RCM Exemption on Supplies from URPs – Prospective or Retrospective?

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Introduction:

Under the GST[1] laws, the charging section is provided under section 9. Sub-section (4) of this section as was originally constituted to provide for levy of GST under reverse charge wherein the registered recipients are required to pay GST on all the supply of taxable goods or services when they are procured from unregistered persons. Further, NN[2] 8/2017-CT(R) dated 28.06.2017 has been issued to provide exemption from this levy. However, proviso was inserted in the said notification stating that exemption was not applicable in all the cases where the aggregate value of such supplies of goods or services or both received from any or all the unregistered suppliers does exceed five thousand rupees in a day. Subsequently, the said notification was amended by NN 38/2017-CT(R) dated 13.10.2017 to omit the proviso thereby making the exemption applicable to all cases including the cases where value of such supplies exceeding five thousand rupees in a day.

When the said reverse charge was introduced, all the registered taxpayers found it difficult to comply with as it required resource time, lack of adequate tax knowledge on business of vendors and cumbersome computation mechanism involved in quantifying the daily threshold limit for exemption especially in case of those business having multi locational operations. Further, all the taxpayers were completely occupied in understanding GST implications on their business in order to ensure smooth transition to GST regime. Taking these aspects into consideration, exemption was brought in unconditionally on 13.10.2017. Considering the unconditional exemption and in view of above-mentioned complexities, many of the taxpayers have not complied with this reverse charge tax payment during the interim period from 01.07.2017 to 12.10.2017. With respect to tax compliance related to FY[3] 2017-18, many of the taxpayers are being subjected to audit by GST authorities and are being issued show cause notices requiring them to pay tax under reverse charge for supplies received from unregistered persons during this interim period.

Considering the challenges associated with this compliance, the levy was completely exempted and thereby taxpayers are claiming that the amendment by NN 38/2017-CT(R) have retrospective implications. On the contrary, the Maharashtra AAR in the case of M/s Famous Studios Limited[4] held that the said amendment is prospective and is not retrospective in nature. Considering this backdrop, an attempt is made in this article to understand the implications of the said amendment.

Legal Background:

Before, we delve upon the issue whether the amendment is prospective or retrospective in nature, we will first examine the provisions of section 9(4) and notifications issued thereunder:

[1] Goods and Services Tax
[2] Notification No
[3] Financial Year
[4] 2019 (4) TMI 454— AAR, Maharashtra

Section 9(4) of CT Act[5]:

The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both

Exemption under NN 8/2017-CT(R):

G.S.R. 680 (E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts intra-State supplies of goods or services or both received by a registered person from any supplier, who is not registered, from the whole of the central tax leviable thereon under sub-section (4) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017):

Provided that the said exemption shall not be applicable where the aggregate value of such supplies of goods or service or both received by a registered person from any or all the suppliers, who is or are not registered, exceeds five thousand rupees in a day

This notification shall come into force with effect from the 1st day of July, 2017

Thus, in view of the above provisions of section 9(4), reverse charge is applicable on registered persons who have procured goods or services from unregistered persons requiring them to pay the applicable tax on such goods or services procured by them.

As mentioned above, the registered taxpayers found it difficult to comply with this requirement as it required huge time of tax teams, lack of adequate tax knowledge on business of vendors and cumbersome computation mechanism involved in quantifying the daily threshold limit for exemption. Further, they were all being engaged in understanding GST implications on their business for smooth transition into GST regime. Considering all these, representations were made to GST Council by various sections of trade to relax these provisions. The Commissioner (GST Policy) of CBIC[6] has proposed before the GST Council for suspension of section 9(4). The GST Council has deliberated on these problems in their 22nd Meeting held on 06.10.2017 and took decision to suspend section 9(4) and referred to Law Review Committee to review and suggest the changes required in law for smooth implementation of the provisions of section 9(4). The relevant extracts of the minutes are reproduced as under:

Minutes of 22nd Meeting of GST Council held on 06th October 2017:

17. The Commissioner (GST Policy), CBEC stated that this agenda item proposed suspension of application of provisions of sub-section (4) of Section 9 till 31 March, 2018. He added that in the meeting of the officers held on 5 October 2017, it was felt that this would also be required for section 5(4) of the IGST Act. He explained that the provision had virtually eliminated the exemption limit provided to the small taxpayers and increased compliance for larger taxpayers. He added that establishments making small quantity of taxable supplies but substantial quantity of exempt supplies (e.g.

[5] Central Goods and Services Tax Act, 2017
[6] Central Board of Indirect Taxes and Customs

educational and religious institutions) were adversely affected. He stated that the provision of exempting purchases up to Rs. 5,000 per day from the purview of this Section was also proving to be difficult to implement as many entities had several business locations in one State. He also explained that the Union Law Ministry had suggested to prescribe an end date for suspension. This provision brought huge compliance burden without commensurate benefits. He stated that the proposed suspension of this provision would give trade and industry time to acclimatize itself with the GST system and allow its compliance matrix to get stabilized.

17.1. The Hon'ble Deputy Chief Minister of Delhi suggested that Section 9(4) of the CGST/SGST Act should be repealed altogether. The Hon'ble Minister from Jammu & Kashmir stated that while drafting the GST Law, some provisions were kept in the current shape on the consideration that any possibility of leakage of revenue could be addressed through reverse charge mechanism under Section 9(4). He supported the proposal to suspend this provision up to March, 2018 but not to repeal it. The Hon 'ble Deputy Chief Minister of Bihar stated that there was a strong opposition to this provision in his State and it should be suspended for a year or two till GST stabilised. The Hon'ble Chairperson stated that the provision of reverse charge mechanism would check cash transactions. The Hon'ble Chief Minister of Goa supported the proposal to repeal the provision under Section 9(4) of the CGST/SGST Acts, 2017 and observed that easier ways should be found to check cash transactions. He suggested that one alternative mechanism could be to make a voluntary Composition scheme for micro sector with an annual filing of return and payment of 0.1% tax on their turnover. He added that such units should remain exempt from the provisions of Section 9(4) of the CGST/SGST Act. He suggested that the provision of reverse charge mechanism should be suspended till 31 March 2018 and alternate mechanisms could be considered during this period. The Hon'ble Minister from Madhya Pradesh suggested not to implement the reverse charge mechanism. The Hon'ble Minister from Kerala did not support the proposal to repeal the provisions of Section 9(4) of the CGST/SGST Acts, 2017 and observed that in its absence, GST would effectively become VAT on the total value of transaction. He supported the proposal to suspend this provision as a temporary measure. The Hon'ble Minister from Telangana also supported a temporary suspension of reverse charge mechanism.

17 .2. The Advisor (Finance), Government of Punjab, stated that reverse charge mechanism had certainty of levy for goods but its applicability was uncertain in many cases in the services sector. He gave an example of an unregistered person providing free software to a registered recipient on the condition that the recipient would not share it with anyone else. This amounted to agreeing to not doing something which was also a supply of service by the unregistered person to the registered person making the latter liable to tax under reverse charge mechanism. He stated that because of such uncertainties, large taxpayers were shy of making purchases from smaller taxpayers. The Senior Joint Commissioner (Commercial Taxes), West Bengal recalled that originally, the reverse charge mechanism under Section 9(4) of the CGST/SGST Acts, 2017 was meant only for Composition taxpayers buying from unregistered persons but the Council took a considered decision to apply it to all taxable persons. He pointed out that when small taxpayers raised objection, daily purchases up to Rs. 5,000 from one or more unregistered persons by a registered person had been exempted from this provision. He suggested to raise this limit to Rs. 10,000 to provide more cushion to the small and medium enterprises instead of removing the provision of reverse charge mechanism. The Hon'ble Minister from Andhra Pradesh supported this proposal.

17.3. The Hon'ble Ministers from Haryana and Assam supported the proposal to suspend reverse charge mechanism till 31 March, 2018. The Hon'ble Minister from Haryana added that the basic purpose of this provision was to expand the tax base and the original design of GST should be maintained. The Commissioner (GST Policy), CBEC stated that this

proposal also applied to suspending the application of reverse charge on Composition taxpayers for purchases from unregistered persons.

17.4. The Hon'ble Chairperson suggested that keeping in view the discussions, the provision of reverse charge mechanism under Section 9(4) of the CGST/SGST Acts, 2017 and Section 5(4) of the IGST Act, 2017 could be suspended till 31 March, 2018 for all categories of registered persons including Composition taxpayers. In the meantime, the scheme could be reviewed by the new Law Review Committee constituted to review the changes required int he law. The Council agreed to this suggestion.

Some key points that came to the discussion before GST Council are summarized as under:

1. *The said provision has virtually eliminated the exemption limit provided to small taxpayers.*
2. *Establishments making small quantity of taxable supplies but substantial quantity of exempt supplies (e.g. educational and religious institutions) were adversely affected.*
3. *The exemption for purchases up to Rs. 5,000 per day was also proving to be difficult to implement as many entities had several business locations in one State.*

Subsequent to this decision, the NN 8/2017-CT(R) was amended by NN 38/2017-CT (R) to omit the proviso in order to provide unconditional exemption from tax under reverse charge for all goods and services procured from unregistered persons. The said notification is reproduced as under:

Extracts of NN 38/2017-CT(R):

G.S.R. 1262 (E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following amendment in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No.8/2017- Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 680(E), dated the 28th June, 2017, namely:-

In the said notification, the proviso under Paragraph 1 shall be omitted.

2. The exemption contained in the notification No. 8/2017-Central Tax (Rate) dated the 28th June, 2017 as amended by this notification shall apply to all registered persons till the 31st day of March, 2018[7]*.*

In view of the above notification, the exemption under NN 8/2017-CT(R) was allowed unconditionally by eliminating the five thousand rupees daily limit. Further, as the provisions of section 9(4) was suspended with an intention to reintroduce a new provision in its place, a sunset clause was introduced to this exemption stating that the exemption shall apply till 31st day of March 2018 which was later extended from time to time till 30th day of September 2019. As a result of this amendment, the principal NN 8/2017-CT(R) stands amended as under:

[7] Subsequently vide NN 10/2018-CT(R), NN 12/2018-CT(R), NN 12/2018-CT(R), the exemption under NN. 8/2017-CT(R) was extended to 30th June 2018, 30th day of September 2018 and 30th day of September 2019.

Extracts of Amended N No. 8/2017-CT(R) dated 28.06.2017

G.S.R. 680 (E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts intra-State supplies of goods or services or both received by a registered person from any supplier, who is not registered, from the whole of the central tax leviable thereon under sub-section (4) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017):

"omitted"

This notification shall come into force with effect from the 1st day of July, 2017

Thus, in view of the omission of proviso unconditionally without any saving clause, on a plain reading of amended principal NN 8/2017-CT(R), it appears that the exemption has retrospective implications effective from 01.07.2017.

As the provision of section 9(4) was suspended and referred to Law Committee for a revised provision in order to effectively implement reverse charge in case of supplies received by registered persons from unregistered persons, the law committee recommended to implement the reserve charge for supplies from unregistered persons in selected sectors where cash transactions and tax evasion are on higher side. Considering this, section 9(4) was suitably amended by Central Goods and Services Tax (Amendment) Act, 2018 as under:

Amended Section 9(4) under Central Goods and Services Tax (Amendment) Act, 2018:

The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both

The above provision is effective from 01.02.2019 and the same is now made applicable to specified category of goods or services as notified by Government on the recommendations of GST council. By exercising power under the amended section 9(4), vide NN 07/2019-CT(R), reverse charge mechanism was notified for registered persons engaged in the business of real estate sector to the extent of the value of goods and services procured from unregistered persons that was falling shot of specified minimum value of procurements from registered persons. Further, cement and capital goods are also notified under this notification for the purpose of reverse charge.

When the draft bill to pass Central Goods and Services Tax (Amendment) Act, 2018 was prepared, the same was placed in public domain for comments. The explanatory notes for amendment to section 9(4) also clarifies that the present provision is a replacement to the earlier suspended section 9(4).

"Section 9 (4), which mandates that all registered persons shall pay the tax on reverse charge basis on purchases made from unregistered persons, is presently under suspension. This sub-section is being omitted for trade facilitation.

Instead, it is proposed to take an enabling power for the Government to notify a class of registered persons who would be liable to pay tax on reverse charge basis in case of receipt of goods from an unregistered"

Thus, upon considering all the above discussed legal backdrop, it is clear that the GST council has taken a decision to suspend section 9(4) of the CT Act considering the difficulties faced by trade in its implementation. GST Council has recommended to Law Committee for suggestions on implantation of section 9(4). Consequent to this, the notification was issued to unconditionally exempt from tax payment under reverse charge on all supply of goods or services received by registered persons from unregistered persons. Based on the recommendations of law committee, new section 9(4) has been brought into effect replacing the old section 9(4) to limit the said reverse charge only on notified goods and services when purchased by registered person from unregistered persons.

Whether Omission of Proviso in Notification without Saving Clause has Retrospective Implications*:*

In the above referred AAR on the issue whether the exemption under NN 38/2017-CT(R) is retrospective or prospective, the submissions were made on the omission of proviso in NN. 8/2017-CT(R) to grant unconditional exemption from reverse charge for supplies received by registered persons from unregistered persons without any threshold limit. It was argued by the applicant in that case that omission is different from repeal and as the said proviso under NN 8/2017-CT(R) has been omitted without any saving clause, the amendment traces back to 01.07.2017 and thereby have retrospective implications. It was pleaded that section 6 of the General Clauses Act, 1897 is not applicable to cases of omission. In view of this reason, we will now delve upon this issue.

Section 6 of the General Clauses Act, 1897:

Section 6 of the General Clauses Act, 1897 provides for effect of repeal when any Central Act or Regulation was repealed. Under this section, it has been provided that unless a different intention appears, the repeal shall not

(a) revive anything not in force or existing at the tune at which the repeal takes effect; or

(b) ***affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder;*** *or*

(c) ***affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;*** *or*

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence. committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

In view of the above provisions of section 6 of the General Clauses Act, 1897, in case of a repealed statute, it shall not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder. Further, it shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. It is because of this reason, the applicant in the above AAR submitted that the amendment brought in is by way of omission of proviso without any saving clause and not by way of repeal.

It is because of this reason, it was pleaded by the applicant that the provisions of section 6 of the General Clauses Act, 1897 was not applicable to this case. In fact, it was submitted that the proviso was omitted without saving clause. Thereby, it was pleaded by the applicant that repeal is different from omission. As proviso was omitted without any saving clause to say that the omission is effective from 13.10.2017, the omission has retrospective implications and traces back to 01.07.2017.

In support of this argument, the applicant relied upon the judgments of Supreme Court viz. Rayala Corporation (P) Ltd. & Ors vs. Director of Enforcement, New Delhi[8], Kolhapur Cane Sugar Woks Ltd vs Union of India[9] and General Finance Co. & Anr. vs Assistant Commissioner of Income Tax, Punjab[10]. Let us now understand the ratio laid down by such judgments.

In the matter of Rayala Corporation (P) Ltd:

In the facts of this case, the premises of accused No. 1 were raided by the Enforcement Directorate on the 20th and 21st December 1966 and certain records were seized from the control of the manager. Some enquiries were made subsequently and, thereafter, on the 25th August, 1967, a notice was issued by the respondent to the two accused to show cause why adjudication proceedings should not be instituted against them for violation of sections 4 and 9 of the Foreign Exchange Regulation Act VII of 1947 (hereinafter referred to as 'the Act' on the allegation that a total sum of 2,44,713.70 Swedish Kronars had been deposited in a Bank account in Sweden in the name of accused No. 2 at the instance of accused No. 1 which had acquired the foreign exchange and had failed to surrender it to an authorised dealer as required under the provisions of the Act. In addition to the proceedings under the Foreign Exchange Regulation Act, 1947, the accused were also charged with violation of Rule 132-A(2)of the Defence of India Rules (hereinafter referred to as 'DIRs') which was punishable under Rule 132-A(4) of the said Rules. Both the accused moved the High Court for quashing the proceedings sought to be taken against them and High Court dismissed their applications and thereby they came up in these appeals before the Supreme Court. The Supreme Court held that repeal does not include omission and the saving clause under section 6 of the General Clauses Act, 1897 which applies to cases of repeal would not apply to cases of omission. Accordingly, set aside the proceedings initiated under omitted Rule 132A(2) of the Defence of India Rules. The relevant extracts are as under:

"Reference was next made to a decision of the Madhya Pradesh High Court in State of Madhya Pradesh v. Hiralal Sutwala (A.I.R. 1959 M.P.93), but, there again, the accused was sought to be prosecuted for 'an offence punishable under an Act on the repeal of which section 6 of the General Clauses Act had been made applicable. ***In the case before us, s. 6 of the General Clauses Act cannot obviously apply on the omission of R. 132A of the D.I.Rs. for the two obvious reasons that s. 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule. If s. 6 of the General Clauses Act had been applied no doubt this complaint' against the two accused for the offence punishable under R. 132A of the D.I.Rs. could have been instituted even after the repeal of that rule.***

The last case relied upon is 1. K. Gas Plant Manufacturing Co., (Rampur) Ltd. and Others v. The King Emperor([1947] F.C.R. 141). In that case, the Federal Court had to deal with the effect of sub-s. (4) of section 1 of the Defence of India

[8]1970 AIR 494 = 1970 SCR (1) 639) = 1969 (7) TMI 109- SUPREME COURT OF INDIA
[9] (2000 (1) SCR 518) = 2000 (2) TMI 823 - SUPREME COURT OF INDIA
[10] (2002) 7 SCC 1 = AIR 2002 SC 3126 = 2002 (9)TMI 3 - SUPREME COURT

Act, 1939 and the Ordinance No. XII of1946 which were also considered by the Allahabad High Court in the case of Seth Jugmendar Das & Ors.(A.I.R. 1951 All. 703). After quoting the amended sub-s. (4) of s. 1 of the Defence of India Act, the Court held :-

The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of s. 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of a temporary statute is that unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can betaken upon it and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate.*"*

In view of the above extracts of this decision, the Supreme Court held that section 6 of the General Clauses Act, 1897 is not applicable to cases of omission and is applicable to cases of only repeal. Further, it is also observed that the said section 6 is applicable only in cases of repeal of an Act or regulation but not to a rule. The above principle laid down by Supreme Court was also followed by Supreme Court in the cases of Kolhapur Cane Sugar Woks Ltd vs Union of India[11] and General Finance Co. & Anr. vs Assistant Commissioner of Income Tax, Punjab[12].

All these cases were relied upon by the applicant to hold that as omission of proviso under NN 8/2017-CT(R) was made without any saving clause, the provisions of section 6 of General Clauses Act, 1897 as applicable to cases of repeal are not applicable to the present case and there by pleaded that proceedings to recover tax under the said notification as was in force prior to such omission cannot be invoked.

The Advance Ruling Authority has not made any findings on the above submissions. It has simply held there is nothing to show that the amendment NN 38/2017 would have retrospective effect and therefore held that the provisions of reverse charge under Section 9(4) of the CT Act are applicable. Thus, it was held that the benefit of exemption from payment of tax on reverse charge as provided under Section 9(4) of CT Act is not applicable from 01.07.2017 as claimed by the applicant.

Though in the above case, the above referred decisions were relied upon by the Applicant to submit that repeal does not include omission, the paper writers would like to submit that the decision of Supreme Court in Rayala Corporation (P) Ltd was subsequently overruled by Supreme Court in the case of M/s Fibre Boards (P) Limited vs. Commissioner of Income Tax[13]. The relevant extracts are reproduced as under:

"27. First and foremost, it will be noticed that two reasons were given in Rayala Corporation (P) Ltd. for distinguishing the Madhya Pradesh High Court judgment. Ordinarily, both reasons would form the ratio decidendi for the said decision and both reasons would be binding upon us. ***But we find that once it is held that Section 6 of the General Clauses Act would itself not apply to a rule which is subordinate legislation as it applies only to a Central Act or Regulation, it would be wholly unnecessary to state that on a construction of the word "repeal" in Section 6 of the General Clauses Act, "omissions" made by the legislature would not be included.*** *Assume, on the other hand, that the Constitution Bench*

[11] (2000 (1) SCR 518) = 2000 (2) TMI 823 - SUPREME COURT OF INDIA
[12] (2002) 7 SCC 1 = AIR 2002 SC 3126 = 2002 (9)TMI 3 - SUPREME COURT,
[13] 2015 (8) TMI 482 – Supreme Court

had given two reasons for the non-applicability of Section 6 of the General Clauses Act. In such a situation, obviously both reasons would be ratio decidendi and would be binding upon a subsequent bench. ***However, once it is found that Section 6 itself would not apply, it would be wholly superfluous to further state that on an interpretation of the word "repeal", an "omission" would not be included. We are, therefore, of the view that the second so-called ratio of the Constitution Bench in Rayala Corporation (P) Ltd. cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta.***

28. Secondly, we find no reference to Section 6A of the General Clauses Act in either of these Constitution Bench judgments. Section 6A reads as follows:

"6A. Repeal of Act making textual amendment in Act or Regulation - Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

29. ***A reading of this Section would show that a repeal can be by way of an express omission. This being the case, obviously the word "repeal" in both Section 6 and Section 24 would, therefore, include repeals by express omission. The absence of any reference to Section6A, therefore, again undoes the binding effect of these two judgments on an application of the 'per incuriam' principle.***

30. Thirdly, an earlier Constitution Bench judgment referred to earlier in this judgment, namely, State of Orissa v. M.A. Tulloch & Co., (1964)4 SCR 461 has also been missed. The Court there stated: -

"….Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted……." (At page 484)

31. The two later Constitution Bench judgments also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in M.A. Tulloch & Co. that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression "repeal", it is clear

that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act.

(emphasis supplied)

In view of the above findings, it is clear that Supreme Court has over-turned the findings of Constitutional Bench in the earlier decision of Rayala Corporation (supra). Further, going by the language of section 6A of the General Clauses Act, 1897, it was held that repeal also includes omission.

Considering the above findings of the Supreme Court, we can say that repeal includes omission. However, the fact of the matter remains that the omission involved in the case of section 9(4) is with respect to NN 8/2017-CT(R) which is not a Central Act or a Regulation and is nothing but a sub-ordinate legislation like a rule. Therefore, by taking this aspect into consideration, it can still be pleaded that section 6 of the General Clauses Act, 1897 is not applicable to the proviso under NN 8/2017-CT(R). Therefore, a view is possible that omission of such proviso in the said notification without saving clause imply that such omission has retrospective implications. Therefore, this aspect requires detailed examination by courts.

Whether the Amendment Notification has Retrospective Effect by Implication*:*

It is not necessary that a provision can be given retrospective effect only when the language expressly provide so. Alternatively, a provision can be given retrospective effect by necessary implication even when the language does not expressly provide so. In this regard, reliance is placed in the case of Zile Singh vs State of Haryana & Others[14], wherein it was held as under:

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis' __ a new law ought to regulate what is to follow, not the past. (See: Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). ***It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.*** *(ibid, p.440) The presumption against retrospective operation is not applicable to declaratory statutes.* ***In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form.*** *If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended an amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect."*

(emphasis supplied)

[14] Civil Appeal no. 6638 of 2004 Supreme Court of India

As discussed in the legal background, recommendations were made to suspend section 9(4) of the CT Act as the said provision has virtually eliminated exemption limit provided to small taxpayers and is causing undue hardship to registered taxpayers in determining tax liability to comply with the same. Accordingly, the GST council has taken a decision to suspend the provisions of section 9(4).

Considering this decision of the Council, NN 38/2017-CT(R) was issued to omit the proviso in NN 8/2017-CT(R) in order to extend the exemption from reverse charge to all supplies from unregistered persons without any threshold limit. By doing so, effectively, the provisions of section 9(4) were made inoperative. Taking note of these circumstances that lead to NN 38/2017-CT(R), it cannot be construed that the said notification cannot be considered as a mere exemption notification simpliciter in order to consider it as prospective. In support of this argument, the following jurisprudence can be referred to.

Chennai Petroleum Corporation Limited[15]:

In this case, the facts involved are that Kerosene manufactured by the appellant were cleared under warehousing scheme to IOCL and there was normal levy of excise duty on the appellant in respect of such clearances. Policy of the Government was that Kerosene for ultimate distribution under the Public Distribution System (PDS) should not be subjected to levy of excise duty. This intention of the Government is clear from para 4 of the Circular No. 796/29/2004-CX., dated 4-9-2004. Subsequently, Government brought exemption under N No. 4/2005-CE dated 01.03.2005 to exempt kerosene meant for PDS from levy of excise duty. During the interim period, there was confusion on the part of the revenue administration whether to levy duty on the same Kerosene cleared by the appellant meant for PDS through IOCL. In this context, the CESTAT Chennai vide para 7 has held as under:

Law is well-settled that a curative notification which seeks to mitigate the hardships is always read in a manner to advance public welfare and construed liberally as well as retrospectively. The Notification dated 1-3-2005 having conveyed the policy of the Government to exempt PDS kerosene from levy of excise duty, as that was the intention conveyed through the above circular, there shall not be confusion to levy excise duty on PDS kerosene because issuance of notification was delayed by nearly 6 months. ***It can be said that Notification dated 1-3-2005 having same object to exempt the PDS Kerosene from excise duty as was the policy of the State, should not be read in a pedantic sense to rule out retrospective application thereof. That needs interpretation in a broader sense to achieve the public purpose of not burdening consumers under PDS. Therefore, the order of ld. Commissioner (Appeals) fails to stand. Appeal is allowed accordingly.***

Thus, in view of the above decision, a curative notification which seeks to mitigate the hardships should always be read in a manner to advance public welfare and construed liberally and retrospectively. By relying on this decision, it can be pleaded that the exemption under N No. 38/2017-CT(R) cannot be considered in strict legal sense and it should be interpreted liberally to mitigate the hardships.

[15] 2017(352)ELT 31 (Tri-Chennai)

Prince Spintex Private Limited[16]:

At the time when GST was introduced effective from 01.07.2017, there was no clarity on availability of exemption from integrated tax and compensation cess when the capital goods are imported under EPCG license. Though the Foreign Trade Policy provided policy provided for import of goods under the scheme without payment of basic customs duties levied under section 12 of Customs Act, 1962 and additional duties of customs levied under section 3 of Customs Tariff Act, 1975, there was no clarity whether exemption is applicable to the newly introduced integrated tax and compensation cess levied under section 3(7) and section 3(8) of the Customs Tariff Act, 1975. Subsequently, vide N No. 33/2015-20 dated 13.10.2017, certain amendments were made in chapter 5 of the Foreign Trade Policy 2015-20 to provide that capital goods imported under the EPCG Scheme for physical exports also came to be exempted from the whole of the Integrated Tax and Compensation Cess leviable thereon under subsection (7) and sub-section (9) respectively of Section 3 of the Customs Tariff Act. Pursuant to this amendment in FTP 2015-20, the original Customs N No. 16/2015-Cus was amendment vide N No. 79/2017-Cus dated 13.10.2017 to provide exemption to integrated tax and compensation leviable under sub-section (7) and sub-section (9) of section 3 of Customs Tariff Act. In view of the delayed introduction of exemption for integrated tax and compensation cess, doubts were raised about the applicability of exemption for the interim period between 01.07.2017 to 12.10.2017. This issue was considered by Gujarat High Court and it was held under para 34 as under:

"34. In the facts of the present case, as discussed hereinabove, though the exemption notification has been issued under Section 25 of the Customs Act, it has been issued for the purpose of implementing the EPCG Scheme which holds out a promise that import of capital goods under the scheme would be exempt from payment of additional duty under Section 3 of the Customs Tariff Act. ***Therefore, the notification has to be read in the context of the EPCG policy keeping in mind the object envisaged by the policy and not in the strict sense as in the case of a general exemption under Section 25 of the Customs Act.***

In the instant case also, as the notification granting exemption for integrated tax and compensation cess payable on import of capital goods has been brought out consequent to foreign trade policy of the Government not to impose any tax on capital goods imported under EPCG scheme, the court held that the said exemption cannot be construed in strict sense like a general exemption under section 25 of the Customs Act. Further, on the issue whether the notification has retrospective effect or not, the court held as under:

38. In the facts of the present case, import of capital goods under a valid authorisation under the EPCG Scheme was wholly exempt from payment of any additional duty under Section 3 of the Customs Tariff Act. The intention of the Central Government while framing the EPCG Scheme was to permit export at zero customs duty. Accordingly, by Notification No. 16/2015-Cus., dated 1st April, 2015, goods covered by a valid authorisation issued under the EPCG Scheme in terms of Chapter 5 of the Foreign Trade Policy were inter alia exempted from the whole of the additional duty leviable under Section 3 of the Customs Tariff Act. However, when the GST regime came into force, while Section 3 of the Customs Tariff Act came to be amended by inserting sub-sections (7) and (9) providing for levy of Integrated Tax and Goods and Service Compensation Cess, in the corresponding amendment made in Notification No. 16/2015-Cus. Vide Notification No. 26/2017-Cus., dated 29th June, 2017, sub-section (7) and sub-section (9) of Section 3 were left out. However, within a short time thereafter, vide notification dated 13th October, 2017, Notification No. 16/2015-Cus. came to be further

[16] 2020 (35) GSTL 261 (Guj)

amended and the imports under EPCG Scheme were exempted from additional duty under sub-section (7) and sub-section (9) of the Customs Tariff Act. ***It is therefore, apparent that it was on account of inadvertence or oversight that while amending Notification No. 16/2015-Cus., dated 1st April, 2015 by Notification No. 26/2017-Cus., the words, figures and brackets "sub-section (7) and sub-section (9)" were not inserted and that it was always the intention of the Central Government to exempt imports of capital goods under the EPCG Scheme from payment of additional duty under Section 3 of the Customs Tariff Act. Notification No. 79/2017, dated 13th October, 2017, therefore, has to be read as clarificatory or curative in nature, inasmuch as, otherwise it would leave as whole class of importers who had imported capital goods, uncovered during the period 1-7-2017 to 13-10-2017, allowing the department to levy additional duty under sub-sections (7) and (9) of the Customs Tariff Act on such imports, despite the fact that the Foreign Trade Policy 2015-2020 envisages imports under the EPCG Scheme at zero customs duty.*** *Under the circumstances, the action of the respondents in levying Integrated Tax and Compensation Cess on the import of capital goods by the petitioner under a valid authorisation under the EPCG Scheme, not being in consonance with the Foreign Trade Policy 2015-2020 cannot be sustained.* ***For the same reasons, Trade Notice No. 11/2018, dated 30-6-2017, to the extent it is stated therein that under Chapter 5 importers would need to pay IGST, is also rendered unsustainable. Consequently, subject to fulfilment of the conditions contained in the Foreign Trade Policy, 2015-2020 and the exemption Notification No. 16/2015-Cus., dated 1st April, 2015 as amended from time to time, the petitioner would continue to enjoy exemption from payment of additional duty under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act even during the period 1-7-2017 to 13-10-2017 and is, therefore, entitled to refund of the additional duty paid by it under sub-sections (7) and (9) of Section 3 of the Customs Tariff Act.***"

Thus, the Gujrat High Court considered the above amendment to principal notification as curative and is having retrospective implications. Applying the ratio of these decisions to the facts of the present case, by considering the fact that NN 38/2017-CT(R) was issued consequent to suspension of section 9(4) with objective to remove hardships being faced by registered taxpayers, the amendment made under the said notification appears to have retrospective implications.

Calcutta Export Company[17]

In the facts of the said case, the respondent filed return of income for AY 2005-06 for Rs. 4,18,17,910/-. The case was selected for scrutiny and assessment under section 143(3) of the Income Tax Act, 1961 was completed on 28.12.2007. The assessing officer vide order dated 12.10.2009 disallowed the export commission charges paid by assessee to M/s Steel Crackers Private Limited amounting to Rs. 40,82,089/- while stating that the tax deducted at source on such commission amount on 07.07.2004, 07.09.2004 and 07.10.2004 ought to have been deposited by the respondent before the end of previous financial year i.e. 31.03.2005 to get commission income deducted from total income in terms of section 40(a)(ia) of the IT Act as it stood then. The respondent deposited the same on 01.08.2005, hence the Respondent cannot be allowed to claim deduction of the commission income from the total amount. The Assessing Officer revised the total income to Rs. 4,58,99,999/- with the requirement to pay the additional tax amount of Rs. 23,88,832/- by the Respondent. Vide Finance Act, 2010, proviso was inserted in section 40a(ia) of the IT Act to provide that any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the said due date; or during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been

[17] [2018] 93 taxmann.com 51(SC)

paid. The assessee pleaded that the above amendment is curative in nature and have retrospective implications but the same was not considered.

Aggrieved by the order, the assessee preferred appeal before the CIT (Appeals) and vide order dated 01.08.2011, allowed the appeal while holding that the commission amount is eligible for deduction under the said assessment year by considering the amendment made to section 40a(ia) of the IT Act vide Finance Act, 2010 is retrospective in effect. The Revenue preferred appeal before the Tribunal and High Court which were unsuccessful and hence the matter reached Supreme Court. The Supreme Court held that the amendment is curative in nature and have retrospective effect.

"The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. ***However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation*** *i.e., from the date of substitution of the provision.* ***Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision. (para 28)***

Hence, in light of the forgoing discussion and the binding effect of the judgment given in Allied Moters (supra), ***we are of the view that the amended provision of Sec 40(a)(ia) of the IT Act should be interpreted liberally and equitable and applies retrospectively from the date when Section 40(a)(ia) was inserted i.e., with effect from the Assessment Year 2005-2006 so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates****. As the developments with regard to the Section recorded above shows that the amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its insertion. Since the assessee has filed its returns on 01.08.2005 i.e., in accordance with the due date under the provisions of Section 139 IT Act, hence, is allowed to claim the benefit of the amendment made by Finance Act, 2010 to the provisions of Section 40(a)(ia) of the IT Act.* ***(para 30)"***

(emphasis supplied)

Thus, the Supreme Court identified that if the amendments to a statute was brought in to avoid unintended and deleterious consequences beyond the object and purpose of a statutory provision, then the same will have retrospective effect. As it is evident from the excerpts of the minutes of the GST Council Meeting, that the reason behind suspension of section 9(4) was to relieve the taxpayers from heavy and cumbersome work involved in computing tax liabilities under this section. Therefore, the same is also curative in nature and have retrospective implications.

Conclusion:

In view of the above discussion and by taking the legal circumstances under which the amendment was brought to the exemption notification to unconditionally exempt tax payable under section 9(4), one thing is certain that NN 38/2017-CT(R) cannot be considered as ordinary exemption notification simpliciter. Considering the fact that Revenue has already started to issue show cause notices to recover tax for the period 01.07.2017 to 12.10.2017, this issue whether the

amendment brought in by NN 38/2017-CT(R) has retrospective effect or not would be examined by tribunals/courts sooner or later. All the above aspects viz. the effect of omission of proviso without saving clause, whether the suspension of section 9(4) and the amendment brought in are curative in nature to have retrospective implications will be addressed. On the flip side, similar hardships will also be faced by the Revenue officers in issuing show cause notices for this issue as they need to determine tax implications on each item of the goods and services procured by the taxpayers from unregistered persons. Any vagueness in determining such tax liability may give opportunity to taxpayers to plead that they are invalid. Let us see how this matter will end up in the coming days.

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