

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.1904/Mum/2023
(Assessment Year :2013-14)**

Dy. CIT, Circle-7(1)(1) Mumbai Room No.126, 1 st Floor, Aayakar Bhavan, M.K.Road Mumbai – 400 020	Vs.	M/s. Hind Aluminium Industries Pvt. Ltd B-1, 1 st Floor, Tulsi Vihar Dr. A B Road, Worli Mumbai-400 018
PAN/GIR No.AAACA4671Q		
(Appellant)	..	(Respondent)

**CO No.107/Mum/2023
(Arising out of ITA No.1904/Mum/2023)
(Assessment Year :2013-14)**

M/s. Hind Aluminium Industries Pvt. Ltd B-1, 1 st Floor, Tulsi Vihar Dr. A B Road, Worli Mumbai-400 018	Vs.	Dy. CIT, Circle-7(1)(1) Mumbai Room No.126 1 st Floor, Aayakar Bhavan, M.K.Road Mumbai – 400 020
PAN/GIR No. AAACA4671Q		
(Appellant)	..	(Respondent)

Assessee by	Shri Vipul Joshi
Revenue by	Shri Pravin Salunkhe
Date of Hearing	18/10/2023
Date of Pronouncement	30/10/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the Department and cross objection by the assessee passed by ld. CIT (A)-56 Mumbai

in order dated 27/03/2023 for the quantum of assessment passed u/s.143(3) r.w.s. 144C for the A.Y.2013-14.

2. In the grounds of appeal, Revenue has raised the following grounds:-

1. On the facts and in the circumstances of the case and in law, the Ld CITYA) has erred in deleting the Transfer Pricing adjustment on account of difference between the purchase price paid by the assessee to its AE and its Arm's Length Price on account of a Specified Domestic Transaction.

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in concluding that the Arm's Length Price calculated by the assessee was in accordance with the universally acceptable CUP method. In doing so, the Ld. CIT(A) has held that the CUP method should be applied on an aggregate basis, however, considering the nature of business of the assessee, wherein the prices are fluctuating a lot, monthly averages are a better CUP than the aggregate CUP."

3. "On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in concluding that since the price difference is within the range of 3%, the same is to be considered at Arm's Length However, in doing so, the 3% should have been applied on transactional level and not at an aggregate level."

3. Whereas in cross objection the assessee has raised following grounds:-

1. Omission of Clause (i) to Section 92BA

1.1 The Learned Commissioner of Income-tax (Appeals)-56, Mumbai ("Ld. CIT (A)") erred in confirming the action of the A.O. in initiating the Transfer Pricing proceeding against the Appellant with respect to its 'specified domestic transaction', by invoking the provisions of clause (i) of section 92BA of the Income tax Act, 1961 ["the Act"].

1.2 While doing so, the Ld. CIT (A) failed to appreciate that the case of the Appellant did not fall within the said provision, as the said provision stood omitted.

1.3 It is submitted that in the facts and the circumstances of the case, and in law, the reference to the TPO and the consequential orders passed are bad, illegal and void.

2. NO SANCTION OF CIT

2.1 The Ld, CIT (A) erred in not adjudicating the issue that the reference of the TPO was without previous sanction of the Commissioner of Income-tax, in terms of the mandate of section 92CA of the Act.

2.2 It is submitted that in the facts and the circumstances of the case, and in law, the reference to the TPO and the consequential orders passed are bad, illegal and void.

4. Since in cross objection assessee has raised the validity of initiation of transfer pricing proceedings against the assessee with respect to its specified domestic transaction by invoking provision of Clause (i) of Section 92BA which has been omitted from the Act.

5. The brief facts are that assessee had filed its return of income on 28/09/2013 declaring income of Rs.8,29,260/-. The said case was selected for scrutiny under CASS and accordingly, notice u/s 143(2) was issued on 04/09/2014. The said case was referred to Transfer Pricing Officer u/s. 92CA(1) for determination of arm's length price of the transaction that took place between the assessee company and its associate enterprises u/s.92BA(i). The ld. TPO observed that during the year assessee had purchased aluminium wire rod (Alloy) and

aluminium wire rod-EC amounting to Rs.1,48,08,19,668/- from the AE. The assessee had benchmarked the transactions using CUP as most appropriate method and AE as tested party. The ld. TPO observed that the price of the items purchased from AE was higher than that purchase from the third parties. The ld.TPO found that the assessee had compared the prices using annual average net price paid for purchase made from non-AE and AE. The TPO was of the view that average value of purchases for the year could not be adopted to benchmark the transactions as prices were not interlinked. The TPO analysed the purchases made from the AE in the terms of quantity and took the invoice rate per metric ton (MT), from which quantity rebate allowed through credit note were subtracted and effective rate per metric ton was calculated. The TPO took average monthly price of purchases made from third party and non-AEs the prices so arrived with was compared the price paid to the AE. Thus, the ld.TPO worked out adjustment of Rs 1,84,89,101/- in respect of purchase of aluminium wire rod (Alloy) and adjustment of Rs 14,47,982/- In respect of aluminium wire rod-EC. Thus, the ld. TPO has made total adjustment of Rs.1,99,37,083/-.

6. Before the ld. CIT (A) it was submitted that the reference to the ld.TPO in respect of SDT in clause 92BA(i) has been omitted from the statute by the Finance Act, 2017 w.e.f. 01/04/2017 and therefore, the entire reference and transfer pricing adjustment made by the ld. TPO is invalid. In support certain judgments have also been relied upon including the judgment of Hon'ble

Karnataka High Court in the case of PCIT vs. Texport Overseas (P) Ltd. (2020) 114 taxmann.com 568. The ld. CIT (A) accepted the said contention and held that preference made by the ld. AO to the ld. TPO in respect of such SDT is invalid and bad in law. However, he further held that the difference has worked out by the ld. TPO between the total value of purchases made from the AE and the ALP determined by the ld. TPO, the variation is less than 3% and therefore, as per second proviso to Section 92C(2), no adjustment was required.

7. Before us ld. DR has filed his detailed written submission wherein he has submitted that amendment to Section 92BA by the Finance Act, 2017 was brought w.e.f. 01/04/2017 whereby clause (i) has been omitted. According to him, legislature intended to omit the clause w.e.f. A.Y. 2017-18 onwards and this provision was existing in A.Y.2013-14 and the provision of Section 92BA was inserted by the Finance Bill 2012. He has also referred to clause(i) to the provision of Finance Bill 2017 wherein, he has categorically said that amendment will take effect from 01/04/2017 i.e. to apply in relation to A.Y.2017-18 and subsequent years. He has also referred to the Budget speech of Finance Minister and various transfer pricing regulations in respect of specified domestic transactions as introduced by the Finance Bill 2012. In his arguments he has placed reliance on the judgment of the Hon'ble Supreme Court in Constitutional Bench of Supreme Court in the case of Rayala Corporation (P) Ltd. vs. Director of Enforcement, New Delhi (1969) 2 SCC 412, Constitutional Bench decision In the case of Kolhapur

Canesugar Works Ltd vs. Union of India (2000)2 SCC 536 and then after the judgment of Hon'ble Supreme Court in the case of Fibre Boards (P) Ltd. vs. Commissioner of Income Tax, Bangalore (2015) 10 SCC 333 wherein they have explained the judgment of Rayala Croperation (P) Ltd & Kolhapur Canesugar Works Ltd. supra and Shri Bhagwati Steel Rolling vs. Commissioner of Central Excise (2016) 3 SCC 643. The relevant submissions of the Ld. DR are incorporated as under:-

As can be seen from the above, even at the time of insertion of section 928A, the legislature had intended to address the administrative and compliance burden of the assessee. Five years later, with the legislative intention of facilitating the assessee to do the business with ease, it was accordingly decided to take clause (1) of section 020A off the statute from AY 2017-18. The memorandum explaining the clause to the bill make it very explicit that the amendment was prospective and was to take effect only from AY 2017-18. Accordingly, it is humbly submitted that to interpret the said amendment to sec. 02BA in a manner that is completely contrary to the apparent and explicit legislative intent with respect to it being applicable from AY 2017-18 onwards would be an incorrect statutory interpretation. In the case of the assessee, the controversy has arisen due to the word "omitted" used at the time of the amendment to section 92BA by the Finance Act, 2017 wef 1-4-2017. It has been interpreted that since the word "omitted" has been used, the said legislation has to be interpreted differently from "repeal" and would mean that the said provision never existed right from its inception. That, therefore, any proceedings Initiated during the currency or applicability of the said provision would not survive and would be required to be held as ab initio void. However, it is the case of the Revenue that the said provision has been repealed and repeal takes omission within its ken. It is to be humbly submitted that such an Interpretation is the only interpretation which is in consonance with the apparent and explicit legislative intent. As brought out above, the object of repealing or amending by using the word omission was merely to remove an enactment which had become

unnecessary and was not in consonance with the legislative intent which was to facilitate the assesses in doing business with ease. It is humbly submitted, that as the intention to effect the repeal can be squarely attributed to the legislature then the same would attract the incident of saving found in section 6 of the General Clauses Act, 1897 The legislative practice in India shows that omission of the provision is treated as amendment, which signifies the 'deletion of the provision and is not different from 'repeal Reliance in this regard can be placed on the Apex court decision in Bhagat Ram Sharma vs Union of India AIR 1988 SC 740 p. 746

3. With regard to the words 'repeal' and 'omission' with respect to the apex court decisions referred in M/s Texport Overseas Private Limited [ITA 1722/Bang/2017] and other decisions mentioned in the table at para-14 above, it is to humbly submit as under

3.1 The words 'repeal substitute' and 'omission' have different tenor in a literal sense but tend to denote a similar meaning when used in the context of any amendment of law. While the words themselves may not cause a conflict, it is the consequences of the amendment on the rights and liabilities of the parties that have led to the courts differentiating between these terms. It is to humbly submit that the Supreme Court has dealt with these three terms used by the legislature while amending any law in the aforementioned backdrop,

3.2 It is to submit that, one of the earliest authorities which brought up the question of at odds interpretation' between 'repeal' and 'omission' is the five- Judge Bench judgment of the Supreme Court in Rayala Corporation (P) Ltd. v Director of Enforcement, New Delhi [(1969) 2 SCC 412]. The question which arose for consideration before the Supreme Court in this case was if Rule 132-A of the Defence of India Rules, 1952 (the DI Rules) was omitted by a notification of the Ministry of Home Affairs dated 30th March 1965, can a prosecution in respect of an offence punishable under that Rule be instituted on 17th March, 1968 when the Rule itself had ceased to exist?

The Court brought to the fore Section 6 of the General Clauses Act. 1897 (the GC Act) for the purpose of distinguishing between the terms 'repeal' and 'omission', since Section 6 saves the power of

prosecution and punishment for acts committed in a repealed legislation. The Court while differentiating the two terms held that

"Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the DI Rules for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule."

(emphasis supplied)

The Supreme Court in the above judgment did not discuss the two terms 'repeal' and 'omission' before coming to the said conclusion. There is no discussion on how the two terms are separate and whether they can be used interchangeably.

3.3 Rayala Corporation case came for consideration before the five-Judge Bench of Supreme Court in Kolhapur Canesugar Works Ltd. v. Union of India [(200) 2 SCC 536]. In this case the Court dealt with the definitions of 'Central Act', 'enactment', 'regulation', 'rule' as defined in Sections 3(7), 3(19), 3(50) and 3(51) respectively in the General Clauses Act and held that Section 6 only applies to Central Act and regulations. The Court further stated that-

"When the Legislature by clear and unambiguous language has extended the provision of Section 6 to cases of repeal of a 'Central Act or 'regulation', It is not possible to apply the provision to a case of repeal of a 'rule'... Section 6 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a "rule""

(emphasis supplied)

It is humbly submitted that this judgment neither deals with the distinction between the terms 'omission' and 'repeal', nor were any arguments regarding the same raised before the Bench. **It simply deals with the applicability of Section 6 of the GC Act in context of the 'rules' and upholds Rayala Corporation judgment.** But reading between the lines of Kolhapur Canesugar judgment, it can be said that it makes no distinction between

repeal and omission. In para 37 of the judgment, the Court states that -

"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus, the operation of repeal or deletion, as to the future and the past, largely depends on the savings applicable." [Kolhapur Cane Sugar Works Ltd vs Union of India (2000) 2 SCC 536 at p. 551]

(emphasis supplied)

It can be seen from the emphasised (italicised) lines above, that the Court uses the term repeal, omission and deletion interchangeably it is to submit that this is also inferable that in case a provision is omitted, Section 6 may change the position which is contrary to what Rayala Corporation judgment says Rayala Corporation clearly states that Section 6 of GCA is only applicable to the matters of repeal So even though it upheld Rayala Corporation judgment, it did not distinctly lay out the distinction between the two terms

Further, both the cases (Kolhapur Canesugar and Rayala Corporation) have not considered Section 6-A of the GCA which has been reproduced hereinafter-

"6-A. Repeal of Act making textual amendment in Act or Regulation.- Where any [Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [Central Act] or Regulation was amended by the express omission, insertion or substitution

of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

3.5 This argument was raised in *General Finance Co. v Assistant Commissioner of Income Tax, Punjab* [(2002) 7 SCC 11, to state that the earlier two Judgments neither discussed the distinction between the two terms, nor they considered Section 6-A of the GC Act. It was further argued that the "use of the words 'repeals by express omission, Insertion or substitution' will cover different aspects of repeal, that this is a further legislative indication that 'omission' also amounts to a repeal of an enactment." However, the Court rejected the argument in light of the above two five-Judge Bench judgments of the Supreme Court and also refused to refer the matter to a larger Bench In fact, another judgment of the Supreme Court in *Gammon India Ltd. v. Spl. Chief Secretary* [(2006) 3 SCC 354] while dealing with repeal and implied repeal echoed the reasoning that when the intention of legislature is to repeal, the use of words will not make any difference in resorting to Section 6 of the GC Act. The Court held that "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."

3.6 It is to humbly submit that the matter was however finally dealt in length in a two-Judge Bench judgment of *Fibre Boards (P) Ltd, Bangalore v. Commissioner of Income Tax, Bangalore* [(2015) 10 SCC 333], where the Court stated that the view in *Rayala Corporation* needs a reconsideration, for omission of a provision results in abrogation or obliteration of that provision in the same way as it happens in repeal The Court discussed the two terms and concluded that "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."

The Court then went ahead and nullified the effect of the above five-Judge Bench judgment with respect to difference between repeal and omission. The Court held that

"31. 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. [(1969) 2 SCC 412] cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta." [(2015) 10 SCC 333 at p. 354]

(emphasis supplied)

The Court even declared that the two five-Judge Bench decisions (Rayala Corporation and Kolhapur Canesugar) were per incuriam as they did not consider Section 6-A of the GC Act. The Court with this effect held that

"33. A reading of this section would show that a repeal by an amending Act 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 6-A, therefore, again undoes the binding effect of these two judgments on an application of the 'per incuriam' principle." [Fibre Boards (P) Ltd vs CIT. (2015) 10 SCC 333 at p 355]

3.7 It is to humbly submit that, the same two-Judge Bench of Fibre Boards case, once again after a month decided the said issue in detail in *Shree Bhagwati Steel Rolling v. Commissioner of Central Excise* [(2016) 3 SCC 643] and held that 'delete' and 'omit' are used interchangeably, so that when the expression 'repeal' refers to 'delete', it would necessarily take within its ken an omission as well. The Court further observed that all these expressions only go to form and not to substance. It also reiterated its stand in *Fibre Boards* case and held that "This again does not take us further as this statement of the law in *Rayala Corporation* [(1969) 2 SCC 412] is no longer the law declared by the Supreme Court after the decision in the *Fibre Boards* case." [*Fibre Boards (P) Ltd. vs CIT*, (2015) 10 SCC 333 at p. 658]

3.8 The decision in *Fibre Boards and Shri Bhagwati Mills* though rendered by two- Judge Bench, nullified the earlier Constitution Bench judgments by routing through the principle of *per incuriam*. It is to humbly state that these judgments finally clarify that practically there exists no difference between the two terms viz 'repeal & omission'. A plain reading of these words - repeal, omission and substitute, will convey more or less the same meaning - that, it is a form of amendment. The Supreme Court in *Bhagat Ram Sharma v Union of India* [(1988) Supp SCC 30] echoed the same view and held that "

It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. There is no real distinction between 'repeal' and an 'amendment.' [(1988) Supp SCC 30 at p 40, para 17]

Similarly, in the case of the word 'substitute', the Supreme court in *Ramkanali Colliery of BCCL v. Workmen by Secy, Rashtriya Colliery Mazdoor Sangh* [(2001) 4 SCC 236], the Supreme Court held that

"If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression "substituted" is used. Such deletion has the effect of the repeal of the existing provision and also provides for introduction of a new provision. In our view there is thus no real distinction between repeal and amendment or substitution in such cases." [(2001) 4 SCC 236 at p. 240]

4. It is to humbly submit that the arguments as above very clearly show that there is no real distinction between repeal and omission. Further, it is to humbly submit with utmost respect, that, as brought out above, the 'intention of the legislature was clearly and explicitly apparent at the time of amendment of clause (1) of sec. 92BA of the Income-tax Act, 1961 by the Finance Act, 2017 with respect to the said amendment being effective from AY 2017-18 onwards and therefore it did not leave any scope for the ITAT/Court to 'interpret the legislative intent and policy behind

such repeal, omission. substitution or amendment. As is evident from the apparent and explicit legislative intention that the repeal, omission, substitution or amendment to sec. 92BA of the Income-tax Act, 1961 was to be effective/applicable from AY 2017-18 onwards, the un-amended provisions of clause (1) of sec 92BA of the Income-tax Act, 1961 would become applicable for AY 2013-14 for it is an AY prior to AY 2017-18. It is therefore prayed that the un-amended provisions of clause (1) of sec 92BA of the Income-tax Act, 1961 be held applicable for AY 2015-16 which is the AY under consideration in the instant appeal

5. In view of the above, it is humbly prayed that Cross Objections of the assessee Appellant may be dismissed. It is prayed accordingly. It is to humbly state that these submissions are only with respect to Ground No. 1 in Cross Objections of the assessee Appellant and may kindly be taken on record and favourably considered while deciding the case.

8. Before us ld. Counsel for the assessee relied upon the decision of ITAT Delhi Bench in the case of **Yorkn Tech Pvt. Ltd. vs. DCIT in ITA No.635/Del/2021 order dated 18/08/2021**, wherein the Tribunal has discussed all these decisions as relied upon by the ld. DR including the judgment of Hon'ble Karnataka High Court in the case of Texport Overseas (P) Ltd supra. Following these decisions from various judgments of this Tribunal including Mumbai Bench in the case of Tranztar Commercial Vehicle vs. ITO Ward - 14(3)(2) order dated 24/04/2023.

9. We have heard rival submissions and also perused the relevant finding given in the impugned order as well as judgments which have been relied upon by the parties. It is an undisputed fact that the reference to the ld. TPO with respect to specified domestic transaction was made under *clause (i)* of

Section 92BA which was brought in the statute by the Finance Act 2012, however, has been omitted from the statute of the Finance Act 2017 w.e.f. 01/04/2017. The case of the assessee is that once omission has been made without the said clause, it is deemed that the said clause was never part of the Act wherein as the case of the department is that the omission was brought by the amendment by the Finance Act 2017 w.e.f. 01/04/2017. Therefore, the reference at that point of time was valid. This issue has been discussed by the Hon'ble Karnataka High Court in the case of PCIT vs. Texport Overseas (P) Ltd. wherein the Hon'ble High Court relying upon the judgment of Hon'ble Apex Court in the case of Kolhapur Canesugar Works Ltd vs. Union of India supra have held that once the statute has omitted clause (i) of Section 92BA by the Finance Act, 2017, the resultant fact is that it had never been enacted and to be considered as a law and it never existed. However, the ld. DR referred to various judgments of the Apex Court including the judgment of Hon'ble Supreme Court in the case of Shri Bhagwati Steel Rolling vs. Commissioner of Central Excise. This exact issue has been dealt in detail in the case of Yorkn Tech Pvt. Ltd., wherein Tribunal has observed and held as under:-

7. We have heard the rival submissions and also perused the relevant facts arising out from the records on the legal issue raised by the ld. counsel. It is an undisputed fact that the SDT for purchase of office space as inventory was by way of Slump Sale of a going concern w.e.f. 28th March, 2016. The assessee's case was selected for scrutiny on 21.07.2017 and reference to the TPO was made for determination of Arm's Length Price of SDT after seeking approval of PCIT on 29.11.2018. The core argument of the ld.

counsel is that, once the reference which has been made under clause (i) of Section 92BA, itself has been omitted from the statute, therefore, it is deemed that the said clause was never part of the Act and any proceedings commenced under the omitted provision cannot be enforced or action can be taken thereafter. In support, the judgment of Hon'ble Karnataka High Court has been relied upon in the case of **PCIT vs. Textport Overseas Pvt. Ltd., reported in (2020) 114 taxmann.com 568 (Karnataka)** and catena of ITAT Judgments cited supra, the relevant text of which have already been incorporated above. The Finance Act 2017 has omitted SDT whereby any expenditure in respect of which payment has been made or has to be made to a person referred to in clause (b) of sub-Section (ii) of Section 40. It has been omitted w.e.f. 01.04.2017. This precise issue had come up for consideration before the Hon'ble Karnataka High Court wherein the Hon'ble High Court have held that when clause (i) of Section 92BA have been omitted by the Finance Act, 2017 w.e.f. 01.04.2017 from the statute, the resultant effect is that, it had never been passed and to be considered as a law never been existed and therefore order of TPO u/s.92BA could be invalid and bad in law, While coming to this conclusion the Hon'ble High Court has referred and relied upon the judgment of Hon'ble Supreme Court in the case of **Kolhapur Canesugar Works Ltd. & Anr. v. Union of India & Ors., (2000) 2 SCC 536.**

8. Though, this judgment of **PCIT vs. Textport Overseas Pvt. Ltd** (supra) clearly clinches the issue in favour of the assessee and will apply mutatis mutandis in the present appeal also. However, we deem fit to deal with the relevant law on this point. The amendment made in the Act which has the effect of omitting a clause from the statute has to be read in light with Section 6 of the General Clauses Act. As per section 6 of the General Clauses Act, if an amendment for omission has a provision therein that pending proceedings shall continue then such a proceeding will continue. However, in the absence of any such provision in the statute or in the rule, the pending proceeding will lapse. Section 6 and 6A of the General Clauses Act for sake of ready reference are reproduced herein below:-

"6 Effect of repeal. 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.”

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

*9. Ergo, for the purpose of present issue involved, clause (a) of Section 6 of the General Clauses Act is applicable which provides that the effect of the repeal shall not revive anything not in force or existing at the time of repeal takes effect. Section 6A provides that where any Act or Regulation repeals any enactment by which the text of any Act or Regulation is amended by express omission and 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. There is absolutely no saving clause while omitting (i) of Section 92BA by the Finance Act, 2017. The Constitutional Bench of **Hon’ble Supreme Court in the case of Kolhapur Canesugar Works Ltd. & Anr. v. Union of India & Ors., (2000) 2 SCC 536** has observed and held as under:*

“37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in section 6 or in special Acts may modify the position. Thus the operation or repeal or deletion or to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonable inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision.”

10. Thus, if a provision or statute is unconditionally omitted without any saving clause in favour of the pending proceedings, all actions must stop where such an omission is found, especially when action has been taken after the provision has been omitted. During the course of argument a reference was made to the judgment of Hon’ble Supreme Court in the case of **Fiber Boards (P) Ltd., Bangalore v. Commissioner of Income Tax, Bangalore, (2015) 10 SCC 333** and **Shree Bhagwati Steel Rolling v. Commissioner of Central Excise (2016) 3 SCC 643** to canvass the point that the earlier judgments of Constitutional Bench in the case of **Rayala Corporation Pvt. Ltd., 1970 SCR 1 (69)** and **Kohlapur Cane Sugar [supra]** have been not followed or have been overruled. First of all, nowhere the Hon’ble Apex Court in both the judgments have overruled earlier two judgment of the Constitutional bench of the Hon’ble Apex Court rather they have explained it in detail and went on to held that the word repealed in both section of 6A and Section 24 of General Clauses Act would include repeals by expression ‘omission’ and the expression ‘delete and omission’ are used interchangeably.

11. However, it would be apposite to understand the judgments relied upon in terms of their facts and ratio and thereafter apply the same to the facts of the appellant. In the case of *Fibre Boards (P) Ltd. Bangalore v. Commissioner of Income Tax, Bangalore*, (supra) the appellant had an industrial unit at Thane which was a notified urban area.

With a view to shift its industrial undertaking from an urban area to a non-urban area, it sold its land, building and plant and machinery situated at Thane and earned capital gain and claimed exemption under section 54G. Chapter XXII-B of the Income Tax Act, prior to 1.4.1988, contained section 280ZA which when read with the definition of "urban area" in section 280Y(d) and notification dated 22.9.1967 issued under section 280Y(d) by which Thane had been declared to be an urban area for the purpose of Chapter XXII- B, gave to a person who shifted from an urban area to another area, a tax credit certificate with reference to the tax payable by the company on income-tax chargeable under capital gains and would be given relief accordingly. The Appellant contended that section 54G was inserted on 1.4.1988 and at the same time section 280ZA was omitted and that therefore Section 24 of the General Clauses Act would be attracted to the notification dated 22.09.1967. That notification would inure to the benefit of the appellant for the purpose of claiming exemption under Section 54G. Section 280Y (d) which was omitted with effect from 1990, had been so omitted because it had been rendered redundant with the omission of section 280ZA. The revenue relied upon *Rayala Corporation (P) Ltd. 1970 SCR (1) 639* and *M.R. Pratap v. Director of Enforcement, New Delhi, (1969) 2 SCC 412* which was followed in *Kolhapur Canesugar Works Ltd. & Anr. v. Union of India & Ors., (2000) 2 SCC 536* and argued that an "omission" would not amount to "repeal" and that since the present case was concerned with the omission of Section 280ZA, section 24 of general clauses act would have no application as it only applied to 'repeals' and not 'omissions', and also that it saved rights that were given by subordinate legislation, and as the notification dated 22.9.1967 did not by itself confer any right on the appellant, section 24 of the General Clauses Act would not be attracted.

11.1 The Apex Court in the case of *Fibre Boards (supra)* was of the view 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. 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. All that is required is that an intention to abrogate the enactment or portion in question should be clearly shown.

11.2 The Apex Court held that the idea of omitting section 280ZA and introducing Section 54G on the same date was to do away with the tax credit certificate scheme together with the prior approval required by the Board and to substitute the repealed provision with the new scheme contained in Section 54G. Once Section 280ZA is omitted from the statute book, section 280Y (d) having no independent existence would for all practical purposes also be "dead". On this reasoning, the Apex Court decided in favour of the appellant by holding that omission of section 280ZA and its re-enactment with modification in section 54G, section 24 of the General Clauses Act would apply, and the notification dated 22.9.1967 would be continued under and for the purposes of Section 54G.

11.3 The Apex court while rendering its decision in the aforesaid case held that in *Rayala Corporation*, what fell for decision was whether proceedings could be validly continued on a complaint in respect of a charge made under Rule 132A of the Defence of India Rules, which ceased to be in existence before the accused were convicted in respect of the charge made under the said rule. It stated that once it is held by the constitution bench in *Rayala* 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 and therefore the second so-called ratio of the Constitution Bench in *Rayala Corporation* cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta. The Apex Court was of the opinion that the word "repeal" in both section 6 and section 24 would include repeals by

express omission. An implied repeal is covered by the expression “repeal” and 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. The Apex Court also stated that there is no reference to Section 6A of the General Clauses Act in either of these Constitution Bench judgments (*Rayala Corp (supra)* and *Kolhapur Canesugar Works Ltd. (supra)*) and 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.

12. Same view has been reiterated by the Hon’ble Supreme Court in the case of **Shree Bhagwati Steel Rolling v. Commissioner of Central Excise, (2016) 3 SCC 643**. In this case, the appellant took a rolling mill on lease from 1997 to 2000 and manufactured rerolled non-alloyed steel products. On 1.9.1997 the compounded levy scheme was introduced by insertion of section 3A of the Central Excise Act. The appellant opted for the aforesaid scheme under Rule 96ZP of the Central Excise Rules. When the lease expired, the appellant surrendered its registration certificate on 1.6.2000. Section 3A was omitted in 2001. On 19.8.2005 notice was issued to the appellant demanding interest for delayed payment of central excise duty under section 3A of the Central Excise Act for the period 1997 to 2000.

12.1 The question framed before the Hon’ble High Court was whether “omission” of the compounded levy scheme in 2001 wipes out the liability of the assessee for the period during which the scheme was in operation. The Hon’ble High Court held that on omission of section 3A, the liability of the assessee was not wiped out.

12.2 The appellant contended that there is a fundamental distinction between “repeal” and an “omission”, in the case of a “repeal” the statute is obliterated from the very beginning whereas in the case of an “omission” what gets omitted is only from the date of “omission” and not before. This being the case, it is clear that things already done in the case of an “omission” would be saved. However, a “repeal” without a savings clause like section 6 of the General Clauses Act would not so save things already done under the repealed statute. He further argued that “repeal” is

normally used when an entire statute is done away with, as opposed to an “omission” which is applied only when part of the statute is deleted. The appellant further contended that section 6A which was relied upon in Fibre Board’s case did not state that an “omission” would be included within the expression “repeal”, but that if section 6A were carefully read, an “omission” would only be included in an “amendment” which, under the section, can be by way of omission, insertion or substitution. Therefore, it is fallacious to state that section 6A would lead to the conclusion that “omissions” are included in “repeals” and for various reasons Fibre Boards requires a relook and ought to be referred to a larger Bench of three Judges. The appellant further contended that the true ratio decidendi of the Constitution Bench decision in Rayala Corporation is that an “omission” cannot amount to a “repeal”.

12.3 The revenue supported the judgment in the Fibre Board’s case.

12.4 The Apex Court held that when section 6 of the General Clauses Act speaks of the repeal of any enactment, it refers not merely to the enactment as a whole but also to any provision contained in any Act and if a part of a statute is deleted, section 6 would nonetheless apply. The Apex court referred to Fibre Board (supra) wherein it is stated that the expression “omission” is nothing but a particular form of words evincing an intention to abrogate an enactment or portion thereof. It was held that the expression “delete” and “omit” are used interchangeably, so that when the expression “repeal” refers to “delete” it would necessarily take within its kin an omission as well. It was further held that there is no substance in the argument that “repeal” amounts to an obliteration from the very beginning, whereas an “omission” is only in futuro.

12.5 The Apex Court was of the view that when the court referred to section 6A in Fibre Board’s case and held that section 6A shows that a repeal can be by way of an express omission, obviously what was meant was that an amendment which repealed a provision could do so by way of an express omission. Hence section 6A undisputedly leads to the conclusion that repeal would include repeal by way of an express omission. The Apex Court arrived at the conclusion that an “omission” would amount

to a “repeal” for the purpose of Section 24 of the General Clauses Act. Since the same expression, namely, “repeal” is used both in Section 6 and Section 24 of the General Clauses Act, the construction of the said expression in both sections would, therefore, include within it “omissions” made by the legislature.

12.6 The Court was also of the view that merely because the Constitution Bench in case of Rayala Corporation referred to a repeal not amounting to an omission this would not undo the effect of decision in Fibre Board’s case and the statement of the law in Rayala Corporation is no longer the law declared by the Hon’ble Supreme Court after the decision in the Fibre Board’s case. Fibre Board (supra) is a recent judgment which clarifies the law in holding that an omission would amount to a ‘repeal’.

13. The converse view of the law led to an omitted provision being treated as if it never existed, as section 6 of the General Clauses Act would not then apply to allow the previous operation of the provision so omitted or anything duly done or suffered thereunder. Nor may a legal proceeding in respect of any right or liability be instituted, continued or enforced in respect of rights and liabilities acquired or incurred under the enactment so omitted. Hence, section 6 would apply to omission of section 3A.

14. Further, it is a very well recognized rule of interpretation of statutes that where a provision of an Act is omitted by an Act and the said Act simultaneously re-enacts a new provision which substantially covers the field occupied by the repealed provision with certain modification, in that event such re-enactment is regarded having force continuously and the modification or changes are treated as amendment coming into force with effect from the date enforcement of the re-enacted provision.

15. The issue for consideration before us is clause (i) of Section 92BA which has been omitted from 01.04.2017 and there is no re-enactment with modification or any Saving Clause in any other Sections of the Act. Thus, without any Saving Clause or similar enactment, then it has to be held that Clause (i) of Section 92BA did not come into operation whenever any action has been taken especially after such omission. Accordingly, we hold that no Transfer Pricing Adjustment can be made on a domestic

transaction which has been referred to by the Assessing Officer after the omission of the said clause by the Finance Act, 2017 even though transaction has undertaken in the Assessment Year 2016-17.

10. The aforesaid decision has been followed by various Tribunals and now it is well settled that once a provision in the statute has been omitted without any saving clause in the Act, then, it is treated that if provisions does not exist when such provisions are challenged before the Court and the aforesaid decision of the Tribunal, the ratio and principle laid down by the Constitutional Bench as well as subsequently, judgments referred by the ld. DR has been discussed in detail, therefore, following the same ratio we hold that in view of the exemption of Section 92BA(i) will lead to inference that in so far as any reference to the ld. TPO for SDT in Section 92BA(i) is invalid and no transfer pricing adjustment can be made on such SDT. Accordingly, the cross objection of the assessee is allowed and consequently, the appeal of the Revenue is dismissed.

10. In the result, Cross objection of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 30th October, 2023.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Mumbai; Dated 30/10/2023
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai