

Package Scheme of Incentives in Maharashtra – Is it actually incentivizing?

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With a view to encourage industrialization, especially in the lesser developed areas within India's States, various state governments have introduced Package Scheme of Incentives ('PSI') also known as Industrial Promotion Subsidies (IPS). The incentives inter alia are in the form of exemptions or refunds from taxes, reduction in stamp duty, electricity duty related reliefs, etc. Such incentives are generally based on the quantum of capital investment by the entity. The PSI scheme in Maharashtra has been prevalent from as early as 1964.

A lot of the PSI benefits are extended over a period of time and hence even when the Goods and Services Tax (GST) was introduced, part of the PSI benefits was enjoyed pre-GST and part post GST. It therefore called for making appropriate changes in the PSI scheme to transition its tax related benefits under the Value Added Tax ('VAT') regime to the GST regime. The State of Maharashtra introduced the amended PSI benefits on February 14, 2018 (i.e. almost seven months after introduction of GST).

As per the said resolution, the Government inter alia stated that the various incentives under the PSI schemes are being kept unchanged and only IPS which is based on VAT is being changed to a GST basis. It may be worthwhile to note that under the pre-GST regime, the tax benefit was available in terms of VAT and also Central Sales Tax ('CST'). Despite CST, being a central tax, its revenue was retained by the State. The benefit under GST is qua the SGST component of the first sale made in the State.

The said amendments in February 2018 were repealed due to certain anomalies and revised mechanism was introduced on June 12th, 2018. Even in the said amendment, it was stated as under:

Keeping intact various existing incentives under Package Scheme of Incentives, only the formula for admissibility of Industrial Promotion Subsidy is being revised based on Goods and Services



Tax as under.

This again implied that the incentives would remain the same except now the formula would be revised because of GST.

Having said so, on 20th December 2018, the Government of Maharashtra issued another Government Resolution ('GR') providing for revision in the modalities for sanctions and disbursements of IPS.

Explanation 3 of the said GR imposed a new condition for the first time providing as under:

Transactions between following category of related persons, no IPS will be allowable in respect of SGST paid on these transactions.

(A) Transactions between

- I. GST numbers in state having common PAN.
- II. Different firms of a director or partner of an eligible manufacturing unit under PSI registered in the state under GST law.
- (B) Transactions between following related persons:
 - 1. Such persons are officers or directors of one another's businesses.
 - 2. Such persons are legally recognized partners in business.
 - 3. Such persons are employer and employee.
 - 4. Any person directly or indirectly owns, controls or holds 25% or more of the outstanding voting stock or shares of both of them.
 - 5. One of them directly or indirectly controls the other.
 - 6. Both of them are directly or indirectly controlled by a third person.
 - 7. Together they directly or indirectly control a third person.
 - 8. They are members of same family.

For 1 to 8 above the term "person" also includes legal person.

9. Person who are associated in the business of one another in that one is the sole agent or distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.

It can be observed from the above that while the GR stated that only the formula is being revised,



it actually denies IPS benefit on transactions with related parties. Thus, a new condition is effectively introduced by the GR which results into denying the IPS which was otherwise allowed under the pre-GST regime.

Let us take the illustration of a typical manufacturing conglomerate which has set up two manufacturing entities in Maharashtra, say Entity A and Entity B (both being related persons as they are being set up by the same manufacturing conglomerate) whereby the final product of one of the entities (Entity A) is a raw material for the other (Entity B). Such set ups are very common in several sectors e.g. steel, automobile, etc. By virtue of the restriction introduced in the GR, the IPS benefit which was erstwhile available to Entity A for supply of products to Entity B would no longer be available.

Introduction of such a restriction needs to be examined in terms of the doctrine of promissory estoppel. As per the said principle, when a promisee relies and acts based on the promise of the promisor, then such a promise is enforceable under law. The said principle has been examined by the Hon'ble Apex Court in various cases including the decision in (2016) 6 SCC 766 Manuelsons Hotels Pvt. Ltd. Vs. State of Kerala & Ors. wherein it was stated that:

In fact, 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 or conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party.

In the present case, it can be observed that when the IPS benefits were granted to companies setting up industries in the State, there was no restriction in terms of transactions with related parties. In fact, in several letters issued by the State to such companies, it has been mentioned that the benefits would be protected in the event of changes in tax structure to the extent they related to taxes received by the State Government. Even the amendments made in the schemes on account of GST state that while the benefits are kept intact, only the formula / mechanism is being amended because of GST. Subsequent introduction of a restriction in genuine related party transactions which had been enjoying the benefit even under the pre-GST regime effectively results in the Government backing away from its words. Thus, it appears to be a fit case for invocation of doctrine of promissory estoppel.

There are findings on similar lines in various other cases such as (2014) 4 SCC 186 (SVA Steel Rerolling Mills Ltd & Ors. Vs. State of Kerala & Ors). The Apex Court has generally upheld the doctrine of promissory estoppel except in cases involving supervening public purposes. In the GR relating to incentives, it seems that there is no supervening public interest involved.

It appears that the intention of the authorities may be to deny the benefits to entities who open an intermediary trading entity with an intention to obtain higher incentives. However, the manner in which the restriction has been introduced results in restricting the benefits even in respect of genuine related party transactions between manufacturing entities.



In this regard, it is interesting to note that manner in which the State Government of Gujarat has sought to deny the benefit to such transactions. The relevant extract of the Government Resolution dated 15th November 2018 is as under:

If the eligible unit has shown its inter-State sales as intra-State sales through intermediary / marketing network / or any other middle man either directly or indirectly controlled by it, in order to get higher incentives then the eligibility certificate of the eligible unit shall be liable to be cancelled with effect from the date of such contravention, and the eligible unit shall be liable to return forthwith the incentives availed together with interest at the rate of eighteen per cent per annum.

By the above insertion, the benefit is sought to be rightly denied only in cases where one intends to get higher incentives by showing supplies through intermediaries / marketing entities.

Considering the same, one hopes that the Maharashtra Government amends its PSI benefits in a manner as to curtail the benefit only in cases where higher incentives are sought to be claimed by showing supplies through intermediaries and not in genuine cases of supplies between related entities.

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