COMMISSIONER OF TRADE TAX, U.P. AND ANR. A

v.

M/S. KAJARIA CERAMICS LTD.

JULY 12, 2005

[RUMA PAL AND ARUN KUMAR, JJ.] B

U.P. Trade Tax Act, 1948:

Section 4A—Exemption Notification of 1991—Benefit of, from payment of trade tax, to industrial units undergoing expansion under—Extent of benefits available—Held: Benefit of 1991 Notification is limited to a percentage of the additional fixed capital investment and not to a percentage of the aggregate of the original and additional fixed capital. C

Section 4A—Exemption Notification of 1991—Benefit of, from payment of trade tax, to industrial units undergoing expansion—Expansion of units thrice within period of five years—Assessee claiming exemption under 1991 notification that during the period of five years there was one single expansion in three phases—Sustainability of—Held: Admitted facts that there were three separate expansion—Each time assessee made additional investment, increased its capacity to produce and in fact produced goods there was expansion—When expansion done unit was in production for less than three years—Three separate applications were maintainable and not one composite application for three years—Hence, finding of tax Authority that there were three expansions upheld and claim of assessee not sustainable. D E

Section 4A explanation 4—Fixed capital investments—Meaning of—Preoperative expenses, if includible—Held: Preoperative expenses like interest to financial institutions, rights shares issue expenses, foreign technician expenses and foreign travel expenses does not reflect value of items forming part of fixed capital investment for 1991 Notification and the Act—Hence, not includible under head of fixed capital investment for purpose of section 4A—Also cannot be brought within the definition by any principle of statutory interpretation. F G

Sections 4A, 8A, 15A(1)(qq)—Exemption Notification of 1991—Grant of eligibility certificate pursuant to Order of High Court—Assessee units not

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A *collecting or realising any tax—Also order not stayed by this Court—Unit finally not entitled to exemption—Relief against recovery of tax—Entitlement of—Held: Assessee unit is not entitled to any relief—State Government is entitled to recover tax from the unit—Dealer has to pay tax which it did not collect from customers even if it was under fear of punishment under section 15A(1)(qq)(viii).*

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Respondent-Company having obtained industrial licence in 1988 was engaged in manufacturing and selling of ceramic tiles since then. The annual production capacity of the respondent was 12000 tonnes per annum (TPA). The respondents obtained six years tax exemption from 1988-1994 in terms C of the Notification of 1985 issued under section 4A of the U.P. Trade Tax Act, 1948. The annual production capacity of the respondent was increased from 12000 TPA to 26000 TPA, from 26000 TPA to 40000 TPA and from 40000 TPA to 60000 TPA respectively during the period in year 1990, 1991 and 1994. The respondents were granted eligibility certificate. There was total additional investment in three expansions. Meanwhile, the Notification of 1991 D was issued and exemption was granted to a new unit and to units which had undertaken expansion, diversification or modernization. A Circular of 1993 was also issued whereby units which had started production upto 31.3.1990 and which could enjoy unlimited exemption for a fixed period, and which had undertaken expansion, diversification or modernization would get the benefit E of exemption.

After exemption period from 1988-1994 came to an end, respondent filed application under 1991 Notification claiming that there was one expansion during the period from 1988-1994 by which annual production capacity of the respondent's unit was increased from 12000 TPA to 60000 TPA. F Meanwhile the 1995 Notification was filed which granted benefits to units which were either new or had undertaken expansion, diversification or modernization on or after 1.4.1995 but not later on 31.3.2000. Division Level Committee (DLC) ignored the first two expansions for achieving the expansion of 40000 MT and granted an exemption only in respect of the last expansion of the unit from 40000 TPA to 60000 TPA taking 40038 MT as base G production with the production commencing from 28.3.1994. DLC included the cost of land and site building and plant and machinery in the total fixed capital investment but excluded expenses such as interest payable to financial institutions, expenditure incurred for rights issue, foreign travel and foreign technician expenses as claimed by respondents. Thereafter, an eligibility H certificate was issued. Aggrieved respondent filed an appeal. The Tribunal

held that there was only one expansion and that the benefit under the 1991 Notification was to be calculated as a percentage of the additional fixed capital investment and not as a percentage of the fixed capital investment prior to the expansion. It, however, included the expenses on rights issue, foreign technicians, foreign travel, laboratory equipment, fire fighting equipment and establishment of water distribution schemes in the value of the fixed capital investment. Both the appellants and the respondent filed a revision. The High Court held that the tax benefit would be calculated at the specified percentage of the original and additional fixed capital investment and struck down the Circular of 1993 and directed the DLC to issue a revised eligibility certificate. Hence the present appeals.

The questions which arose for consideration in these appeals are:

(i) Whether under the 1991 Notification, unit undergoing expansion is entitled to the benefit of exemption on the additional fixed capital investment or the total fixed capital investment ?

(ii) Whether the respondents' claim of one integrated expansion from 12000 TPA to 60000 TPA during 1988 to 1994 is sustainable in fact or in law ?

(iii) Whether certain preoperative expenses form part of 'fixed capital investment'" under section 4A of the Act and the 1991 Notification ?

(iv) Whether the respondents, allegedly not having collected or realized any tax after the grant of the eligibility certificate, pursuant to the High Court's judgment, and which was not stayed by this Court, are entitled to any relief ?

Allowing the appeals, the Court

HELD: 1.1 The different methods of computation contained in paragraph 4 of the 1991 Notification serve two separate purposes and that is to determine the two relevant investments for the distinct benefits available to two different kinds of units viz. new units and established units which have undertaken expansion etc. Significantly there is no mode prescribed for determination of original fixed capital investment as far as the latter kind of unit is concerned nor additional fixed capital investment in respect of the former. The High Court did not consider the logical consequences of paragraph 4 of the Notification providing only for the computation of additional fixed capital investment as far as units undertaking an expansion etc. were concerned. The High Court

misread paragraph 4, the only reasonable interpretation of which is that as far as new units were concerned the 'original fixed capital investment' would have to be computed and as far as units undertaking expansion etc. were concerned 'additional fixed capital investment alone would have to be computed. [455-E-G]

1.2. Form XLVI appended to the UP Trade Tax Rules, 1948 prescribes the details for an application for exemption from or reduction in rate of tax to new units the date of starting production whereof fell on or after 1.4.1990 or to units which have undertaken expansion, diversification or modernization on or after 1.4.1990 under Section 4A of the U.P. Trade Tax Act. Serial No. 6(a) gives the necessary particulars of the fixed capital investment in case of the latter kind of unit. There are three columns viz., Original investment (without giving margin for depreciation), additional investment in the expansion etc on the date of commencement of the period of facility and a certificate of valuation of the additional fixed capital investment. The investments contemplated are in (i) land (ii) building and (iii) plant, machinery, equipment, apparatus and components. The certificates in respect of items (i) and (ii) as far as additional fixed capital investment are to be given by the Collector of the District and the evaluator approved by the Income Tax Department respectively. The valuation of the third item is to be given by a chartered accountant. The note to Serial No. 6(a) also requires a certificate from a chartered accountant of the original fixed capital investment. The particulars indicate that while fixed capital investment includes original and additional investments a distinction is made between the two. The purpose is patently to enable the Department to verify the calculation of the percentage of increase in the additional investment by reason of the expansion over the original. It does not mean that in respect of units undertaking expansion the percentage is to be calculated on an aggregate of both original and additional investments. [455-H; 456-A-D]

1.3. The three notifications namely the one issued in 1985, 1991 and 1995 form part of a pattern. The 1985 notification granted benefit to new units provided their original investment exceeded Rs. 3 lacs of their entire turnover. The 1991 Notification extended the benefit to old units undertaking expansion and which may have already got the benefit, like the respondent, of the original investment made under the 1985 Notification subject to the old unit making a further investment and the benefit was limited to a percentage of that investment. Similarly the 1995 Notification further extended the benefit to units which had undertaken backward integration again limiting the benefit

to the investment made. All three notifications were issued under the same section and for the same purpose of effecting development and were part of a chain of progress without any overlapping. Not only would the contents of each notification derive its meaning from Section 4A as each is derived from and refers back to the section, but also if a phrase used in one of the notifications is still ambiguous, then for the purpose resolving the ambiguity the contents of the previous or subsequent notifications can be looked into. [456-E-H]

Pappu Sweets and Biscuits v. *CTT, U.P.*, [1998] Supp 2 SCR 119, referred to.

Cape Branch Syndicate v. *I.R.C,* (1921) 2 KB 403, referred to.

1.4. The ambiguity in the 1991 Notification as to the meaning to be put on the phrase 'fixed capital investment' in Annexure I was removed by the clarification in Annexure I of the 1995 Notification by its reference to additional fixed capital investment as far as established units undertaking expansion etc. were concerned. [457-E-F]

1.5. The Circular can be read as a contemporaneous understanding and exposition of the intention and purport of the Notification. Courts have treated contemporary official statements as contemporary exposition and used them as aids to interpret even recent statutes. [458-B]

Collector v. *Andhra Sugar,* [1988] 3 Supp SCR 543 and *Karnataka SSIDCL* v. *CIT,* [2002] Supp 4 SCR 453, referred to.

1.6. The High Court erred in striking down the circular of 1993 by holding that the circular was contrary to what the High Court thought was the clear intention behind the notification instead of seeing the circular as contemporaneous evidence of such intention. Therefore, the position was abundantly clear. Old units undertaking expansion, diversification or modernization would be entitled to get benefit of tax reduction on the additional fixed capital investment made. The respondent acted on this. [458-E-F]

1.7. The respondent had only claimed in its amended application that it should have been given exemption on the additional fixed capital investment relating to the three expansions before the tribunal. The particulars of the items of investment including land and buildings claimed related only to this. It was only the third expansion which should be granted the benefit under the 1991 Notification. Thus, there was no issue raised before the Tribunal by the

A respondent that the original investment should be included in computing the tax benefit under the 1991 Notification. Even if the High Court found that the issue was raised in the grounds of Appeal, it should not have allowed the respondent to raise it in revision when clearly it had not been pressed before the Tribunal. [458-H; 459-A-B]

B 1.8. The appellants' submission that the High Court's interpretation of the 1991 Notification leads to anomalous results also appears to be sound. The High Court has correctly found that "the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production C of goods and promoting the development of industry in the State". If the intention of the State Government, as expressed in Section 4A itself is to encourage investment, it is unlikely that the investment already made would entitle an industry to any further benefit again. Yet if the respondent's reasoning is accepted which was affirmed by the High Court, there may be multiple expansions qualifying for the benefit of the 1991 Notification and D the original investment would be taken into account every time. Apart from the fact that a new unit would have to face competition from an old established unit, a new unit would be additionally handicapped by the greater benefits being granted to the old established businesses. It is unlikely that any new unit could be persuaded to set up industries in such adverse circumstances leading to a situation which was certainly not envisaged either under Section 4A or E under any of the notifications issued thereunder. [459-C-F]

1.9. The Notification is merely sought to be construes. Although consequences cannot and should not alter the statutory language but they may at least fix its meaning. The benefit of the 1991 Notification with regard to F the units undertaking expansion etc. like the respondent, is limited to a percentage of the additional fixed capital investment and not the original and additional fixed capital only and not to a percentage of the aggregate of the original and additional fixed capital. [459-G-H; 460-A]

2.1. Each of the admitted facts show that there were in fact three G separate expansions. For each of the three expansions, separate industrial licences were applied for and obtained from the Central Government. Separate negotiations for finances were entered into between the respondent and the financial institutions. The correspondence exchanged shows that the expansions were separate and the respondent had made three separate applications, one for each expansion. The High Court or the Tribunal did not H

advert to these facts and their conclusion that there was only one expansion was perverse. [461-C-E] A

2.2. Admittedly the respondent produced goods in excess of what was its base production as a result of the establishment of its original unit in 1991 when the first expansion was completed. With the production of the first tile after the first expansion the period of facility under the 1991 *Notification* commenced and the expansion was complete. The years of the first expansion would then be taken into account for determining the base production for the second expansion, and the moment this was exceeded as a result of the second expansion the expansion was complete. The same process would apply to the third expansion. Therefore, each time the respondent made an additional investment, increased its capacity to produce and in fact produced goods there was an expansion. [464-B-C] B C

2.3. The respondent cannot in terms of this statutory scheme claim in one breath that a single expansion commenced from 1988 and was completed in 1994 and at the same time say that the base production was the figure of production in 1992-93 viz. 40038 MT. The base production must statutorily *precede* the expansion and cannot be a figure taken while the expansion has already progressed. The figure of 40038 MT was accepted by the DLC as the base production. The appellants have similarly accepted this figure. But this is in keeping with their submission that there were in fact three expansions and that the figure of 40038 MTs is the base production for the third and last expansion. [464-D-E] D E

2.4. The respondents relied on the second *proviso* to Explanation 6 of the Notification 1991 as well as Notifications of 1996 and 1997 that the notifications permit fixed capital investment even after the commencement of facility and was an instance of the clubbing permitted under the second proviso. The two notifications of 1996 and 1997 declare that new units or old units making an additional fixed capital investment of fifty crore rupees or more would be entitled to exemption from tax for a period of three years on or after specified dates. The clubbing under the second *proviso* does not relate to the date of production and the commencement of the facility but to the base production. Neither of the notifications refers to the second proviso nor were they in operation during the relevant period. [464-F; 465-A-B] F G

2.5. The High Court relied on Circulars of 1996 and 1997 and concluded that the respondent could only make one composite application after 5 years. H

A It should not have done so since the circular was issued subsequent to the relevant period and after the respondent had filed its revised application for exemption under section 4A, and the construction put by the circular on the definition of base production is questionable and has in any event no statutory force. In any event the definition of base production in Explanation 6 which was amended in 1998 w.e. f. 1.4.1990 clearly says that if the unit has been in B production for less than five years, the maximum production achieved during any one of the preceding assessment years would be taken as the base production. Therefore, the appellants rightly submitted that three separate applications were maintainable at all material times despite the fact that when such expansions were done the unit was in production for less than 5 years. C There were in fact and in law three expansions. [465-H; 466-A-D]

3.1. Explanation 4 to section 4A has defined fixed capital investment saying that it 'means " investment in land and building and such plant, machinery, equipment apparatus, components, moulds, dyes, jigs and fixtures as have not been used or acquired for use in any other factory or workshop in D India". The language of the definition of the phrase in Explanation 4 to Section 4A is sufficiently clear and unambiguous. This coupled with the use of the word 'means' in the Explanation shows that the definition is exhaustive. Therefore, apart from what is stated in the definition, no other item of expense is includible under the head of fixed capital investment for the purposes of section 4A of the Act. [466-F-G]

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Feroze N. Dotiwala v. *P. M. Wadhwani,* [2003] 1 SCC 433 and *PLD Corporation Ltd.,* v. *Presiding Officer,* [1990] 3 SCR 111, relied on.

3.2. This principle of statutory interpretation is reinforced not only by the particulars itemized in form XLVI of the Rules but also by the procedures F for determination of fixed capital investment specified in paragraphs 3 and 4 of the 1991 Notification, all of which underscore the definition's restrictive nature. There is and indeed could be no reference either in the form or in the 1991 Notification to any item outside the definition in Explanation 4 to Section 4A. [467-E]

G 3.3. The items of expenditure-Interest paid on loans by financial institutions, expenses in connection with a rights issue of shares, expenses on foreign technicians or foreign travel do not reflect the value of the items forming part of the fixed capital investment for the purposes of the Act or 1991 Notification and cannot by any principle of statutory interpretation be brought within the definition of the phrase in Explanation 4 to section 4A. H [468-B-C]

3.4. The underlying object of the scheme of exemption under Section 4A of the Act, is to grant benefit by way of a *quid pro quo* for the actual value of assets brought into the State. The determination of such value would necessarily have to be an objective exercise. For the purposes of the Income Tax Act, a tax on income may allow the valuation of an asset taking into consideration circumstances which may be entirely personal to the assessee under which the asset is purchased subject to certain permissible limits. Therefore, the perspective of the two statutes is different. The Tribunal and the High Court failed to construe these statutory provisions and relied upon judgments delivered in connection with the Income Tax Act, the provisions and purpose of which could hardly be said to be in *pari materia* with the provisions of the UP Act and the 1991 Notification. [467-F-G; 468-A]

Challapalli Sugars Ltd. v. *CIT,* (1975) 98 ITR 167; *Commissioner of Income Tax* v. *Motor Industries Co. Ltd.,* (1988) 173 ITR 374 and *CIT* v. *Polychem Ltd.* (1975) 98 ITR 574, referred to.

4.1. The State Government is entitled to recover the sales tax from the assessee companies irrespective of the fact that the assessee companies may have lost the chance of passing on their liability to pay sales tax to their purchasers. The Act itself envisages a situation where a dealer may be called upon to pay the tax which it may not have collected from its customers. Further, even if the dealer is under the fear of punishment under section 15A (qq) (viii) does not realise amount by way of tax on the sale of its goods in compliance with the provisions of section 8A (2) during the period it is exempt from paying tax, it would still have to pay the tax under sub section (4) of section 4A if it is found that it was not entitled to such exemption. The overriding nature of this consequence follows not only from the use of the imperative word 'shall' in sub section (4) but also from the non obstante clause with which section 4A opens. [470-G-H]

State of Rajasthan v. *J. K. Udaipur Udyog Limited,* [2004] 7 SCC 673, relied on.

4.2. The Circulars may be of varying kinds. The circulars relied on were merely official communications to the subordinate officers directing compliance with the decision of the High Court. They were not clarifications of statutory provisions that they would represent the official understanding of those statutory provisions and would be binding on the taxing authority. Nor was there any statutory provision in the UP Act which makes circulars issued thereunder binding on the authorities. Respondent's objection to the

A recovery of the tax that the appellants had accepted the decision of the High Court and Circulars had been issued even prior to the refusal to stay the impugned judgment by this Court cannot be accepted. In absence of any order of stay by this Court, the appellants were bound to comply with the impugned decision. Such compliance by itself cannot destroy the appellants rights to press their appeals before this Court. [468-F-H; 469-A]

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Collector of Central Excise, Vadodra v. *Dhiren Chemical Industries,* [2002] 2 SCC 127 and *Commissioner of Sales Tax, UP.* v. *Indra Industries,* [2000] 9 SCC 66, referred to.

C 5. The High Court has found that the respondent had taken the benefit of the increased capacity of the unit which came about by reason of the first two expansions in the sense that the exemption on entire sales turnover relatable to such increased capacity had been enjoyed by the respondent under the 1985 Notification. The DLC had also granted tax benefit to the respondent only in respect of the third expansion excluding the preoperative expenses. D Even though for other reasons, having regard to the decision on the various issues against the respondent, this is the highest relief that the respondent could claim and which the appellants concede would be the most equitable. [471-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4601 of 2000.

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From the Judgment and Order dated 13.1.2000 of the Allahabad High Court in T.T.R. No. 700 of 1997.

WITH

C.A. No. 4602 of 2000.

F

G.K. Banerjee, Punit Dutt Tyagi, S. Aggarwal and Mukesh Verma with him for the Appellants.

Gopal Subramanium, Bharatji Aggarwal, Dhruv Agarwal, Praveen Kumar, Umesh Khaitan and Nishant Menon with them for the Respondent.

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The Judgment of the Court was delivered by

RUMA PAL, J. The issue in these appeals is the extent of the entitlement of the respondent to the benefit of exemption from payment of trade tax granted under a notification dated 27th July, 1991 issued under Section 4A H of the U.P. Trade Tax Act, 1948 (hereinafter referred to as 'the Act')

The respondent manufactures and sells ceramic tiles in its factory at Sikandarabad, District Bulandshahar in the State of Uttar Pradesh since 1988 having received an industrial licence from the Government of India to do so. The annual production capacity of the respondent was 12000 TPA (tonnes per annum). The total investment made in the unit upto 12th August, 1988 was Rs.16,21,54,452 and the first sale was effected on 16th August, 1988.

A notification issued on 26th December, 1985 (referred to as the 1985 Notification) under Section 4-A of the Act granted a six-years' tax exemption in respect of new units having an investment in excess of 3 lakhs starting production on or after the first date of October, 1982 but not later than the first day of March, 1990. Admittedly the respondent's unit fulfilled the conditions mentioned in the notification and, since its investments exceeded Rs. 3 lakhs, it was granted exemption for six years which was reckoned from the date of first sale i.e. from 16th August, 1988 to 15th August, 1994.

During the period 1st April, 1990 to 15th August, 1990 the capacity of the respondent's unit was increased from 12000 to 26000 tonnes per annum. A further fixed capital investment of Rs.11,14,95,641 was made and the eligibility certificate which had been granted was suitably revised on 11th April, 1991 noting the increased production capacity of the unit to 26000 TPA. Again between 16th August, 1990 to 28th December, 1991, the respondent made an additional fixed capital investment of Rs.12,50,66,080 and increased the units capacity from 26000 to 40000 TPA. Finally the capacity was increased to 60000 TPA by making a further investment of Rs. 29,95,20,778 by 28th March, 1994. The total additional investment in the three expansions was Rs. 54,51,03,544.

In the meanwhile a notification dated 27th July, 1991 (referred to as the 1991 Notification) had been issued granting an exemption from tax to a new unit and also to units which had undertaken expansion, diversification or modernization. It provided similar relief from payment of tax under the Act to new units excluding units mentioned in Annexure II to the second Notification as well as to goods manufactured in units other than units of the type mentioned in Annexure II which had undertaken expansion, diversification or modernization on or after 1st April, 1990 but not later than 31st March, 1995 in specified areas. Under paragraph 1(B) (1) (a) no tax was payable or, as the case may be the tax was payable at reduced rates specified in Column IV of Annexure I on the turnover of sales by such units in respect of *inter alia* "the quantity of goods manufactured in excess of the base production in the case of units undertaking expansion or modernization". Paragraph 1B (2) (ii)

A provided that in the case of units undertaking expansion or modernization the period of such facility was to be reckoned from the first date of production of goods manufactured in excess of the base production. The benefits under the Notification were available only on production of an eligibility certificate granted by the named authority to the assessing authority. Annexure I provided for the rates of tax applicable in respect of such units situated in different B districts named in that Annexure. The rate of exemption of tax applicable was fixed on the basis of the investment and varied according to the location of the unit as specified in Annexure 1 to the Notification. The respondent's unit was covered by Serial No. 2(i) of Annexure 1 to the notification which covered the district of Bulandshahr within which the respondent's factory is C situated. The relief was granted for 9 years and was fixed at 'nil' in case of units with a fixed capital investment exceeding 50 crores and in the case of other units at different percentages subject to 150 per cent of the fixed capital investment in the case of small scale units and 125 per cent of the fixed capital investment in the case of medium and large scale units.

D On 30th June, 1993, a Circular was issued by the Commissioner of Sales Tax clarifying that units which had started production upto 31st March, 1990 and which could enjoy unlimited exemption for a fixed period, and which had undertaken expansion, diversification or modernization would get the benefit of exemption of reduction from the specified dates confined to 100% to 150% E of the additional fixed capital investment.

When the 1991 Notification came into force, the respondent was still enjoying the benefit of the 1985 notification. After that period of exemption came to an end on 15th August, 1994, on 16th September, 1994, the respondent made three separate applications under cover of a letter dated 15th September, F 1994 to the General Manager, District Industries Centre for recommendation to the Divisional Level Committee stating that the respondent company had started its production on 12th August, 1988 with an installed capacity of 12000 TPA and that it had "undertaken three successive expansions during 1990 to 1994. First it increased the capacity from 12000 MT to 26000 in August, 1990 and raised it to 40000 MT in December, 1991 and 60000 MT in G March, 1994".

However, on 21st November, 1994 the respondent withdrew all three applications and on 17th July, 1995, filed a revised application claiming that there was one expansion from 12th August, 1988 to 28th March, 1994 by which the annual production capacity of the respondent's unit was increased H

from 12000 TPA to 60000 TPA by making an additional fixed capital investment of Rs. 54,51,03,549. A

Before the revised application under the 1991 Notification was filed by the respondent a third notification was issued on 31st March, 1995 (referred to as the 1995 Notification) granting benefits to units which were either new or had undertaken expansion, diversification or modernization on or after 1st April, 1995 but not later on 31st March, 2000. The difference in this notification with the earlier notifications is not only with regard to the period but also in the allowance of the benefit to any finished goods manufactured in such a unit which had undertaken "backward integration" during the same period. The limits to which exemption was granted has been mentioned in Annexure I. Units where the fixed capital investment exceeded Rs. 50 crores would, like the earlier notification, be wholly exempted from payment of tax. Where the investment was not Rs. 50 crores, the benefit was granted at reducing percentages - the maximum (at least as far as certain districts including Bulandshahar were concerned) being 200% of the fixed capital investment or, as the case may be, additional fixed capital investment. B C D

On the basis of the revised application and in accordance with the procedure prescribed, an inquiry was made and a report submitted by the Trade Tax Officer to the Divisional Level Committee (DLC). The DLC by its decision dated 7th July, 1996 granted an exemption only in respect of the expansion of the unit from 40000 TPA to 60000 TPA. The base production was taken at 40038 MT. The benefit in respect of the first and second expansions for achieving the expansion of 40000 MT was not granted. The production was also taken to have commenced from 28th March, 1994 as a result of expansion. The total figure of investment accepted by the DLC included the cost of land and site building and plant & machinery. Other expenses claimed by the respondent such as interest payable to financial institutions, expenditure incurred for rights issue, foreign travel and foreign technical expenses were not included. An eligibility certificate based on the decision of the DLC was accordingly issued. E F

Aggrieved by the DLC's decision, the respondent filed an appeal under Section 10 of the Act to the Trade Tax Tribunal. The Tribunal accepted the respondent's claim except to the extent that the exemption was limited to a percentage of the additional fixed capital investment of Rs. 54,51,03,544. In other words, the Tribunal held that there was only one expansion and not three and that the benefit under the 1991 notification was not to be calculated G H

A as a percentage of the fixed capital investment prior to the expansion but as a percentage of the additional fixed capital investment. However the expenses on rights issue, foreign technicians, foreign travel, laboratory equipment, fire fighting equipment and establishment of water distribution schemes were included in the value of the fixed capital investment.

B The appellants filed a trade tax revision before the High Court. The respondent also filed a trade tax revision before the High Court challenging the limitation of the grant of exemption to the additional fixed capital investment. By the impugned judgmen, the High Court allowed the respondent's application and dismissed the State's application holding that the respondent's unit was C entitled to include the fixed capital investment of Rs.16,21,54,452/- as on 12th August, 1988 in the fixed capital investment under the 1991 notification and that the tax benefit would be calculated at the specified percentage of the original and additional fixed capital investment. The Circular dated 30th June 1993 was struck down and the DLC was directed to issue a revised eligibility certificate to the respondent in accordance with the finding.

D Two appeals have been preferred from both these decisions by the Trade Tax Authorities, both of which are being disposed of by this judgment. As no stay was granted by us at the time of the admission of the appeals, tax relief was granted to the respondent by the appellants as directed by the High Court.

E According to the appellants the 1985 Notification granted tax relief only to new units and did not extend to units undergoing expansion, diversification or modernization. The 1991 Notification expanded the category of units to the latter category for the first time. As far as the fixed capital investments were F concerned it is submitted that Explanations 1,2,4 and 5 to Section 4A of the Act showed that there was a distinction between original and additional fixed capital investment and that contextually, the phrase "fixed capital investment" used in the notification when read in the case of a new unit should mean 'original fixed capital investment' and in the case of a unit undertaking expansion, diversification or modernization to mean 'additional fixed capital G investment resulting in such expansion, diversification or modernization. It is submitted that that was how the respondent had understood the matter initially. Any other construction, according to the respondents, would lead to absurd consequences not only by granting benefits to older units at the expense of new units but also by granting double benefit in respect of the H same investment. Multiple expansions would also allow the same original

investment to be counted for each expansion and an expansion by only 25% of the original investment would mean that the unit would have a tax benefit including the 100% earlier invested. This, according to the appellants was not the object of the notification. The appellants contend that the ambiguity in the 1991 Notification was clarified by the 1995 Notification which explicitly says that tax benefits would be on the additional fixed capital investment in the case of expansion, diversification or modernization. According to the Appellants the High Court should not have struck down the Circular issued in 1993 which had earlier clarified the issue. In any event it is submitted, the fixed capital investment could not, in the light of explanation 4 to Section 4A be construed to include any item apart from the items specified therein. On the question whether there was one or three separate expansions, the Appellants contended that there was no evidence whatsoever to show that the three expansions were part of one integrated scheme. They say that treating the expansion as one would be contrary to the statute. Finally it is submitted that if at all the respondent had not collected any tax on the strength of the eligibility certificate issued by the authorities consequent to the High Courts judgment (which was disputed) that did not, according to the appellants, debar the State Government from recovering its dues from the respondent. It is said that the respondent had the option of collecting the tax from the customers and applying for a refund.

Countering these submissions, the respondent has submitted that Section 4A fixed the eligibility criteria for the grant of benefits under the Act and the actual grant of the benefit was effected by the notification and in terms thereof. Thus the 1991 notification linked the extent of the benefit to the fixed capital investment in contrast to the additional fixed capital investment provided in the 1995 notification. There was a conscious decision to grant older units the benefit in respect of the additional production by linking the same to the original and the additional fixed capital investment. The distinction was deliberate and unambiguous. If, as a result, older units undertaking expansion, diversification or modernization were in a better position than new units, this would not, according to the respondent, make the grant discriminatory or arbitrary, nor was there any warrant in law not to give effect to the language used. It was then submitted that there was no bar under the 1991 Notification against claiming exemption in three phases of expansion at the end of the third phase nor was there any time limit to do so.... It was contended that the Tribunal had correctly allowed the preoperative expenses as part of the value of the plant and machinery which was includible in the respondent's fixed capital investment. It is said that to limit the phrase 'fixed

A capital investment' as excluding the expenses for setting up and commissioning the expanded unit would lead to an anomalous result as all the expenses incurred in connection with such fabrication, installation and commissioning forms part of the value of this plant. This was an accepted principle of accountancy and the respondent had only taken such amounts which it had paid on the plant before the commencement of the production as a result of B such expenses. It was next submitted that the decision of the High Court had been accepted by the appellants and circulars had been issued by the authorities to this effect even prior to the refusal of stay by this Court, and it was not open to the State to re-agitate the issue. Besides, according to the respondent, it had not availed of even 50% of the benefit which it could have C claimed under the 1991 Notification in terms of the High Court's judgment. Finally the submission is that the respondent had not realised any tax during the period nor could it have done so under Section 8A (2) read with Section 15A (1) (qq) of the Act. In the circumstances even if the appeal were to be allowed the tax should not be directed to be recovered as this would lead to a closure of the respondent's unit.

D

The issues which have arisen for the decision in this appeal and which have been formulated fairly by the appellants are :

I. Whether a unit undergoing expansion is entitled under the notification dated 27.07.1991 to the benefit of exemption on the E *additional fixed capital investment as a result of such expansion, or the total fixed capital investment (being the aggregate of the original as well as the additional fixed capital investment) ?*

II. Whether the Respondents' claim of one integrated expansion from 12000 TPA to 60000 TPA during the period 12.8.88 to F *28.3.94 is sustainable in fact or in law ?*

III. Whether or not certain preoperative expenses form part of "Fixed Capital Investment" for the purpose of Section 4A of the U.P. Trade Tax Act and the notification dated 27.07.1991 ?

G *IV. Whether the Respondents, (allegedly) not having collected or realized any tax on the strength of the eligibility certificate, granted pursuant to the High Court's judgment, and which was not stayed by this Hon'ble Court, are entitled to any relief ?*

ISSUE - I

H Section 4A of the Act was introduced in the Act for the stated purposes

of increasing the production of goods or for promoting the development of industry in the State or any of the districts. Under Section 4-A sub-section (1) the State Government may by notification, declare that the turnover of sales is exempt from trade tax for a period not exceeding 12 years subject to such conditions as may be specified in the notification. The 1991 Notification cannot therefore be read in isolation but in the context and within the parameters of Section 4A of the Act under which it was issued. As we have noticed at the outset, the varying amounts of the benefit available under the 1991 Notification have been tabulated in Annexure I thereto. The basis of the exemption or reduction on tax is the fixed capital investment the quantum of relief being a percentage of such investment. The phrase "fixed capital investment" will have to be read harmoniously not only with the other provisions of the Notification itself but also in the light of section 4A.

'Fixed Capital Investment' has been defined in paragraph 3 of the 1991 Notification as being determinable in the case of an industrial undertaking financed by a term loan advanced by a public financial institution or a Scheduled Bank according to the certificate to that effect issued by such institution or a bank and in any other case according to (a) value of the land certified by the Collector; (b) value of building certified by an evaluator approved by the Income Tax Department for the purpose (c) the value of plant, machinery, equipment, apparatus and components certified by a Chartered Accountant.

Paragraph 4 provided:

> "In determining the fixed capital investment as defined in clause (4) of the Explanation in case of 'New units' *or 'Additional Fixed Capital Investment' referred to in sub-clause (d) of clause (5) of the Explanation in case of 'unit which have undertaken expansion, diversification or modernization' the investment in only* such land, building, plant, machinery, equipment, apparatus and component or, as the case may be, *such additional land, building, plant, machinery, equipment apparatus and component shall be taken into account as were acquired on or before the relevant date of commencement of the period of facility notified under sub-section (1) of Section 4-A of the Act."*
>
> (Emphasis supplied).

This paragraph therefore links original fixed capital investments to new

A units and additional fixed capital investments to already established units undertaking expansion, modernization etc. for the purposes of Clauses (4) and clause (5) (d) of the Explanation. There appears to be no clause (4) or (5) to any Explanation in the 1991 Notification. Clearly the reference is to the Explanation in Section 4A of the Act which has defined "fixed capital investment" and "unit which has undertaken expansion diversification or
B modernization" in clauses (4) and (5) respectively. The relevant extracts of these clauses read as follows :-

"(4) 'Fixed capital investment' means investment in land and building and such plant, machinery, equipment apparatus, components,
C moulds, dyes, jigs and fixtures as have not been used or acquired for use in any other factory or workshop in India:

(5) 'unit which has undertaken expansion, diversification or modernization' means an industrial undertaking

(a) of a dealer who is not a defaulter in payment of any due under
D this Act, or the Central Sales Tax Act, 1956 or under any loan scheme administered by the Pradeshiya Industrial and Investment Corporation of Uttar Pradesh regarding trade tax on sale or purchase, of goods;

(b) whose first date of production of goods,

E

(i) Of a nature different from those manufactured earlier by such undertaking in case of units undertaking diversification, and (or)

(ii) Manufactured in excess of base production, in such undertaking in case of units undertaking expansion or modernization, falls at any time after March 31, 1990.

F

(c) the production capacity whereof has increased by at least twenty five percent as a result of expansion of modernization or wherein goods of a nature different from these manufactured earlier are manufactured after diversification;

G (d) Wherein an additional fixed capital investment of at least twenty five percent, of such original fixed capital investment (without providing for depreciation) is made.

What is of significance is that a distinction is made between 'additional' and 'original' fixed capital investment' not only in clause (d) of clause (5) to
H the Explanation in Section 4A of the Act but in the body of the entire clause

the first relating to old units undertaking expansion etc. and the second to new units. A

Paragraph 4 of the Notification also refers only to the additional fixed capital investment in determining the fixed capital investment as far as units which have undertaken expansion, diversification or modernization are concerned. The emphasised portions of the paragraph as quoted earlier indicate the mode of determination of additional fixed capital investment as far as units which have undertaken expansion etc. and original fixed capital investment as far as new units are concerned. B

The High Court held that sub clause (d) of Explanation 5 to Section 4A had nothing to do with the extent of benefit of exemption which could be granted to a unit undertaking modernization, expansion for diversification but referred to the field of eligibility. As far as paragraph 4 of the 1991 notification was concerned, according to the High Court, it merely provided how the fixed capital investment as defined in Explanation-4 in the case of new units or in the case of additional fixed capital investment referred to in sub clause (d) of Explanation 5 was to be computed. It did not provide that in the case of a unit undertaking modernization expansion or diversification only additional fixed capital investment shall be considered. C D

We disagree. The different methods of computation contained in paragraph 4 of the 1991 Notification serve two separate purposes and that is to determine the two relevant investments for the distinct benefits available to two different kinds of units *viz.* new units and established units which have undertaken expansion etc. Significantly there is no mode prescribed for determination of original fixed capital investment as far as the latter kind of unit is concerned nor additional fixed capital investment in respect of the former. The High Court did not consider the logical consequences of paragraph 4 of the notification providing only for the computation of additional fixed capital investment as far as units undertaking an expansion etc. were concerned. In our opinion the High Court misread paragraph 4 of the notification, the only reasonable interpretation of which is that as far as new units were concerned the 'original fixed capital investment' would have to be computed and as far as units undertaking expansion etc. were concerned 'additional fixed capital investment alone would have to be computed. E F G

Form XLVI appended to the UP Trade Tax Rules, 1948 (referred to hereafter as the Rules) prescribes the details for an application for exemption H

A from or reduction in rate of tax to new units the date of starting production whereof fell on or after 1st April, 1990 or to units which have undertaken expansion, diversification or modernization on or after 1st April, 1990 under Section 4A of the Act. Serial No. 6(a) gives the necessary particulars of the fixed capital investment in case of the latter kind of unit. There are three columns viz., Original investment (without giving margin for depreciation), B Additional investment in the expansion etc on the date of commencement of the period of facility and a certificate of valuation of the additional fixed capital investment. The investments contemplated are in (1) land (ii) building and (iii) plant, machinery, equipment, apparatus and components. The certificates in respect of items (1) and (ii) as far as additional fixed capital C investment are to be given by the Collector of the District and the evaluator approved by the Income Tax Department respectively. The valuation of the third item is to be given by a chartered accountant. The note to Serial No. 6(a) also requires a certificate from a chartered accountant of the original fixed capital investment. The particulars indicate that while fixed capital investment includes original and additional investments a distinction is made between the D two. The purpose is patently to enable the Department to verify the calculation of the percentage of increase in the additional investment by reason of the expansion over the original. It does not mean that in respect of units undertaking expansion the percentage is to be calculated on an aggregate of both original and additional investments.

E

The three notifications namely the one issued in 1985, 1991 and 1995 form part of a pattern. The 1985 notification granted benefit to new units provided their original investment exceeded Rs. 3 lacs of their entire turnover. The 1991 Notification extended the benefit to old units undertaking expansion and which may have already got the benefit, like the respondent, of the F original investment made under the 1985 Notification subject to the old unit making a further investment and the benefit was limited to a percentage of that investment. Similarly the 1995 Notification further extended the benefit to units which had undertaken backward integration again limiting the benefit to the investment made. All three notifications were issued under the same section and for the same purpose of effecting development and were part of G a chain of progress without any overlapping. Not only would the contents of each notification derive its meaning from Section 4A as each is derived from and refers back to the section, but also if a phrase used in one of the notifications is still ambiguous, then for the purpose resolving the ambiguity the contents of the previous or subsequent notifications can be looked into. H Indeed that is what the High Court did. It relied upon the 1995 notification

for construing the 1991 notification, an exercise which was recognised as permissible in *Pappu Sweets and Biscuits* v. *CTT, U.P.*, [1998] Supp 2 SCR 119. Because the 1995 notification explicitly states in Annexure 1 to that notification that the exemption is calculatable on the fixed capital investment or as the case may be 'additional fixed capital investment', the High Court was of the view that when the 1991 notification only used the words 'fixed capital investment' in Annexure 1 as the basis of calculation of benefit without making any such distinction, all units whether new or old were entitled to the benefit of the original and the additional fixed capital investment.

Apart from being contrary to the language of paragraph 4 of the 1991 Notification, the decision in *Pappu Sweets,* on which the High Court founded its reasoning does not support the conclusion of the High Court. In *Pappu Sweets,* the very same notifications namely the 1991 and 1995 Notifications were considered. The question was whether the word 'Sweetmeats" under the 1991 Notification could be read as including 'toffees'. A Bench of 3 Judges of this Court held that the 1995 Notification could be looked into for clarifying the ambiguity in the 1991 Notification. The 1995 Notification did not use the word 'Sweetmeats' at all but mentioned different kinds of condiments but did not mention toffees. On the principle enunciated in *Cape Branch Syndicate* v. *I.R.C,* (1921) 2 KB 403 to the effect that "if there be any ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier Act" , it was held that the word 'Sweetmeats' in the 1991 Notification did not include toffees. Therefore the 1995 Notification was seen as clarificatory of the 1991 Notification. Applying the same reasoning we hold that the ambiguity in the 1991 Notification as to the meaning to be put on the phrase 'fixed capital investment' in Annexure I was removed by the clarification in Annexure I of the 1995 Notification by its reference to additional fixed capital investment as far as established units undertaking expansion etc. were concerned.

In fact even before the issuance of the 1995 Notification a circular had been issued by the Department in 1993 *inter alia* to the following effect-"

> (4) - *Units starting production on or after 1.4.90 if undertake expansion diversification or modernization in accordance with clause 5 of explanation to Sec. 4A than such unit shall be entitled to facility exemption/reduction in rate of tax on the production in excess of base products or on the manufacture of new product for a period of 8,9,10 years from the date of expansion diversification modernization*

A *and shall be limited to the extent of 100% to 150% of additional fixed capital investment".*

The Circular can be read as a contemporaneous understanding and exposition of the intention and purport of the Notification. Courts have treated contemporary official statements as contemporary exposition and used
B them as aids' to interpret even recent statutes.

Thus in *Collector* v. *Andhra Sugar,* [1988] 3 Supp [SCR] 543 Mukharji, J (as His Lordship then was) said

C *"It is well settled that the meaning ascribed by the authority issuing the Notification, is a good guide of a contemporaneous exposition of the position of law. Reference may be made to the observations of this Court in K.P. Varghese* v. *The Income Tax Officer, Ernakulam* **[1982] 1 SCR 629.** *It is a well settled principle of interpretation that courts in construing a Statute will give much weight to the*
D *interpretation put upon it at the time of its enactment and since, by those whose duty has been to construe, execute and apply the same enactment."*

(See also in *Karnataka SSIDCL* v. *CIT,* [2002] Supp 4 SCR 453, 460.)

E The High Court therefore erred in striking down the circular by holding that the circular was contrary to what the High Court thought was the clear intention behind the notification instead of seeing the circular as contemporaneous evidence of such intention.

The position was therefore abundantly clear. Old units undertaking
F expansion, diversification or modernization would be entitled to get benefit of tax reduction on the additional fixed capital investment made. The respondent acted on this and in its application dated 27th October, 1995 for grant of Eligibility Certificate for expansion of its capacity addressed to the Chairman, Committee of Sales Tax Exemption & Commissioner said

G "According to rules the Company is entitled to get full exemption from Trade Tax for a period of nine years subject to monetary limit of 125% of *additional* fixed capital investment with effect from the first date of production in excess of base production."

Before the Tribunal too, the respondent had only claimed in its amended
H application that it should have been given exemption on the capital investment

of Rs. 54,51,03,544 namely the additional fixed capital investment relating to the three expansions. The particulars of the items of investment including land and buildings claimed related only to this. The appellants contention before the Tribunal was that only the third expansion should be granted the benefit under the 1991 Notification. There was thus no issue raised before the Tribunal by the respondent that the original investment should be included in computing the tax benefit under the 1991 Notification. Even if the High Court found that the issue was raised in the grounds of Appeal, it should not have allowed the respondent to raise it in revision when clearly it had not been pressed before the Tribunal.

Furthermore the appellants' submission that the High Court's interpretation of the 1991 Notification leads to anomalous results also appears to be sound. The High Court has correctly found that "the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State". If the intention of the State Government, as expressed in Section 4A itself is to encourage investment, it is unlikely that the investment already made would entitle an industry to any further benefit again. Yet if we accept the respondent's reasoning (which was affirmed by the High Court), there may be multiple expansions qualifying for the benefit of the 1991 Notification and the original investment would be taken into account every time. Apart from the fact that a new unit would have to face competition from an old established unit, a new unit would be additionally handicapped by the greater benefits being granted to the old established businesses. It is unlikely that any new unit could be persuaded to set up industries in such adverse circumstances leading to a situation which was certainly not envisaged either under Section 4A or under any of the notifications issued thereunder.

The respondent may be correct in contending that if as a result of the notifications new units lose market or face tough composition the same cannot be said to be arbitrary or discriminatory. The contention would have been apposite if there were a challenge to the constitutionality of the notification. There is no such challenge. We are merely seeking to construe the notification and although consequences cannot and should not alter the statutory language but they may at least fix its meaning.

It is patent to us therefore that the benefit of the 1991 Notification as far as units undertaking expansion etc. like the respondent are concerned is

A limited to a percentage of the additional fixed capital investment and not the original and additional fixed capital only and not to a percentage of the aggregate of the original and additional fixed capital.

ISSUE NO. 2

B Were there three separate expansions of the respondent's unit as claimed by the appellants or only one as asserted by the respondent and affirmed by both the Tribunal and the High Court ?. The issue is a mixed question of law and fact. Were it only a question of fact no doubt we would have stayed our hands and let the matter rest there unless ofcourse the concurrent conclusion of both fora could be said to be perverse. However the appellants' contention C is that the decision is factually perverse and erroneous in law.

The DLC had taken the last expansion as the only expansion and granted relief to the respondent on that basis. The first two expansions were ignored. The Tribunal held that the three expansions were phases of a single D scheme of expansion. It is not very clear what persuaded the Tribunal to hold so. The High Court held that the Tribunal's finding was a conclusion of fact and could not be reversed except on the ground of perversity. It also independently came to the same conclusion on the grounds 1) that the DLC had categorically observed that the dealer had made the expansion in phases and that the respondents pleading that there was one scheme for expansion E prepared earlier was not disputed by it; 2) the Enquiry report submitted by the Trade Tax Officer did not observe that there were three separate schemes of expansion. The High Court also relied on a circular dated 26th September, 1996 in support of its finding. Whether it could have done so is a question of law and will be addressed after the factual reasons are assessed.

F The High Court was right in saying that the question is essentially one of fact but it has lost right of the basic principle that the onus to prove a fact is on the person asserting it. Since it was the respondent's case that there was a single scheme of expansion which was implemented in three phases the onus was on the respondent which it has not discharged. A scheme of G expansion would necessarily warrant estimates, plans, drawings and all the other steps which go into the process of formulating a scheme. There is not a single piece of evidence to this effect. Merely because the DLC uses the phrase "phase" would not do. Apart from the fact that there is a dispute as to the correct translation of the relevant Hindi word which has been translated as 'phase', the appellants have consistently though unsuccessfully reiterated H their stand of there being three expansions. A mere plea before the DLC by

the respondent cannot cure this very crucial lacuna in the respondent's case. A

As far as the Trade Tax Officer's Report is concerned, the terms or the scope of the enquiry have not been shown to us. Was he called upon to determine whether there was one expansion or three ? The report is prepared in a set proforma. It gives a picture of the various investments made and when they were made. That is all. It does not in any way support the respondent's B submission on this issue.

Although not strictly speaking necessary, we may now consider on the other hand the admitted facts each of which go to show that there were in fact three separate expansions. For each of the three expansions, separate industrial licences were applied for and obtained from the Central Government. C Separate negotiations for finances were entered into between the respondent and the financial institutions. The correspondence exchanged shows that the expansions were separate. For example, a letter dated 17th July, 1989 written by the IFCI to the respondent in connection with the first expansion refers to "your (the respondents) expansion scheme envisaging increase in the D installed capacity for the manufacture of ceramic wall and floor tiles from 12000 TPA to 26000 TPA at Sikanderabad". Finally as noticed earlier, the respondent had itself made three separate applications, one for each expansion. In the covering letter it was said that the respondent had undertaken three successive expansions". These facts were not adverted to either by the High Court or the Tribunal and their conclusion that there was only one expansion E was perverse.

This brings us to the law. Sub-Section (2) of Section 4A provides for the conditions which may be imposed in the notification in order to obtain an exemption or reduction in the rate of tax. Two of such conditions are : F

> "(c) *in respect of those goods only which are manufactured in a unit which has undertaken expansion, diversification or modernization on or after April 1, 1990, and which, in case of diversification, are different from the goods manufactured before such diversification, and in the case of expansion of* G *modernization are additional production as a result of such expansion or modernization; and*
>
> (d) *only if the manufacturer furnishes to the assessing authority an Eligibility Certificate granted by such Officer, in accordance with such procedure, as may be specified."* H

A Paragraph 1 (B) 1 of the 1991 Notification accordingly specified *inter alia* that the benefit of tax exemption or reduction would be available on the turnover of sales of the goods manufactured in certain industries which had undertaken expansion, diversification or modernization between 1st April, 1990 and 31st March, 1995.

B Reading the quoted provisions of Section 4A with paragraph 1 (B) (1) (a) of the Notification it is clear that the benefit under the notification must be limited to those goods which are additionally produced as *a result of expansion or modernization.* In other words the benefit was relatable to the expansion. We then come to Explanation (5) to Section 4A of the Act. It has C been quoted verbatim earlier on. To recapitulate briefly : Explanation 5 defines a "unit which has undertaken expansion, diversification or modernization". It contains four clauses which provide the conditions of the definition. Clause (a) requires that the dealer should not be a defaulter. Clause (b) defines "first date of production of goods". Clause (c) refers to the minimum extension of capacity, namely 25% as a result of expansion. Clause (d) requires a D minimum additional fixed capital investment of 25% .

Explanation 6 defines the expression "base production". (the original definition has been replaced in 1998 with retrospective effect from 1.4.90) as:-

"(a) *eighty percent of the installed annual production capacity; or*

E

(d) *maximum production achieved during any one of the preceding five consecutive assessment years or if the unit were in production for less than five years, the maximum production achieved during any one of the preceding assessment years, whichever is higher"*

F These definitions are reflected in the 1991 Notification. Base production of unit undertaking expansion or modernization has been provided for under paragraph 5 according to which it shall be deemed to be :

(a) maximum production achieved during any one of the preceding five consecutive assessment year, or

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(b) 80 per cent of the installed annual production capacity, whichever is higher".

Determination of base production has been provided also in paragraph 6 as follows :-

H (a) Turnover of sale of goods in any assessment year to the extent

of the quantity covered by base production of that year and the stock of base production of previous years shall be deemed to be the turnover of base production. A

(b) Only the turnover of goods in any assessment year in excess of the quantity referred to in clause (a) shall be entitled to the facility of exemption from or reduction in the rate of tax. B

Base production therefore refers to the pre additional investment stage or the maximum production in the already installed pre-expanded unit. The excess production as a result of the expansion is entitled to the benefit of exemption or reduction of tax.

C

The commencement of the facility according to Section 4A (1) would be the date declared in the 1991 Notification. Paragraph 1 (B) (2) (ii) says that the period of facility shall be reckoned from the first date of production of goods manufactured in excess of the base production.

So with the commencement of an additional investment which must D overtake the original investment by at least 25% the expansion commences. Ofcourse the ultimate expansion must result in an increased capacity of at least 25%. Then the first excess production over the base production brought about by such increased capacity and ultimately by the additional investment would be the 'first date of production' and the expansion would be completed E and the period of facility would commence.

Section 4A (5) (a) provides that a manufacturer shall be entitled to the facility of exemption from, or reduction in, the rate of tax notified under subsection (1)

> "(a) *If he applies for such facility within six months from the relevant date of commencement of the period of facility referred to in that Sub-Section or by 30th September, 1992, whichever expires later, for the entire period notified under that Sub-Section".* F

Now a dealer may, for whatever reason apply for the facility of exemption G later. This would not mean that the facility starts from the date of application but that the dealer is entitled to the facility from the date of the application till the period of the operation of Notification is over. This is clear from clause (b) of sub-section (5) of Section 4A which provides :

(b) *If he applies for such facility later than the date specified in* H

A *Clause (a) only for part of the period notified under Sub-Section (1) which shall be computed from the date of application till the end of the period of the facility*".

Admittedly the respondent produced goods in excess of what was its base production as a result of the establishment of its original unit in 1991 B when the first expansion was completed. With the production of the first tile after the first expansion the period of facility under the 1991 Notification commenced and the expansion was complete.

The years of the first expansion would then be taken into account for determining the base production for the second expansion, and the moment C this was exceeded as a result of the second expansion the expansion was complete. The same process would apply to the third expansion. Therefore each time the respondent made an additional investment, increased its capacity to produce and in fact produced goods there was an expansion.

D The respondent cannot in terms of this statutory scheme claim in one breath that a single expansion commenced from 1988 and was completed in 1994 and at the same time say that the base production was the figure of production in 1992-93 viz. 40038 MT. The base production as we have seen must statutorily *precede* the expansion and cannot be a figure taken while the expansion has already progressed. The figure of 40038 MT was accepted by E the DLC as the base production as it had rejected the respondent's claim relating to the first two expansions and limited it to the third expansion. The appellants have similarly accepted this figure of 40038 MTs. But this is in keeping with their contention that there were in fact three expansions and that the figure of 40038 MTs is the base production for the third and last expansion.

F The respondent has however relied on the second proviso to Explanation 6 of the Notification as well as Notifications dated 19th July, 1996 and 21st February, 1997 in support of its contention that there was one expansion. To quote the language of the second proviso to Explanation 6 as it originally stood:

G "*Provided further that where investment made during certain period is clubbed together for the purpose of determining the fixed capital investment, the production immediately prior to the date on which such investment was first started to be made in respect of expansion or modernization shall be taken into account for determining the* H *base production.*"

The clubbing under the second *proviso* does not relate to the date of production and the commencement of the facility but to the base production.

The two notifications referred to declare that new units or old units making an additional fixed capital investment of fifty crore rupees or more would be entitled to exemption from tax for a period of three years on or after specified dates. According to the respondent the notifications permit fixed capital investment even after the commencement of facility and was an instance of the clubbing permitted under the second proviso. Neither of the notifications refer to the second *proviso* nor were they in operation during the relevant period.

The circular dated 26th September, 1996 was relied on by the High Court presumably to overcome the effect of Section 4A (5) (a) & (b) quoted earlier. Although the circular itself does not attempt to explain or clarify these provisions. It purports to construe the provisions relating to base production and reads :

> *"Reference was made to the government in respect of grant of exemption on the goods produced by new industrial units as defined u/s. 4A(2) of Uttar Pradesh Trade Tax Act, having undertaken diversification or modernization as to whether a unit which has undertaken diversification/ modernization after establishment but before completion of 5 years, would be entitled to benefit of diversification/ modernization or not ? If such unit is granted benefit under the said policy than how the calculation of base production in accordance with sub section (5) of Section 4A shall be made ?*
>
> *In the matter under reference, the government vide its letter No. TT-1167/Eleven-9(101)/96 dtd. 4/6/1996 have informed that according to the present provisions base production shall be deemed to be maximum production achieved during any one of the preceding five consecutive assessment years or 80 percent of the installed annual production capacity, which ever is higher. If any unit undertakes diversification, modernization before five years from its establishment than the aforesaid provisions shall be applicable even thereafter meaning thereby that it shall not be entitled to exemption unless there is production in the preceding five consecutive assessment years."*

The High Court therefore concluded that the respondent could only

A make one composite application after five years. It should no have done so.

For one, the circular was issued subsequent to the relevant period and after the respondent had filed its revised application for exemption under Section 4A. For another, the construction put by the circular on the definition of base production is questionable and has in any event no statutory force. B In any event the definition of base production in Explanation 6 which was amended in 1998 with effect from 1st April, 1990 (quoted earlier) clearly says that if the unit has been in production for less than five years, the maximum production achieved during any one of the preceding assessment years would be taken as the base production. The appellants are therefore right in C contending that three separate applications were maintainable at all material times despite the fact that when such expansions were done the unit was in production for less than five years.

We accordingly hold that there were in fact and in law three expansions and decide the issue in favour of the appellants.

D

ISSUE NO. 3

The respondent had claimed preoperative expenses as part of the fixed capital investment which included interest to financial institutions, rights shares issue expenses, foreign technician expenses and foreign travel expenses. E The Tribunal allowed the claim relying on *Challapalli Sugars Ltd.* v. *CIT,* (1975) 98 ITR 167, *Commissioner of Income Tax* v. *Motor Industries Co. Ltd.,* (1988) 173 ITR 374 and *CIT* v. *Polychem Ltd.,* (1975) 98 ITR 574 on the ground that the expenses were necessary to undertake the expansion scheme. The view was affirmed by the High Court, in our opinion, wrongly.

F We have already noted in connection with Issue I that Explanation 4 to section 4A has defined fixed capital investment saying that it "means "investment in land and building and such plant, machinery, equipment apparatus, components, moulds, dyes, jigs and fixtures as have not been used or acquired for use in any other factory or workshop in India".

G The language of the definition of the phrase in Explanation 4 to Section 4A is sufficiently clear and unambiguous. This coupled with the use of the word "means" in the Explanation shows that the definition is exhaustive. As has been observed in *Feroze N. Dotiwala* v. *P. M. Wadhwani,* [2003] 1 SCC 433, 442 :

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A *"Generally, when the definition of a word begins with "means" it is indicative of the fact that the meaning of the word has been restricted;* that is to say, it would not mean anything else but what has been indicated in the definition itself

B *Therefore, unless there is any vagueness of ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition."*

C According to the Constitution Bench in *PLD Corporation Ltd.,* v. *Presiding Officer,* [1990] 3 SCR 111, 150 when the statute says that a word or phrase shall mean certain things it is a "hard and fast definition, and no other meaning can be assigned to the expression than is put down. A definition is an explicit statement of the full connotation of a term".

D Therefore apart from the actual investment in or cost of the specific items of land, building, plant, machinery, equipment apparatus, components moulds dyes, jigs and fixtures, no other item of expense is includible under the head of fixed capital investment for the purposes of section 4A of the Act.

E This principle of statutory interpretation is reinforced not only by the particulars itemized in form XLVI of the Rules but also by the procedures for determination of fixed capital investment specified in paragraphs 3 and 4 of the 1991 notification, all of which underscore the definition's restrictive nature. There is and indeed could be no reference either in the form or in the 1991 notification to any item outside the definition in Explanation 4 to Section 4A.

F Besides the underlying object of the scheme of exemption under Section 4A of the Act, is to grant benefit by way of a *quid pro quo* for the actual value of assets brought into the State. The determination of such value would necessarily have to be an objective exercise. For the purposes of the Income Tax Act on the other hand, a tax on income may allow the valuation of an asset taking into consideration circumstances which may be entirely personal to the assessee under which the asset is purchased subject to certain G permissible limits. The perspective of the two statutes is therefore different and everything that may go into the cost of an asset for the purpose of the Income Tax Act may not be relevant for an objective determination of its value under the U.P. Act. It is also noteworthy that the definition of 'fixed capital investment' in Explanation 4 talks of investment in land, building, plant, H

machinery etc. and not investment in relation to or in connection with them. The Tribunal and the High Court failed to construe these statutory provisions and relied upon judgments delivered in connection with the Income Tax Act, the provisions and purpose of which could hardly be said to be in *pari materia* with the provisions of the UP Act and the 1991 Notification.

The four items of expenditure which the High Court accepted viz. Interest paid on loans by financial institutions, expenses in connection with a rights issue of shares, expenses on foreign technicians or foreign travel do not reflect the value of the items forming part of the fixed capital investment for the purposes of this Act or 1991 Notification and cannot by any principle of statutory interpretation be brought within the definition of the phrase in Explanation 4 to Section 4A. The issue is thus decided against the respondent and in favour of the appellants.

ISSUE - 4

The respondent's objection to the recovery of the tax is that the appellants by Circulars dated 31st October, 2000 and 14th November, 2000 had accepted the judgment of the High Court even prior to the refusal to stay the impugned judgment by this Court. It is submitted that circulars issued by the Department are binding upon them and that this was laid down in *Collector of Central Excise, Vadodra* v. *Dhiren Chemical Industries,* [2002] 2 SCC 127 and *Commissioner of Sales Tax, U.P.* v. *Indra Industries,* [2000] 9 SCC 66.

The objection is misconceived. Circulars may be of varying kinds. The circulars relied on were merely official communications to the subordinate officers directing compliance with the decision of the High Court. They were not clarifications of statutory provisions in which event, as was held in *CST* v. *Indra* (supra), they would represent the official understanding of those statutory provisions and would be binding on the taxing authority. Nor was there any statutory provision in the UP Act corresponding to Section 37B of the Central Excise Act, 1944 by the Central Board of Excise and Customs which make circulars issued there under binding on the authorities as was held in *CCE* v. *Dhiren Chemicals* (supra) . The appellants' appeals before this Court were filed before any action was taken on the High Court's decision. We granted leave to appeal on 11th August, 2000 and issued notice on the interim relief claimed by the appellants. Stay was finally refused on contest on 4th January, 2001. In the absence of any order of stay by this Court, the appellants were bound to comply with the impugned decision. Such compliance

by itself cannot destroy the appellants rights to press their appeals before this Court. A

The preliminary objection is accordingly rejected.

The respondent then submitted that it has not availed of even 50% of the total benefit under the notification in terms of the impugned judgment and it has not and could not in law have realised any tax during the period of the facility which expired on 31st March, 2003. Reference has been made to Section 8A (2) read with Section 15A (1) (qq) to contend that the prohibition on the collection of tax from consumers by a dealer which is itself not liable to pay tax is backed by severe penalties. It is said that the recovery of the tax would lead to the ultimate closure of the Respondent's unit which would be contrary to the very concept, object and intention of the exemption provision and policy of the state. B C

The appellants on the other hand have relied on the *State of Rajasthan* v. *J. K. Udaipur Udyog Limited,* [2004] 7 SCC 673 to contend that even if the respondent had not passed on its liability to and collected tax from its consumers, it was bound to pay the tax which it could and should have paid on the tiles sold by it during the period of facility. The factual basis of the respondent's claim that it had not collected tax from its customers is also disputed. It is said that the respondent had the option of collecting the tax and applying for refund under Section 29A of the Act in terms of paragraph II of the Industrial Policy. D E

A similar contention was considered by us in *State of Rajasthan* v. *J. K. Udaipur Udyog Ltd.,* (supra) where after considering the authorities on the issue we held : F

> "*The mere circumstance that the respondent Companies having availed of the Exemption Scheme were prohibited from collecting the tax from their customers or that they had not collected the sales tax from their customers (which assertion is strongly disputed by the appellants), is of no consequence. The primary liability to pay the sales tax is on the seller. The seller may or may not be entitled to recover the same from the purchaser. The State Government is entitled to recover the same from the respondent Companies irrespective of the fact that the respondent Companies may have lost the chance of passing on their liability to pay sales tax to their purchasers*". G H

A We see no reason to differ from this view. Indeed the Act itself envisages a situation where a dealer may be called upon to pay the tax which it may not have collected from its customers. We have seen earlier that sub section (2) of section 4A of the Act provides for the conditions which may be imposed in an exemption notification. Apart from the conditions already noted by us, paragraph 2 of the 1991 notification stated that the facility of exemption B from or reduction in the rate of tax shall be subject to the condition :

> "(iv) *that the said unit furnishes to the assessing authority concerned an eligibility certificate granted in this behalf by the General Manager, District Industries centre, Area Development Officer (Industry) of the concerned Industrial Development Authority,* C *Additional or Joint Director of Industries of the range or Additional or Joint Director Industries of the concerned Industrial Development Authority, as the case may be*".

In our narration of facts in an earlier part of this judgment we have seen D how the respondent had with the completion of each of the expansions, applied for and obtained an amendment of the eligibility certificate granted to it on 5th May, 1990 in respect of the original unit.

Sub section (3) of Section 4A however allows the Commissioner by order to cancel or amend the eligibility certificate *before or after the expiration* E *of the period of exemption* under certain circumstances. In such event the dealer is liable to pay the tax which ought to have been paid under sub section (4) which provides:

> "*(4) For the removal of doubts, it is hereby declared that where an Eligibility Certificate has been cancelled or amended under sub-*F *section (3), the dealer shall be liable to pay tax on his turnover of the period during which the facility of exemption or reduction under this Section is not admissible to him.*"

Therefore even if the dealer under the fear of punishment under section 15A (qq) (viii) does not realise amount by way of tax on the sale of its goods G in compliance with the provisions of section 8A (2) during the period it is exempt from paying tax, it would still have to pay the tax under sub section (4) of section 4A if it is found that it was not entitled to such exemption. The overriding nature of this consequence follows not only from the use of the imperative word "shall" in sub section (4) but also from the non obstante H clause with which section 4A opens. Given the clear language, it is not

necessary for us to express any view on section 29A of the Act or the industrial policy underlying section 4A or the 1991 Notification. A

The High Court has found that the respondent had taken the benefit of the increased capacity of the unit which came about by reason of the first two expansions in the sense that the exemption on entire sales turnover relatable to such increased capacity had been enjoyed by the respondent under the 1985 Notification. The DLC had also granted tax benefit to the respondent only in respect of the third expansion excluding the preoperative expenses. Albeit for other reasons, in our opinion, having regard to our decision on the various issues against the respondent, this is the highest relief that the respondent could claim and which the appellants concede would be the most equitable. B C

The appeals are accordingly allowed. The decisions of High Court and Tribunal are set aside and the decision of the Divisional Level Committee is affirmed. There will be no order as to costs. D

N.J. Appeals allowed.