assist in an attempt to unequivocally ascertain its status. A categorical elucidation by a larger bench of the Supreme Court being overdue also does not help such attempts.

The recent trend reveals that the effectiveness of this doctrine is dwindling and its contours failing to equip the citizens in their quest to hold Governments accountable and enforce the performance of their promises. If this trend is a guide, it would not be long before the citizens seek to abandon their reliance on such equitable pivots for their claims and instead seek to explore statutory remedies, such as the Section 70 remedy under contract law discussed above. One would, however, hope that this crucial doctrine, which seeks to draw parity between the citizens' entitlement *vis-à-vis* the Government by way of its equitable stance, is not lost in the process, for it is too important to be forgotten that it is equity which mitigates the harshness of the law.