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CONTENTS

EDITORIAL..1

INCOME TAX..2

DEEMED RESIDENCY – CONCEPT AND ISSUES THEREOF..2

GST..11

RCM EXEMPTION ON SUPPLIES FROM URPS 11

Dear Readers,

Greetings for the season!

In this edition, we bring you an article on retrospectivity of Section 9(4) of Central Goods and Services Tax Act. The said section was omitted with effective from Oct 17 after CBIC receiving huge representations stating that the compliance burden it caused and forced many small time assesses to register. However, while the said section is omitted from Oct 17, the applicability from June 17 to Oct 17 is unknown. The tax authorities believe that the said omission is from Oct 17, the taxability would exists for the period prior to it. However, the tax payers state that considering the jurisprudence and intention to relive tax payers, the omission should be held retrospective. The article deals precisely on the said issue.

The next article is on 'deemed residency' which was inserted vide Section 6(1A) of ITA in the last budget. A citizen of India would be deemed to be resident if he is not resident elsewhere and accordingly tax liability is fastened in India. The article deals with consequential issues arising from the amendment, namely, whether such individual would be eligible for claiming tax treaty benefits and credit of foreign tax paid.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder &Chairman

INCOME TAX

DEEMED RESIDENCY – CONCEPT AND ISSUES THEREOF

Contributed by CA Sri Harsha & CA Narendra |

Introduction:

Residency is one of the important issues which has to be fixed before proceeding with determination of tax liability. Unless the residency of an individual or company or any entity for that matter is not fixed, there cannot be a way to determine the tax liability. Apart from the tax liability, the residency also gives a person a right to seek various reliefs. Till this point of time, we have seen instances where an individual was treated as a resident in more than one country and tried to resolve such issues by opting various measures namely by applying tie-breaker rules and place of effective management. However, the Finance Act, 2020 has opened up doors for new breed of resident, which is the subject matter of this article. The Finance Act, 2020 has amended Section 6 of Income Tax Act, 1961 ('ITA'/'Act') inserting a new sub-section to deal with residency of an individual, who is nowhere a resident. Let us understand the said concept and issues surrounding thereof.

Section 6(1) of ITA, an individual shall be treated as resident, if he is in India for a period of 182 days during previous year or if he is in India for a period of 365 days within 4 years immediately preceding previous years and 60 days or more during the previous year. The statutory limits provided under Section 6 above are being misused by some Individuals in order to become non-residents in India thereby avoiding the liability to pay tax in India.

Let us take an example, Mr. A is a citizen of India having high net worth who is planning his stay across the countries in order to make sure that he is not a resident in anywhere in the world. In a particular year, he stays in India for period of 150 days (assuming that he stays less than 365 days in 4 years immediately preceding year) and remaining days in multiple countries. By virtue of his limited stay in India and other countries, he is not becoming resident in any country. As majority of the countries in the world tax an individual based on residence rule, being a non-resident in every country, such Individual is not liable to tax in any country on residence rule and thereby avoiding significant amount of tax payable to tax authorities.

This issue is addressed neither by the Income Tax Act nor by Double Taxation Avoidance Agreements ('DTAA') entered into by the India with various countries. However, DTAA does not address the issue when an Individual is not a resident in any country.

Deemed Residency:

By taking recommendations made by Direct Tax Task Force Committee into consideration, through Finance Bill 2020, it is proposed to amend section 6 of ITA to insert a new sub section (1A) so as to provide that, an individual, being a citizen of India, shall be deemed to be resident in India in any previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature ('deemed resident').

Immediately after treating the inserting the sub section (1A) in section 6 to treat such person as deemed resident in India, there was a huge hue and cry from the non-residents regarding the taxability of the income earned outside India. In this regard, Central Board of Direct Taxes ('CBDT') vide press release dated February 02, 2020, stated that income earned outside India is not liable to tax in India unless such income is derived from a business controlled or profession set up in India.

While passing the Finance Bill 2020, certain relaxations have been provided in Section 6 of ITA for the individuals who shall be the deemed resident. Under the amended provisions, only an individual, being a citizen of India, whose income other than income from foreign source[1] exceeds INR 15,00,000 in any previous year, shall be deemed to be a resident in India, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

In other words, if such individual is neither a citizen of India nor being a citizen of India, the income from foreign source does not exceeds INR 15,00,000 nor he is liable to tax in any other country or territory, then such individual would not be classified as 'deemed resident'. Hence, only on satisfaction of certain conditions, an individual would be falling under the ambit of 'deemed resident'.

Scope of Total Income vis-à-vis Deemed Residency:

Once he falls under the ambit of 'deemed resident', the next important aspect is the scope of his total income. As stated earlier, generally, majority of the countries stipulate that once an individual is 'resident' of a state, his global income would be taxable in such state. India also adopts similar mode of taxation. Hence, the next question, that would arise is, what is the scope of total income of 'deemed resident'.

Section 5 of ITA deals with the scope of total income. The said section subject to other provisions of the act, lays down the scope of total income for a person who is a resident, not ordinarily resident and non-resident, which is detailed as under:

Status	Received or Deemed to be Received in India	Accrues or Arises or is deemed to accrue or arise to him in India	Accrues or Arises to him outside India
Resident	Scoped -In	Scoped -In	Scoped -In
Not Ordinarily Resident	Scoped -In	Scoped -In	Scoped-In only if such income is derived from a business controlled in or a profession set up in India
Non-Resident	Scoped -In	Scoped -In	-

Hence, it is relevant to understand, whether the deemed resident is classified as resident or not ordinarily resident or non-resident to understand the scope of total time. From the perusal of Section 6, which deals with 'Residence in India', the deemed resident was covered under sub-section (6) which deals with a person who is 'not ordinarily resident'. Hence, an individual who becomes 'deemed resident' by virtue of Section 6(1A), he is classified as 'not ordinarily resident'.

[1] Explain foreign source

Once he is classified as 'not ordinarily resident', the scope of total income shall be restricted to received or deemed to be received in India and accrues or arises or is deemed to accrue or arise to him in India. The income which accrues or arises to him outside India is not to be included unless such income is derived from a business controlled in or a profession set up in India.

With the above introduction, let us examine certain consequential aspects which arise because of inclusion of the concept of deemed resident and as not ordinarily resident thereof.

Deemed Residency vis-à-vis Treaty Benefit:

As stated earlier, one of the conditions mentioned in sub section (1A) to section 6of ITA, to treat an individual to be deemed resident, is that such individual is not liable to tax in any other county or territory by reason of his domicile or residence or any other criteria of similar nature. One may find the similar language in model tax conventions. Generally, as per Article 1 of Double Tax Avoidance Arrangements ('DTAA'), a person can access the benefits of DTAA provided such person is resident of one or both the contracting states. In other words, a person shall be eligible to access the treaty benefits only if he is resident of at least one contracting state to the arrangement.

The concept of resident is dealt with by Article 4[2] of DTAA under which an Individual is treated as a resident of a contracting state, if such individual, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of effective management or any other criteria of similar nature and also includes that state and any political subdivision or local authority thereof. In other words, if such person is not liable to tax therein by reason of his residence, domicile or other criteria of similar nature then such individual will not be resident of such contracting state, thereby denial of treaty benefits.

Hence, the question that arises for consideration is, whether a deemed resident by virtue of Section 6(1A) would be treated as resident for the purposes of Article 4? If the response is affirmative, then he may access the treaty benefit and if not, he would not. Now, let us proceed to examine the said aspect.

To illustrate with an example, let us assume, an individual being a citizen of India, who is not a resident in any other jurisdiction, derives income from a profession setup in India with source outside India, say country X. Let us also assume that such individual is not a resident of country X and such income is taxable in country X as per the local laws (based on source rules) of such country.

Further, such income is also taxable in India as per Section 5 read with section 6 of the ITA as stated earlier (since the income is from a profession set-up in India, the same shall be scoped-in, even though such individual is RNOR). In this context, whether such an Individual can claim benefits of DTAA between India and country X ?.

[2]Article 4 of UN Model Convention 2017

As stated earlier, as per Article 1 read with Article 4 of DTAA, an Individual can claim benefits of DTAA if such individual is liable to tax therein by reason of his residence, domicile or other criteria of similar nature. As assumed that since the individual is not a resident of country X, he shall become deemed resident by virtue of Section 6(1A) of ITA. Now, the question would be that, whether he would also qualify as resident for the purposes of Article 4. To satisfy the conditions mentioned in Article 4 of DTAA, individual needs to satisfy the following two conditions:

a. He shall be liable to tax in India and
b. such liability arises by the reason of his residence, domicile or other criteria of similar nature.

If above two conditions are satisfied, such individual may claim benefits under DTAA otherwise he may not. Now, let us proceed to examine, whether the individual in our example, satisfies the two conditions.

<u>He shall be liable to tax in India:</u>

The first condition is that the individual shall be liable to be taxed in India. Normally seen, the deemed resident is liable to be taxed in India to the extent of total income as per Section 5. Hence, on a plain reading of the first condition, one can conclude that he is liable to tax in India. Further, it is clarified by Honourable Supreme Court in the matter of Azadi Bachao Andolan [3], liable to tax and payment of tax are two different aspects and there is no requirement of reading of payment of tax into liable to tax. Hence, if the deemed resident would be said to satisfy the first condition, if he can prove that there is a liability to tax in terms of Section 5 despite of the fact there is no payment. As explained above, an Individual can claim benefits of DTAA if such person is liable to tax therein by reason of his residence, domicile, or other criteria of similar nature. In the above example, liability to pay tax in India arises in the hands of an Individual because such person a resident under section 6(1A) of the Act. Hence, such person is treated as resident under Article 4 of DTAA and can claim benefits provided under DTAA.

However, a reading of commentary of Article 4 of OECD / UN Model Tax Convention 2017, would present a different picture. OECD[4] in its preliminary remarks to commentary on Article 4 of DTAA has explained that domestic laws of the various states impose comprehensive liability to tax – full liability to tax – based on the taxpayers' personal attachment to the state concerned. OECD further mentions that conventions do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as 'resident' and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on 'residence' have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws. The relevant part of the commentary is as under:

[3] [2003] 263 ITR 706 – SC
[4] Organisation for Economic Co-operation and Development

Paragraph 1 provides a definition of the expression "resident of a Contracting State" for the purposes of the Convention. The definition refers to the concept of residence adopted in the domestic laws (see Preliminary remarks). As criteria for the taxation as a resident the definition mentions: domicile, residence, place of management or any other criterion of a similar nature. ***As far as individuals are concerned, the definition aims at covering the various forms of personal attachment to a State which, in the domestic taxation laws, form the basis of a comprehensive taxation (full liability to tax). It also covers cases where a person is deemed, according to the taxation laws of a State, to be a resident of that State and on account thereof is fully liable to tax therein[5].***

From the above, it would mean that the definition of resident under Article 4 covers those individuals who are liable to tax, basis the various forms of personal attachment, in the country on comprehensive basis. Interestingly, Finance Bill has been amended the original Finance Bill introduced in the Parliament, so as to provide that such individual is treated as RNOR. Further, amended Finance Bill provided that such Individual is liable to tax in India as a resident only when such Individual has income other than from foreign sources exceeding INR 15,00,000. As stated earlier, RNOR is not liable to tax on the income derived outside India except under certain circumstances.

Hence, the essential question that would arise is that whether RNOR is treated as **'liable to tax'** in India on **'comprehensive basis',** given of the fact that income accrued or arises outside India is not required to be included in scope of his total income. If such individual is not 'liable to tax' in India on **comprehensive basis**, then reading in light of the commentary, he may not be considered as resident under Article 4 of DTAA and thereby not eligible for benefits of DTAA.

In this regard, one needs to decode the phrase 'comprehensive basis'.Whether the income accruing or arising outside India and exclusion of such income from the scope of total income for deemed resident (RNOR) can be stated that such RNOR is liable to tax on comprehensive basis?

As per the Oxford English Dictionary, the word 'comprehensive' means 'including all, or almost all, the items, details, facts, information, etc., that may be involved' and the word 'fully' means 'completely'. However, since RNOR is liable to tax on only certain types of income as specified in Section 5 and by taking a literal interpretation, there is a chance that individual may not be considered to be 'liable to tax' in India on comprehensive basis and is not a resident in India under Article – 4 of DTAA and is there by not eligible to benefits therein.

However, individual may argue that he is a citizen of India and his tax liability arises in India because of his citizenship in India and by virtue of Section 6(1A).And a treaty shall be interpreted in contrary to an ordinary taxing statute and must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned. If individual is denied the benefit of DTAA then, individual is liable to tax in two jurisdictions on the same income which is definitely not the objective of any DTAA.

[5] OCED Commentary Article – 4 of Model Tax Convention

Further, according to Klaus Vogel "Double Taxation Conventions establishes an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible. In other words, Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other Contracting State either entirely or in part. Contracting States are said to waive 'tax claims' or more illustratively to divide 'tax sources', 'taxable objects', amongst themselves".

The AAR[6] in the case of *Alimohammed Rafik*[7] *held that 'as already pointed out the several articles in the DTAA which specifically concern individuals would make no sense at all, if individuals living in UAE are treated as excluded from the benefits of the agreement because they are not currently subjected to any tax in UAE. It is difficult to conceive of a large number of such provisions being inserted in the agreement merely to meet a situation which does not arise on the date of the agreement but may possibly arise in the future. These provisions are consistent only with the interpretation that certain benefits qua Indian tax are intended to be conferred on individuals resident in UAE even though they are not liable to tax in their State' and concluded that an individual, though at present is not actually liable to pay any income-tax in Dubai, should also be considered to be a resident of Dubai for the purposes of the DTAA as, being a person living in Dubai and having sources of income there, he is certainly liable to be called upon to pay income-tax under the tax laws of that country.*

The AAR has expressed the similar view in the case of Emirates Fertilizer Trading Co. WLL, In re[8].

Further, the Hon'ble Mumbai Tribunal in the case of Green Emirate Shipping & Travels[9] held that *"The expression 'liable to tax' is not to be read in isolation but in conjunction with the words immediately following it i.e., 'by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature'. That would mean that merely a person living in a Contracting State should not be sufficient, that person should also have fiscal domicile in that country. These tests of fiscal domicile which are given by way of examples following the expression 'liable to tax by reason of', i.e., domicile, residence, place of management, place of incorporation, etc., are not more than examples of locality-related attachments that attract residence type taxation. Therefore, as long as a person has such locality-related attachments which attract residence type taxation, that 'person' is to be treated as resident and this status of being a 'resident' of the Contracting State is independent of the actual levy of tax on that person. Therefore, being 'liable to tax' in the Contracting State does not necessarily imply that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover the cases where other Contracting State has the right to tax such persons - irrespective of whether or not such a right is exercised by the Contracting State."*

The above discussed views which are held by AAR and Hon'ble Tribunal are upheld by the Hon'ble Delhi Tribunal in the case of Vinod Arora[10] and Mushtaq Ahmad Vakil[11].

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[6] Authority for Advance Ruling
[7] [1995] 79 Taxman 75 (Delhi)
[8] [2005] 142 Taxman 127 (AAR)
[9] [2006] 100 ITD 203 (MUM.)
[10] [2012] 26 taxmann.com 23 (Delhi)
[11] I.T.A. Nos.3424, 3425 & 3426/Del./2010

In the above cases, the appellants were residents in UAE and earned income from source in India. In respect of income earned by such residents, revenue has argued that respective Individual is not liable to tax in UAE and thereby not eligible to benefits of DTAA as he is not a resident under Article -4. The AAR as well as Hon'ble Mumbai Tribunal and Delhi Tribunal pointed out that mere because taxing rights are not exercised by the UAE does not render the assessee ineligible to claim benefits of DTAA.

Similar to the above situation, Government of India has imposed tax liability on deemed residents with regard to income accrued or received in India and income sourced outside India, if such income is derived from a business controlled in or a profession set up in India. The Government of India has deliberately exercised its right not to tax any other income (i.e., other foreign sourced income). By applying the rulings given by above discussed authorities to our example, it can be concluded that a person deemed to be resident in India is liable to tax in India on comprehensive basis by reason of his citizenship and is considered as resident within the meaning of section eligible to claim benefits of DTAA between India and other countries.

Claiming of Foreign Tax Credit:

Assuming, if the individual in our above example, is not able to access benefits of DTAA between India and country X, then there arises a question whether such individual can claim foreign tax credit ('FTC') under Section 91 of the Act?

Section 91 provides that any person who is **resident in India** earns any income from any source outside India and such person has paid taxes in respect of such income in any country with which India does not have DTAA then, such person may claim credit of tax paid in such other country under Section 91 of ITA.

Before going forward, it is required to understand whether the deemed resident as provided in sub section (1A) of section 6 of the ITA is considered as resident for the purposes of Section 91. In other words, whether RNOR is considered as 'resident' under Section 91 to obtain relief therein. If such RNOR has not been considered as resident for purposes of Section 91, then such individual is not entitled to benefits under Section 91.

Section 2(30) of the ITA defines the word 'non-resident' to mean a person who is not a 'resident' and only for the purpose of Section 92, 93 and 168, RNOR is treated as 'non-resident' to mean that for all other provisions of the Act, RNOR is treated as 'resident'. Further, there is no concept of 'resident and ordinary resident' under ITA to limit the definition 'resident' to such class alone. ITA defines 'not ordinary resident' and not 'ordinary resident' in India. Such 'not ordinary resident' is also covered under the definition of 'resident' for all other provisions of the Act where there is a reference to the word 'resident'. In this regard, it is prudent to interpret the law to include the RNOR in 'resident'.The Honourable Delhi Tribunal in the matter of Aditya Khanna[12] held as under:

[12][2019] 105 taxmann.com 323 (Delhi - Trib.)

The provisions of section 6 of the income tax act provides for qualification of the persons who are residents in India. The provisions of section 6 (6) carves out another category of person in 'Residents', who is said to be 'not ordinarily resident' in India. However such persons are also 'resident'. The category is also called a 'resident but not ordinarily resident' in India. Therefore persons who are 'resident but not ordinarily resident' in India are forming larger group of the persons who are 'resident' in India.

Given the above discussion, a person who is a 'not ordinary resident' under the Act is considered as resident for the purpose of Section 91 of the Act. Having understood that RNOR is also considered as resident, now let us move forward to understand whether such RNOR is eligible to claim benefits of Section 91.

Section 91 provides for giving credit of tax paid in respect of tax paid in any other country when there is no DTAA with such other country. In other words, to access Section 91, the primary condition that should be satisfied is that there should not be DTAA with another country in respect which income is liable to tax.

However, one needs to appreciate the fact that one of the main purposes and objective of the DTAA is to provide relief to the person from double taxation. Section 91 was inserted to provide relief to other individuals, if Government of India has not entered into agreement with any other country for providing relief from double taxation.

Even though there is an agreement with other countries, as the individual is not able to access benefits of DTAA as the individual is not a 'resident' under DTAA, denying the benefits of Section 91 is not in line with the objective of DTAA. Further, DTAA benefits are not available to the individual merely because of inherent limitations (he is classified as RNOR instead or Resident) on the individual which are otherwise available to such individual, hence benefits of Section 91 shall not be denied. If the individual is denied from benefits of DTAA and benefits of Section 91, then that it is a clear case of double taxation of the same income which is not the intention of the legislature for inserting Section 6(1A).

Further, many judicial fora, in dealing with DTAA between India and USA, have held that resident shall not be denied from claiming benefits of Section 91 merely because that India has entered into DTAA with USA. The Honourable Mumbai Tribunal in the case of Tata Sons Ltd[13] explained the interplay between Section 90 and Section 91 and granted the relief under Section 91 even though there was a DTAA.

The Honourable Tribunal pointed out that, if one adopts a literal interpretation of the provision by bearing in mind the undisputed position that tax credit provisions under Section 91 are more beneficial to the individual vis-à-vis the tax credit provisions in related tax treaties inasmuch as while Section 91 permits credit for all Income-taxes paid abroad - whether State or Federal, relevant tax treaties permit credits in respect of only Federal taxes, it will result in a situation that an resident will be worse off as a result of the provisions of tax treaties.

[13][2011] 10 taxmann.com 87 (Mum.)

Further, the Tribunal held that Circular 621, dated 19-12-1991issued by the CBDT states that 'since the tax treaties are intended to grant relief and not put residents of a Contracting State at a disadvantage vis-à-vis other taxpayers, section 90 of the Income-tax Act has been amended to clarify any beneficial provision in the law will not be denied to a resident of a contracting country merely because corresponding provision in a tax treaty is less beneficial'

Similar view was also upheld by Co-ordinate bench of Ahmedabad Tribunal in the case of Dr. Rajiv I. Modi[14] and the Hon'ble Delhi Tribunal in the case of Aditya Khanna (supra).

By invoking above judicial interpretations into amended section 6 and section 91, it is legally tenable to claim benefits under section 91 of the Act by deemed resident who is resident but not ordinary resident in India.

Given the above discussion, deemed resident as specified under sub section (1A) of section 6 can claim credit of foreign tax paid on income earned from outside India.

[14] [2017] 86 taxmann.com 253 (Ahmedabad - Trib.)

GST

RCM EXEMPTION ON SUPPLIES FROM URPS

Contributed by CA Sri Harsha & CA Manindar

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 NN38/2017-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 asit 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.

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

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:

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:

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[5] Central Goods and Services Tax Act, 2017

[6] Central Board of Indirect Taxes and Customs

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.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% taxon 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 chargemechanism 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 chargemechanism.

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 31March, 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 in the 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]*.*

[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.

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:

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 NN8/2017-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.

<u>Whether Omission of Proviso in Notification without Saving Clause has Retrospective Implications:</u>

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.

<u>Section 6 of the General Clauses Act, 1897:</u>

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 20thand 21st December 1966 and certain records were seized from the control of the manager. Some enquiries were made subsequently and, thereafter, on the 25thAugust, 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

[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

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. HiralalSutwala(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 therepeal 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 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 ClausesAct (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of at emporary 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 Ltdvs 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 NN8/2017-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 NN38/2017 would have retrospective effect and therefore

[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,

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 from01.07.2017 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 theConstitution Bench 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 bea 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 6Areads as follows:

"6A. Repeal of Act making textual amendment in Act or Regulation - Where any Central Act or Regulation made after th ecommencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the expressomission, 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 in curiam' 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

[13] 2015 (8) TMI 482 – Supreme Court

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 impliedrepeals 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 animplied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given bythe 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.

<u>Whether the Amendment Notification has Retrospective Effect by Implication:</u>

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

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

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 constitutiofuturis formamimponeredebet 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)

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, NN38/2017-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 NN38/2017-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 NNo. 4/2005-CE dated 01.03.2005to 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:

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

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.

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 here in above, 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 25of the Customs Act.***

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

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 toforeign 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 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 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. ***<u>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)</u>***

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

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 NN38/2017-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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