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# SPECIFIED DOMESTIC TRANSACTIONS: RETROSPECTIVE OPERABILITY OF OMISSION OF CLAUSE (i) TO SECTION 92BA(1)

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*Section 92BA of the Income-tax Act, 1961 defines 'Specified Domestic Transaction' by providing an exhaustive list of transactions; this section was introduced through the Finance Act, 2012 w.e.f. 1st April, 2013. The transaction for expenditure payable / paid to certain persons [mentioned u/s 40A(2)(b)], being one of the specified domestic transactions, was omitted from the statute book through the Finance Act, 2017 w.e.f. 1st April, 2017.*

*The enumeration of a domestic transaction in section 92BA is a necessary requirement for the reference of the same to the Transfer Pricing Officer u/s 92CA. Accordingly, the omission of clause (i) to section 92BA(1) had the effect of restraining reference to the Transfer Pricing Officer in case of transactions for expenditure payable / paid to certain persons [mentioned u/s 40A(2)(b)] on and after the date of enforcement of the omission (1st April, 2017).*

*The above said omission and its effect was clear enough to rule out the scope for any ambiguities, but incidentally, there exist contradictory findings / judicial pronouncements by certain Tribunals as well as the High Courts in relation to (A) applicability of the above said omission since 1st April, 2013, i.e. the date of introduction of section 92(BA); (B) on holding that the clause (i) to be believed to have never existed on the statute book; and (C) holding the reference to the Transfer Pricing Officer in respect of clause (i) transactions as void* ab initio. *Hence, this article puts forth a synopsis of various judicial decisions on the captioned issue.*

## MOOT QUESTION FOR CONSIDERATION

The moot question for consideration is **whether the provisions appearing in clause (i) to section 92BA [i.e., the clause that included expenditures relating to clause (b) of section 40A(2), under Specified Domestic Transactions], which was omitted *vide* Finance Act, 2017 with effect from 1st April, 2017, will be considered as omitted since the date on which section 92BA was brought into force (i.e., 1st April, 2013 itself), which makes clause 92BA(1)(i) inapplicable even in respect of the period of assessment prior to 1st April, 2017?**

And accordingly, **whether it is a correct and settled position of law to state that when a provision is omitted, its impact would be to believe that the particular provision did not ever exist on the statute book and that the said provision would also not be applicable in the circumstances which occurred when the provision was in force even for the prior period?**

## WHAT IS CENTRAL TO THE ISSUE

Section 92BA, as it stood prior to the omission of clause (i), and section 92CA are central to the issue at stake and hence are reproduced hereunder:

***Section 92BA(1)*** *– For the purposes of this section and sections 92, 92C, 92D and 92E, 'specified domestic transaction' in case of an assessee means any of the following transactions, not being an international transaction, namely,*

*(i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;*

*(ii) any transaction referred to in section 80A;*

*(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;*

*(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;*

*(v) any transaction referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or*

*(vi) any other transaction as may be prescribed and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of [five] crore rupees.*

***Section 92CA(1)*** *– Where any person, being the assessee, has entered into an international transaction or specified domestic transaction in any previous year,*

*and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Principal Commissioner or Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under section 92C to the Transfer Pricing Officer.*

## PROSPECTIVE, NOT RETROSPECTIVE

It is pertinent to note here that the deletion by the Finance Act, 2017 was prospective in nature and not retrospective, either expressly or by necessary implication of the Parliament. At this juncture, the findings of ***ITAT Bangalore (further upheld by the High Court of Karnataka in ITA 392/2018) in Texport Overseas Pvt. Ltd. vs. DCIT [IT(TP)A No. 2213/Bang/2018]*** are of relevance:

*The ITAT held* that *'clause (i) of section 92BA deemed to be omitted from its inception and that clause (i) was never part of the Act. This is due to the reason that while omitting the clause (i) of section 92BA, nothing was specified whether the proceeding initiated or action taken on this continue. Therefore, the proceeding initiated or action taken under that clause would not survive at all in the absence of any specific provisions for continuance of any proceedings under the said provision. As a result if any proceedings have been initiated, it would be considered or held as invalid and bad in law.'*

## WIDE ACCEPTANCE

This finding of the ITAT Bangalore received wide acceptance all over the country and had been followed by various Tribunals (such as ITAT Indore, Ahmedabad, Cuttack and Bangalore).

The Tribunal based its finding completely on the following judicial pronouncements pertaining to section 6 of the General Clauses Act, 1897:

***i. Kolhapur Canesugar Works Ltd. vs. Union of India in Appeal (Civil) 2132 of 1994*** *vide* ***judgment dated 1st February, 2000 (SC);***

***ii. General Finance Co. vs. Assistant Commissioner of Income-tax 257 ITR 338 (SC);***

***iii. CIT vs. GE Thermometrics India Pvt. Ltd. in ITA No. 876/2008 (Kar.).***

Before looking into the findings of the Hon'ble Supreme Court in this regard, which were relied upon by the ITAT Bangalore, sections 6, 6A and 24 of the General Clauses Act, 1897 should be considered. These sections are reproduced hereunder:

***Section 6:****'Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –*
*(a) revive anything not in force or existing at the time 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.'*

**Section 6A:***'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.'*

***Section 24:*** *'Where any Central Act or Regulation is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment notification, order, scheme, rule, form or bye-law, made or issued under the provisions so re-enacted.'*

## DEEMED ORDER

The effect of section 24 insofar as it is material is that where the repealed and re-enacted provisions are not inconsistent with each other, any order made under the repealed provisions are not inconsistent with each other, any order made under the repealed provision will be deemed to be an order made under the re-enacted provisions.

Section 24 of the General Clauses Act deals with the effect of repeal and re-enactment of an Act and the object of the section is to preserve the continuity of the notifications, orders, schemes, rules or bye-laws made or issued under the repealed Act unless they are shown to be inconsistent with the provisions of the re-enacted statute. In the light of the fact that section 24 of the General Clauses Act is specifically applicable to the repealing and re-enacting statute, its exclusion has to be specific and cannot be inferred by twisting the language of the enactments – ***State of Punjab vs. Harnek Singh (2002) 3 SCC 481.***

## WHERE AN ACT IS REPEALED

Section 6 applies to repealed enactments. Section 6 of the General Clauses Act provides that where an Act is repealed, then, unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding in respect of such right or liability and the legal proceeding may be continued as if the repealing Act had not been passed.

As laid down by the Apex Court in ***M/s Gammon India Ltd. vs. Spl. Chief Secretary & Ors. [Appeal (Civil) 1148 of 2006]*** that, *'…whenever there is a repeal of an enactment the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears in the repealing statute. In case the repeal is followed by fresh legislation on the same subject, the court has to look to the provisions of the new Act for the purpose of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. The application of this principle is not limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. As this Court has said, it is both logical as well as in accordance with the principle 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 attract the incident of saving found in section 6.'*

Section 6A is to the effect that a repeal can be by way of an express omission, insertion or substitution of any matter, and in such kind of repeal 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.

Now, we examine the observations of the Apex Court in ***General Finance Co. vs. ACIT.*** Therein, the Apex Court has examined the issue of retrospective operation of omissions and held that the principle underlying section 6 as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in different cases. In the case before the Apex Court, a prosecution was commenced against the appellants by the Department for offences arising from non-compliance with section 269SS of the Income-tax Act, 1961 (punishment for non-compliance with provisions of section 269SS was provided u/s 276DD). Section 276DD was omitted from the Act with effect from 1st April, 1989 and the complaint u/s 276DD was filed in the Court of the Chief Judicial Magistrate, Sangrur, on 31st March, 1989.The assessee sought for quashing of the proceedings by filing a petition u/s 482 of the Code of Criminal Procedure and Article 227 of the Constitution. The High Court held that the provisions of the Act under which the appellants had been prosecuted were in force during the accounting year relevant to the assessment year 1986-87 and they stood omitted from the statute book only from 1st April, 1989. The High Court, therefore, took the view that the prosecution was justified and dismissed the writ petition. But the Apex Court did not concur with the view of the High Court and ruled that:

*'…the principle underlying section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the aforesaid decisions. In the Income-tax Act, section 276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched or continued by invoking section 6 of the General Clauses Act after its omission.'*

## PRINCIPLE OF EQUITY AND JUSTICE

It is inferable from the findings of the Apex Court that by granting retrospective operability to the omission of a penal provision it was merciful and did uphold the principles of equity and justice. But the moot question here is whether the findings of the Apex Court in respect of a penal provision can be extended universally to all kinds of provisions present under any law in force, i.e. substantive, procedural and machinery provisions. A situation that revolves around this moot question was before the

Karnataka High Court in ***CIT vs. GE Thermometrics India Pvt. Ltd. [ITA No. 876/2008]*** and further in ***DCIT vs. Texport Overseas Pvt. Ltd. [ITA 392/2018]***, which followed the *ratio* laid down by the Apex Court in ***General Finance Co. vs. ACIT*** and applied the findings in an identical manner to the cases involving omission of the provision providing definitions.

The ITAT Bangalore in ***Texport Overseas*** also relied upon the findings of the Apex Court in ***Kolhapur Canesugar Works Ltd. vs. Union of India [1998 (99) ELT 198 SC]***, wherein the sole question before the Hon'ble Court was whether the provisions of section 6 of the General Clauses Act can be held to be applicable where a Rule in the Central Excise Rules is replaced by Notification dated 6th August, 1977 issued by the Central Government in exercise of its Rule-making power, (and) Rules 10 and 10A were substituted. The findings of the Apex Court herein were also similar to those in ***General Finance Co. vs. ACIT***, as to retrospective operability of the omission.

Section 6A of the General Clauses Act is central to the captioned issue; it removes the ambiguity of whether the repeal and omission both have the same effect as retrospective operability. 'Repeal by implication' has been dealt with in ***State of Orissa and Anr. vs. M.A. Tulloch and Co. [(1964) 4 SCR 461]*** wherein the Court considered the question as to whether the expression 'repeal' in section 6 r/w/s 6A of the General Clauses Act would be of sufficient amplitude to cover cases of implied repeal. It was stated that:

*'The next question is whether the application of that principle could or ought to be limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word "repeal" in the later statute.'*

## REPEAL VS. OMISSION

The captioned issue in reference to the findings of the Apex Court in ***Kolhapur Canesugar Works Ltd. vs. Union of India*** and ***General Finance Co. vs. ACIT*** was also discussed in G.P. Singh's 'Principles of Statutory Interpretation' [12th Edition, at pages 697 and 698] wherein


the learned author expressed his criticism of the aforesaid judgments in the following terms:

*'Section 6 of the General Clauses Act applies to all types of repeals. The section applies whether the repeal be express or implied, entire or partial, or whether it be repeal* simpliciter *or repeal accompanied by fresh legislation. The section also applies when a temporary statute is repealed before its expiry, but it has no application when such a statute is not repealed but comes to an end by expiry. The section on its own terms is limited to a repeal brought about by a Central Act or Regulation. A rule made under an Act is not a Central Act or regulation and if a rule be repealed by another rule, section 6 of the General Clauses Act will not be attracted. It has been so held in two Constitution Bench decisions. The passing observation in these cases that "section 6 only applies to repeals and not to omissions" needs reconsideration, for omission of a provision results in abrogation or obliteration of that provision in the same way as it happens in repeal. The stress in these cases was on the question that a "rule" not being a Central Act or Regulation, as defined in the General Clauses Act, omission or repeal of a "rule" by*

*another "rule" does not attract section 6 of the Act and proceedings initiated under the omitted rule cannot continue unless the new rule contains a saving clause to that effect…'*

In a comparatively recent case before the Apex Court, ***M/s Fibre Boards (P) Ltd. vs. CIT Bangalore [(2015) 279 CTR (SC) 89]***, the Hon'ble Court reconsidered its opinion as to retrospective operability of omissions and distinguished the findings in ***Kolhapur Canesugar Works Ltd. vs. Union of India, General Finance Co. vs. ACIT*** and other similar cases. The Apex Court held that sections 6 and 6A of the General Clauses Act are clearly applicable on 'omissions' in the same manner as applicable on 'repeals'; it also held that:

*'…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 section 6A, therefore, again undoes the binding effect of these two judgments on an application of the* per incuriam *principle. …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.*

*...32. In fact, in* 'Halsbury's Laws of England' Fourth Edition*, it is stated that:*

*"So far as express repeal is concerned, it is not necessary that any particular form of words should be used.* ***[R vs. Longmead (1795) 2 Leach 694 at 696].*** *All that is required is that an intention to abrogate the enactment or portion in question should be clearly shown. (Thus, whilst the formula "is hereby repealed" is frequently used, it is equally common for it to be provided that an enactment "shall cease to have effect" (or, if not yet in operation, "shall not have effect") or that a particular portion of an enactment "shall be omitted").'*

In view of the above-mentioned judicial pronouncements and the provision of law, it can be interpreted that insofar as 'omission' forms part of 'repeal', the omission of clause (i) to section 92BA(1) does not have retrospective operation and the omission will not affect the reference to the Transfer Pricing Officer in respect of transactions u/s 92BA(1)(i) for the accounting years prior to 1st April, 2017. But on account of varied findings in this regard by the Tribunals as well as the High Courts, the matter is yet to be settled. ■