

**IN THE INCOME TAX APPELLATE TRIBUNAL
GAUHATI 'E' COURT, AT KOLKATA**

BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.117/Gau/2019

(निर्धारणवर्ष / Assessment Year:2014-15)

M/s. Bhartia-SMSIL (JV), 201, Royal Arcade, Dr. B. Baruah Road, Ulubari, Guwahati, Assam – 781007.	Vs.	ITO, Ward – 3(1), Guwahati.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABAB 7132 J		
(Assessee)	..	(Revenue)

Assesseeby : Shri Sanjay Modi, FCA

Respondent by :Shri M.K. Dal, Addl. CIT, Sr. Dr

सुनवाईकीतारीख/ Date of Hearing : 08/06/2020

घोषणाकीतारीख/Date of Pronouncement : 17/06/2020

आदेश / O R D E R

Per Dr. A. L. Saini:

By way of this appeal, the assessee appellant has challenged correctness of the order dated 13.03.2019 passed by the Learned Principal Commissioner of Income Tax-Guwahat-2 (for short 'PCIT'), under section 263 of the Income Tax Act 1961, (hereinafter referred to as the "Act"). Grievances raised by the assessee are as follows.

"1. For that the revisionary order of the learned Principal Commissioner of Income Tax (PCIT) passed under section 263 of the I.T. Act, 1961 (the Act) is bad in law, facts and procedure.

2. For that the ld. PCIT even after admitting that the assessee has submitted that in view of the amendment made in section 92BA of the Act, no transaction was entered into during the year under consideration by the assessee for determination of ALP of which reference could be made to TPO, without finding any error in the said submission, was not justified in still passing the impugned revisionary order.

3.For that in absence of any transaction entered into during the year under consideration by the assessee whose ALP is required to be computed and consequently, reference to

TPO could have been made, the impugned order of revision passed by the ld. PCIT is bad in law and unsustainable.

4. For that the assumption of jurisdiction by the ld. PCIT in the instant case on the date on which such jurisdiction was assumed being without satisfaction of pre-requisite twin conditions of the law, the same is bad in law and consequently, the impugned order passed in pursuance thereto is liable to be cancelled.

5. For that the ld. PCIT was not justified in interfering with the order of the ld. AO vide impugned revisionary order without finding that any of the four circumstances specified in clauses (a) to (d) of sub-section 3 of section 92C of the Act existed in the instant case which in turn required the ld. AO to compute ALP.

6. For that the ld. PCIT was not justified in interfering with the order of the ld. AO vide impugned revisionary order without finding that the circumstances specified in section 92CA of the Act existed in the instant case.

7. For that the ld. PCIT failed to appreciate that the Board's circular cannot override the provisions of the law enacted by Parliament and erred in arbitrarily holding an order passed in accordance with the law as erroneous and prejudicial to the interest of the Revenue.

8. For that the ld. PCIT was not justified both in law and on facts in arbitrarily branding the order of assessment passed by the ld. AO as erroneous which was passed after due application of mind by the ld. AO.

9. For that the ld. PCIT was not justified in holding that the order of ld. AO as without jurisdiction and therefore void and simultaneously holding the same also as erroneous and prejudicial to the interest of Revenue and setting aside the matter back to the same Assessing Officer for redoing.

10. For that the impugned order passed is unreasoned and without dealing with the submissions of the appellant and hence, the impugned order is bad in law and liable to be quashed.

11. For that your appellant craves leave of your honours to take additional ground or grounds and/or to modify any ground(s) of appeal at or before the time of hearing.”

2. Although in this appeal the assessee has raised multiple grounds of appeal, but at the time of hearing the solitary grievance of the assessee has been confined to the legal issue that since clause (i) of section 92BA was omitted with effect from 01.04.2017 and the effect of such omission is that clause (i) of section 92BA had obliterated from the Statute and it would be treated that such clause (i) of section 92BA was never existed in the Statute Book, therefore, ld PCIT can not exercise his jurisdiction under section 263 of the Act.

3. Brief facts qua the issue are that Id PCIT issued a notice u/s 263 of the Act on 03.12.2018 proposing to set aside the assessment order u/s 143(3) dated 28/10/2016 on the ground that the said order was erroneous and prejudicial to the interest of revenue as the assessing, officer (AO) had failed to refer to the Transfer Pricing Officer(TPO) under section 92CA related party transactions amounting to Rs.51,08,99,031/- which is falling within the meaning of 'specified domestic transactions' under section 92BA(i) of the Income Tax Act, 1961 to arrive at the Arm's Length Price (ALP) u/s 92C of the Act as required in terms of CBDT Instruction No. 3/2016 dated 10.03.2016.

4. In response to the notice under section 263 of the Act, the assessee had submitted written submission before the Id PCIT. The written submission to the extent applicable for our discussion is reproduced below:

“ However, a reply dated 05.03.2019 was received through e-mail. In the said reply, the assessee has made long submissions, basically objecting to the proposed set-aside of the order on the ground that its related party transactions are payments u/s 40A(2)(b) amounting to Rs.43,39,38,536/- (not Rs.51,08,99,031/-) as pointed out in the notice u/s 263, which relates to the subsequent AY 2015-16 and after the omission of clause (i) in the definition of specified domestic transactions by the Finance Act, 2017 the said provisions do not apply to transactions in the nature of payments u/s 40A(2)(b)”.

5. However, Id PCIT rejected the contention of the assessee and held that the Assessment order passed u/s 143(3) dated 28.10.2016 is erroneous and prejudicial to the interest of Revenue therefore he set aside the assessment order and direct the AO to refer the transactions to Id TPO for determination of arm's length price.

6. Aggrieved by the order of Id. PCIT, the assessee is in appeal before us.

7. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 26.07.2019, passed by the Division Bench of Indore in the case of Swastik Coal Corporation Pvt Ltd, in ITA No.486/Ind/2018 for the Assessment Year 2014-15 whereby the effect of omission of clause (i) of section 92BA was discussed and adjudicated in favour of assessee.

Learned counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

8. Learned Departmental Representative relied upon the orders of the authorities below.

9. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of the Tribunal in the case of Swastik Coal Corporation Pvt Ltd (Supra) vide order dated 26.07.2019. In this order, the Tribunal has inter alia observed as follows:

“8. We find that the above view of the Ld. Pr. CIT is not correct. In view of the aforesaid discussion, moreover, the coordinate bench has also examined the issue in the case of Texport Overseas Pvt. Ltd. in IT(TP)A No.1722/Bang/2017. Admittedly, in this case, the order has been revised purely on the basis that the assessing officer has not referred to determine the arm's length price to the TPO. Since the provision itself stood omitted at the time when the order was passed by the Ld. Pr. CIT, under these undisputed facts in the light of the Judgement of the Hon'ble Supreme Court rendered in the case of General Finance Company (supra) as well as the order of the coordinate bench rendered in the case of Texport Overseas Pvt. Ltd. (supra), the impugned order cannot be sustained, hence is hereby quashed. The order impugned is thus quashed and the grounds raised in the appeal are allowed.”

10. On the very identical facts, the Coordinate Bench of ITAT Kolkata in the case of M/s Raipur Steel Casting India Pvt Ltd, in ITA No.895/Kol/2019, for A.Y. 2014-15, order dated 10.06.2020 held as follows:

“11. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld PCIT under section 263 of the Act and other materials brought on record.

We note that assessee has raised multiple grounds of appeal to challenge the correctness of the order dated 08.03.2019 passed by the ld PCIT under section 263 of the Act but at the time of hearing the solitary grievance of the assessee has been confined to the issue that since clause (i) of section 92BA has been omitted by Finance Act, 2017, w.e.f. 01.04.2017 and the effect of such omission without any saving clause of General Clauses Act, means that the above provisions was not in existence or never existed in the statute, therefore, the jurisdiction exercised by the ld PCIT under section 263 of the Act is void and as a result the order passed by the assessing officer dated 30.08.2016, under section 143(3) of the Act is neither erroneous nor prejudicial to the interest of the Revenue.

If this is the solitary grievance of the assessee, then, first of all, it would be necessary for us to examine **meaning of “omission” and its consequences** in respect to the provisions of clause (i) of section 92BA of the Act. The Clause (i) of section 92BA of the Act is reproduced below:

Section 92BA: Meaning of specified domestic transaction

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).Omitted by Finance Act, 2017, w.e.f. 1-4-2017*.

*Prior to omission, clause (i) of section 92BA, as originally enacted, read as under:

“(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.”

Clause (i) of section 92BA of the Act, inter alia provides that any expenditure in respect of which payment has been made by assessees to certain “specified person” under section 92BA are covered within the ambit of specified domestic transactions.

As a matter of compliance and reporting, taxpayers need to obtain the chartered accountant's certificate in Form 3CEB providing the details such as list of related parties, nature and value of specified domestic transactions, method used to determine the arm's length price for specified domestic transactions, positions taken with regard to certain transactions not covered as specified domestic transactions etc. This has considerably increased the compliance burden of the taxpayers. In order to reduce the compliance burden of the taxpayers, it was proposed by the Finance Act 2017 to provide that expenditure in respect of which payment has been made by the assessee to a person referred to in section 40A(2)(b) are to be excluded from the scope of section 92BA of the Act. The whole object of the omission of clause (i) of section 92BA is to reduce the compliance burden of taxpayers.

As we noticed that clause (i) of section 92BA has been ‘omitted’ with effect from 01.04.2017. The effect of such omission without any saving clause of General Clauses Act, means that the above provision was not in existence or never existed in the statute book. If it is held that effect of such “omission” of clause (i) of section 92BA means that this provision was never existed in the statute book, then in that situation the exercise of jurisdiction by the ld PCIT [in respect of above said clause (i) of section 92BA] under section 263 of the Act would fail.

12. We note that ld PCIT has issued a show cause notice under section 263 of the Act to the assessee, which is reproduced below:

"It is observed from the assessment records that as per Form 3CEB your concern had made specified domestic transactions amounting to Rs. 34,82,67,956/- but the same was not referred to Transfer Pricing Officer by the Assessing officer after obtaining the approval of PCIT as per 92CA of the Act. In this view of the matter the benchmarking of the domestic transaction undertaken with the specified domestic parties for the purpose of determining the Arms Length Price was not done in this case. In the above conspectus, the order passed u/s. 143(3) on 30.08.2016 for A. Y. 2014-15 appears to be erroneous in so far as it is prejudicial to the interest of revenue."

We note that ld PCIT issued the above show cause notice u/s 263 in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act which was omitted with effect from 01.04.2017, and effect of such “omission” of clause (i) of section 92BA means that this provision was never existed in the statute book, since clause (i) of section 92BA was never existed in the statute book therefore, ld PCIT cannot exercise his jurisdiction under section 263 of the Act in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act. In other words, since the clause (i) of section 92BA was omitted with effect from 01.04.2017 by the Finance Act 2017. Therefore, in the Act, clause (i) of section 92BA stood “omitted” from the Act as if it was never in the statute book. Therefore, “omission” means the above provisions was not in existence or never existed in the statute book. To support this, we find useful guidance from

the judgment of the Hon`ble Supreme Court in the case of Rayala Corporation (P) Ltd (1970 AIR 494) wherein the Hon`ble Supreme Court has defined the terminology "omission" and "Repeal" and distinguished these terminologies also. The relevant para of the judgment is reproduced below:

"The argument of Mr. Sen was that, even if there was a contravention of R. 132A(2) by the accused when that Rule was in force, the act of contravention cannot be held to be a "thing done or omitted to be done under that rule," so that, after that rule has been omitted, no prosecution in respect of that contravention can be instituted. He conceded the possibility that, if a prosecution had ,already been started while R. 132A was in force, that prosecution might have been competently continued. Once the Rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period that the rule was in force. We are inclined to agree with the submission of Mr. Sen that the language contained in clause 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. On this interpretation, the complaint made for the offence under R. 132A(4) of the D.I. Rs., after 1st April, 1965 when the rule was omitted, has to be held invalid.

This view of ours is in line with the general principle enunciated by this Court in the case of S. Krishnan and Others' v. The State of Madras(1), relating to temporary enactments, in, the following words :-

"The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires."

Mention may also be made to a decision of a learned single Judge of the Allahabad High Court in Seth Jugmendar Das and Others v. State(2), where a similar view was taken when considering the effect of the repeal of the Defence of India Act, 1939, and the (1) [1951] S.C.R. 621. (2) A.I.R. 1951 All. 703.

Ordinance No. XII of 1946 which had amended s. 1 (4) of that Act.

On the other hand, Mr. Desai on behalf of the respondent relied on a decision of the Privy Council in Wicks v. Director of Public Prosecutions(1). In that case, the appellant, whose case came up before the Privy Council, was convicted for contravention of Regulation 2A of the Defence (General) Regulations framed under the Emergency Powers (Defence) Act, 1939 as applied to British subjects abroad by s. 3 (1)(b) of the said Act. It was held that, at the date when the acts, which were the subject matter of the charge, were committed, the regulation in question was in force, so that, if the appellant had been prosecuted immediately afterwards, the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on February 24, 1945. The trial of the accused took place only in May 1946, and he was Convicted and sentenced to four years penal servitude on May 28. In these circumstances, the question raised in the appeal was: "Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that regulation was in operation, because his trial and conviction take place after the regulation expired ?" The Privy Council took notice of sub- s. (3) of section 11 of the Emergency Powers (Defence) Act, 1939 which laid down that "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". It was argued before the Privy Council that the phrase "things previously done" does not cover offences previously committed. This argument was rejected by Viscount Simon on behalf of the Privy Council and it was held that the appellant in that case could be convicted in respect of the offence which he had committed when the regulation was in force. That case, however, is distinguishable from the case before us inasmuch as, in that case, the saving provision laid down that the operation of that Act itself was not to be

affected by the expiry as respects things previously done or omitted to be done. **The Act could, therefore, be held to be in operation in respect of acts already committed, so that the conviction could be validly made even after the expiry of the Act in respect of an offence committed before the expiry. In the case before us, the operation of R. 132A of the D.I. Rs. has not been continued after its omission. The language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. The offence alleged against the accused in the present case is in respect of acts done by them which cannot be held to be acts under that rule. The difference in the language thus makes (1) [1947] A.C. 362. it clear that the principle enunciated by the Privy Council in the case cited above cannot apply to the notification with which we are concerned.**

Reference was next made to a decision of the Madhya Pradesh High Court in **State of Madhya Pradesh v. Hiralal Sutwala**(1), but, there again, the accused was sought to be prosecuted for 'an offence punishable under an Act on the repeal of which **section 6** of the General Clauses Act had been made applicable. In the case before us, **s. 6** of the General Clauses Act cannot obviously apply on the omission of R. 132A of the D.I.Rs. for the two obvious reasons that s. 6 only applies to repeals and not to omissions, and applies when the repeal is of a **Central Act** or Regulation and not of a Rule. If **s. 6** of the General Clauses Act had been applied no doubt this complaint 'against the two accused for the offence punishable under R. 132A of the D.I.Rs. could have been instituted even after the repeal of that rule.

The last case relied upon is 1. K. Gas Plant Manufacturing Co., (Rampur) Ltd. and Others v. The King Emperor(2). 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 of 1946 which were also considered by the Allahabad High Court in the case of Seth Jugmendar Das &Ors.(2). After quoting the amended sub-s. (4) of s. 1 of the Defence of India Act, the Court held :-

"The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of s. 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of a temporary statute is that unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken 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."

The Court cited with approval the decision in the case of Wicks v. Director of Public Prosecutions(4), and held that, in view **s. 1** (4) of the Defence of India Act, 1939, as amended by Ordinance No. XII of 1946, the prosecution for a conviction for an offence committed when the Defence of India Act was in force, was valid even after the Defence of India Act had ceased to be in force. That case is, however, distinguishable from the case before us in two respects. In that case, the prosecution had been started before the Defence of India Act ceased to be in force and, secondly, the language introduced in the amended sub-s. (4) of **s. 1** of the Act had the effect of making applicable the principles laid down in **s. 6** of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. As we have indicated earlier, the notification of the Ministry of Home Affairs omitting R. 132A of the D.I.Rs. did not make any such provision similar to, that contained section 6 of the **General Clauses Act**. Consequently, it is clear that, after the omission of R. 132A of the D.I.Rs., no prosecution could be instituted even in respect of an act which was an offence when that Rule was in force. In this connection, Mr. Desai pointed out to us that, simultaneously with the omission of R. 132A of the D.I.Rs., s. 4(2) of the Act was amended so as to bring the prohibition contained in R. 132A(2) under **s. 4(1)** of the Act. He urged that, from this simultaneous action taken, it should be presumed that there was no intention of the Legislature that acts, which were offences punishable under R. 132A of the

D.I.Rs., should go unpunished after the omission of that rule. It, however, appears that when [s. 4\(1\)](#) of the Act was amended, the Legislature did not make any provision that an offence previously committed under R. 132A of the D.I.Rs. would continue to remain punishable as an offence of contravention of [s. 4 \(1 \)](#) of the Act, nor was any provision made permitting operation of R. 132A itself so as to permit institution of prosecutions in respect of such offences. The consequence is that the present complaint is incompetent even in respect of the offence under R. 132A(4). This is the reason why we hold that this was an appropriate case where the High Court should have allowed the applications under [s. 561A](#) of the Code of Criminal Procedure and should have quashed the proceedings on this complaint.

Consequently, as already directed by our short order dated 2nd May, 1969, the appeals are allowed, the order of the High Court rejecting the applications under [s. 561A](#) of the Code of Criminal Procedure is set aside, and the proceedings for the prosecution of the appellants are quashed."

After going through the judgment of the Hon`ble Supreme Court in the case of Rayala Corporation (P) Ltd (supra), we note that the provisions of section 6 of the General Clauses Act (X of 1897) apply only to repealed statutes and not to "omitted" statutes, unless it contains some special provision to the contrary. Therefore, any penalty/prosecution under clause(i) of section 92BA may be punished before its "omission" that is, before 01.04.2017 and as soon as the Act omits any proceedings which are being taken against a person will ipso facto terminate.

Argument advanced by Shri Vijay Shankar, (CIT-DR), on behalf of the Revenue was that the prosecution/penalty in respect of clause (i) of section 92BA of the Act, was in force in assessment year 2014-15, and therefore it is valid even after 01.04.2017, [when the clause(i) was omitted]. We do not agree with ld DR for the Revenue because omitted clause (i) of section 92BA of the Act, does not contain any condition/ saving clause to the effect that a legal proceeding could be instituted even after the omission of clause (i) of section 92BA of the Act. It is clear that when clause (i) of section 92BA was omitted, the Legislature did not make any provision that any prosecution/penalty committed under clause (i) of section 92BA of the Act, would continue to remain punishable even after its omission w.e.f. 01.04.2017, therefore, in the absence of such condition/ saving clause it would be presumed that clause (i) of section 92BA had obliterated from the inception, that is, it would be presumed that clause (i) of section 92BA was never existed in the statute book.

13. We note that the Hon`ble Supreme Court in the case of KolhapurCanesugar Works Ltd (2000), Civil Appeal No.2132of 1994, dated 01/02/2000, has distinguished the terminology "omission" and "Repeal" as follows:

*"29. We have carefully considered the decisions in Saurashtra Cement and Chemical Industries (supra) and Falcon Tyres case (supra). Though the judgments in these cases were rendered after the decision of the Constitution Bench in Rayala Corporation Pvt. Ltd. (supra) a different view has been taken by the High Courts for the reasons stated in the judgments. The **Full Bench of the Gujarat High Court in Saurashtra Cement and Chemical Industries (supra)**, as it appears from the discussions in the judgment, tried to distinguish the decision of the Constitution Bench in M/s Rayala Corporation (supra) for reasons, we are constrained to say not sound in law. The decision of the Constitution Bench is directly on the question of applicability of Section 6 of the General Clauses Act in a case where a rule is deleted or omitted by a notification and the question was answered in the negative. The Constitution Bench said 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" (Page 656 of the S. C. Report).*

30. The Full Bench appears to have lost sight of the position that all the relevant terms i.e. 'Central Act', 'Enactment' Regulation', and 'Rule' are defined in Sub-section 3(7), 3(19), 3(50) and 3(51) respectively of the General Clauses Act. When the term Central Act or Regulation or

Rule is used in that Act reference has to be made to definition of that term in the statute. It is not possible nor permissible to give a meaning to any of the terms different from the definition. It is manifest that each term has a distinct and separate meaning attributed to it for the purpose of the Act. Therefore, when the question to be considered is whether a particular provision of the Act applies in a case then the clear and unambiguous language of that provision has to be given its true meaning and import. **The Full Bench has equated a 'rule' with 'statute'. In our considered view this is impermissible in view of the specific provisions in the Act. 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'.**

The position will not be different even if the rule has been framed by virtue of the power vested under an enactment; it remains a 'rule' and takes its colour from the definition of the term in the Act (General Clauses Act). At the cost of repetition we may say that the omissions in the judgment in M/s Rayala Corporation (supra) pointed out in paragraph 17 of the Judgment of the full Bench have no substance as they are not relevant for determination of the question raised for the reasons stated herein.

31. In paragraph 21 of the judgment the Full Bench has noted the decision of a Constitution Bench of this Court in Chief Inspector of Mines v. K.C. Thapar, AIR 1961 SC 838 and has relied upon the principles laid down therein. The Full Bench overlooked the position that was a case under section 24 of the General Clauses Act which makes provision for continuation of orders, notification, scheme, rule, form or bye-law, issued under the repealed Act or Regulation under an Act after its repeal and re-enactment. In that case section 6 did not come up for consideration. Therefore the ratio of that case is not applicable to the present case. With respect we agree with the principles laid down by the Constitution Bench in M/s Rayala Corporation case (supra). In our considered view the ratio of the said decision squarely applies to the case on hand.

"32. For the reasons set forth above we do not accept the view taken in Saurashtra Cement and Chemical Industries Ltd. (supra), in Falcon Tyres Ltd. (supra) and the other decisions taking similar view. It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. It is our considered view that in such a case the Court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceeding was initiated being deleted/omitted. It is relevant to note here that in the present case the question of divesting the Revenue of a vested right does not arise since no order directing refund of the amount had been passed on the date when Rule 10 was omitted.

We, therefore, hold that the decisions of the Full Bench of the Gujarat High court and the Division Bench of the Karnataka High Court noted above were not correctly decided. The said decisions are overruled.

We, therefore, hold that the decisions of the Full Bench of the Gujarat High court and the Division Bench of the Karnataka High Court noted above were not correctly decided. The said decisions are overruled.

In the case in hand Rule 10 or Rule 10-A is neither a "Central Act" nor a "Regulation" as defined in the Act. It may be a Rule under Section 3(51) of the Act. 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".

*The position is well known that at common law, the normal effect of repealing a statute or 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 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. 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 reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.***

In the present case, as noted earlier, Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceeding. Therefore action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof.

The further question that arises for consideration in this connection is whether the notification No. 267/77 dated 6.8.77 by which Rule 10 was deleted contained any provision for continuance of the proceedings already initiated and whether Act 25 of 78 which introduced Section 11-A of the Central Excise Act, adopted the legal device of creating a fiction by virtue of which a proceeding under Rule 10 could be deemed to be a proceeding under section 11-A of the Act. If such was the position then it could be argued that the proceeding initiated when old Rule 10 was in force could be continued on the strength of the clause of the notification by which the said Rule was omitted and substituted by a new Rule which in turn was substituted by section 11-A of the Act.

From the contents of the provisions in the Rules it is clear that it did not contain any saving clause for continuance of the proceeding initiated under the rule which was deleted/omitted. There is also no provision in Section 11-A or in any other Section of the Act saving the proceedings initiated under the deleted/omitted provision. The consequential position that follows is that the proceeding lapsed after 6th August 1977 and any order passed in the proceeding thereafter is to be treated as non-est. In case the notice was issued after Section 11-A was introduced in the Act, the proceeding will continue and will not be affected by this decision. All the cases are disposed of on the terms aforesaid. No costs."

From the above judgment it is abundantly clear that 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. 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 reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

Case before us is that the clause(i) of section 92BA is unconditionally omitted without a saving Clause in favour of pending proceedings therefore ld PCIT cannot exercise the jurisdiction under section 263 of the Act.

14. Our view is also fortified by the judgment of the Hon`ble Supreme Court in the case of General Finance Co. 257 ITR 338 (SC), wherein the Hon`ble Supreme Court relied on its previous judgments in the case of Rayala Corporation (P) Ltd. & vs. Director of Enforcement 1969 (2) SCC 412, and Kolhapur Canesugar Works Ltd &Anr. vs. Union of India &Ors. 2000 (2)

SCC 536, and held that an 'omission' of a provision is different from a 'repeal' and section 6 of the General Clauses Act applies to a repealed law and not to omission. The Hon'ble Supreme Court held in the context of section 276DD of the Income Tax Act that 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. The findings of the Hon'ble Supreme Court are as follows:

"6. Net result of this discussion is that the view taken by the High Court is not consistent with what has been stated by this Court in the two decisions aforesaid and the principle underlying s. 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 IT Act, s. 276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched or continued by invoking s. 6 of the General Clauses Act after its omission."

15. Now we shall address the main grievances of ld DR for the Revenue, which are on three counts.

i. First grievance is that clause (i) of section 92BA has been "repealed" and not "omitted." Effect of such "Repeal" means the clause (i) of section 92BA was in existence till 01.04.2017 and it was removed by the Finance Act, 2017. In the assessee's case under consideration, ld PCIT has exercised his jurisdiction under section 263 of the Act, for the assessment year 2014-15. In the assessment year 2014-15, the clause (i) of section 92BA was in force therefore, the exercise of the jurisdiction under section 263 of the Act during the currency of the Act is very much valid.

ii. Second grievance is that ld DR relied on the following two judgments of Hon'ble Supreme Court, namely: (1) M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.) and (2) M/s. Fibre Boards 62 Taxmann.com 135 (S.C.) and contended that these two judgments interpret the matter in favour of the Revenue.

iii. Third grievance is that the judgments of Hon'ble Supreme Court, which were relied by the assessee in its favour, in the case of Kolhapur Canesugar Works Ltd. V Union of India (2002) 2 SCC 536 and in Royala Corporation P. Ltd. V Director of Enforcement (1969) 2 SCC 412 and in the case of General Finance Co. Vs. Asstt CIT (2002) 257 ITR 338 (SC) were overruled by the Hon'ble Supreme Court by its subsequent judgments in the case of M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.), and M/s. Fibre Boards 62 Taxmann.com 135 (S.C.), therefore, the assessee cannot use them in his favour.

16. Regarding the first grievance of ld DR to the effect that in the assessment year 2014-15, the clause (i) of section 92BA was in force therefore, the exercise of the jurisdiction under section 263 of the Act during the currency of the Act is very much valid. The said issue has been already addressed by us in para 12 of this order, hence we do not repeat the same for the sake of brevity.

17. Regarding second grievance of ld DR who relied on the following two judgments of Hon'ble Supreme Court, namely: (1) M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.) and (2) M/s. Fibre Boards 62 Taxmann.com 135 (S.C.) and contended that these two judgments interpret the matter in favour of the Revenue. In order to appreciate the contention of ld DR, let us go through, one by one, the concluding para and ratio decidendi of the said judgments, in the case of (1) M/s. Shree Bhagwati Steel Rolling Mills (supra) and (2) M/s. Fibre Boards (supra)

First, we take the judgment of Hon`ble Supreme Court in the case of M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.), the relevant paras of the said judgment are reproduced below:

“24. Fibre Boards case is a recent judgment which, as has correctly been argued by Shri Radhakrishnan, learned senior counsel on behalf of the revenue, clarifies the law in holding that an omission would amount to a repeal. The converse view of the law has 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. In the vast majority of cases, this would cause great public mischief, and the decision of Fibre Boards case is therefore clearly delivered by this Court for the public good, being, at the very least a reasonably possible view. Also, no aspect of the question at hand has remained unnoticed. For this reason also we decline to accept Shri Aggarwals persuasive plea to reconsider the judgment in Fibre Boards case. This being the case, it is clear that on point one the present appeal would have to be dismissed as being concluded by the decision in the Fibre Boards case.

.....
.....
43. We are in broad agreement with the Karnataka High Court view as it is clear that the load capacity of an induction furnace unit is certainly relevant material referred to in Rule 3(2) to determine the capacity of the furnace installed. It is obvious that it is not necessary to state such load capacity in terms for it to be included in Rule 3(2). Agreeing therefore with the Karnataka High Courts view we set aside the judgment of the Punjab and Haryana High Court and declare that a Chartered Engineer Certificate dealing with the sanctioned electrical load for a furnace is a relevant consideration which can be looked at in the absence of other factors mentioned in Rule 3. This appeal is disposed of accordingly.

44. Conclusion We have declared in this judgment that the interest and penalty provisions under the Rules 96ZO, ZP, and ZQ of the Central Excise Rules, 1994 are invalid for the reasons assigned in the judgment. **Accordingly, the appeals filed by the Revenue are dismissed and the appeals filed by the assesseees are allowed to the extent indicated above.** It may be noted that in an appeal from a judgment of the Allahabad High Court dated 8.11.2012 in SLP (C) No. 9796/2012, it has been held that the levy of penalty under the aforesaid provisions is mandatory in character. In view of what has been held by us today, this appeal will also have to be allowed in the same terms as the other assesseees appeals which have been allowed. All the aforesaid appeals are disposed of accordingly.”

Having gone through the concluding para, as mentioned above, we note that Hon`ble Supreme Court in the case of M/s. Shree Bhagwati Steel Rolling Mills (supra), has not decided the issue in favour of Revenue. Therefore, the contention of ld. D.R. that Hon`ble Supreme Court has interpreted the issue in favour of Revenue, is not tenable. In fact, the concluding para No. 44 of the said judgment clearly speaks that the appeals filed by the Revenue are dismissed and the appeals filed by the assesseees are allowed. The said judgment of the Hon`ble Supreme Court also advocates that omitted provision being treated as if it never existed and 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. Therefore, considering the judgment of the Hon`ble Supreme Court in the case of M/s. Shree Bhagwati Steel Rolling Mills(supra), it can be

said that since clause(i) of section 92BA was omitted w.e.f. 01.04.2017 therefore, it would be treated that said since clause(i) of section 92BA was never existed in the statute book.

18. Now, we shall take second judgment, in the case of M/s. Fibre Boards, 62Taxmann.com135(S.C.),relied on by the ld DR for the Revenue. The important part of the judgment is reproduced below for ready reference:

“18. On a reading of Section 24 together with what has been stated by this Court above, it becomes difficult to accept Shri Arijit Prasad’s contention that Section 24 would only apply to notifications which themselves gave rights to persons like the appellant. Unlike Section 6 of the General Clauses Act, which saves certain rights, Section 24 merely continues notifications, orders, schemes, rules etc. that are made under a Central Act which is repealed and re-enacted with or without modification. The idea of Section 24 of the General Clauses Act is, as its marginal note shows, to continue uninterrupted subordinate legislation that may be made under a Central Act that is repealed and re-enacted with or without modification. It being clear in the present case that Section 280ZA which was repealed by omission and re-enacted with modification in section 54G, the notification declaring Thane to be an urban area dated 22.9.1967 would continue under and for the purposes of Section 54G. It is clear, therefore, that the impugned judgment in not referring to section 24 of the General Clauses Act at all has thus fallen into error.

19. But then Shri Arijit Prasad put before us two roadblocks in the form of two Constitution Bench decisions. He cited **Rayala Corporation (P) Ltd. 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. He argued based upon these two judgments that an “omission” would not amount to “repeal” and that since the present case was concerned with the omission of Section 280ZA, Section 24 would have no application.

20. Shri Prasad is correct in relying upon these two Constitution Bench judgments for they do indeed say that in Section 6 of the General Clauses Act, the word “repeal” would not take within its ken an “omission”.

21. In **Rayala Corporation (P) Ltd.**, 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. The said Rule 132A was omitted by a notification dated 30th March, 1966. What was decided in that case is set out by paragraph 17 of the said judgment, which is as follows:

“17. Reference was next made to a decision of the Madhya Pradesh High Court in **State of Madhya Pradesh v. HiralalSutwala** [AIR 1959 MP 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, Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the DIRs 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. If Section 6 of the General Clauses Act had been applied, no doubt this complaint against the two accused for the offence punishable under Rule 132-A of the DIRs could have been instituted even after the repeal of that rule.”

22. It will be clear from a reading of this paragraph that a Madhya Pradesh High Court judgment was distinguished by the Constitution Bench on two grounds. One being that Section 6 of the General Clauses Act does not apply to a rule but only applies to a Central Act or Regulation, and secondly, that Section 6 itself would apply only to a “repeal” not to “an omission”. This statement of law was followed by another Constitution Bench in the **Kolhapur**

Canesugar Works Ltd. case. After setting out paragraph 17 of the earlier judgment, the second constitution bench judgment states as follows:

“33. In para 21 of the judgment the Full Bench has noted the decision of a Constitution Bench of this Court in *Chief Inspector of Mines v. Karam Chand Thapar* [AIR 1961 SC 838] and has relied upon the principles laid down therein. The Full Bench overlooked the position that that was a case under Section 24 of the General Clauses Act which makes provision for continuation of orders, notification, scheme, rule, form or bye-law, issued under the repealed Act or regulation under an Act after its repeal and re-enactment. In that case Section 6 did not come up for consideration. Therefore the ratio of that case is not applicable to the present case. With respect we agree with the principles laid down by the Constitution Bench in *RayalaCorpn. Case* [(1969) 2 SCC 412 : (1970) 1 SCR 639]. In our considered view the ratio of the said decision squarely applies to the case on hand.”

23. The **Kolhapur Canesugar Works Ltd.** judgment also concerned itself with the applicability of Section 6 of the General Clauses Act to the deletion of Rule 10 and 10A of the Central Excise Rules on 6th August, 1977.

24. An attempt was made in **General Finance Company &Anr. v. Assistant Commissioner of Income Tax, Punjab**, (2002) 7 SCC 1 to refer these two judgments to a larger bench on the point that an omission would not amount to a repeal for the purpose of Section 6 of the General Clauses Act. Though the Court found substance in the argument favouring the reference to a larger bench, ultimately it decided that the prosecution in cases of non-compliance of the provision therein contained was only transitional and cases covered by it were few and far between, and hence found on facts that it was not an appropriate case for reference to a larger bench.

25. We may also point out that in *G.P. Singh's Principles of Statutory Interpretation*, 12th Edition, the learned author has criticized 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....”(At pages 697 and 698)

26. In view of what has been stated hereinabove, perhaps the appropriate course in the present case would have been to refer the aforesaid judgment to a larger bench. But we do not find the need to do so in view of what is stated by us hereinbelow.

27. First and foremost, it will be noticed that two reasons were given in **Rayala Corporation (P) Ltd.** for distinguishing the *Madhya Pradesh High Court* judgment. Ordinarily, both reasons would form the ratio decidendi for the said decision and both reasons would be binding upon us. But we find that once it is held that Section 6 of the General Clauses Act would itself not apply to a rule which is subordinate legislation as it applies only to a Central Act or Regulation, it would

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

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

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

29. A reading of this Section would show that a repeal can be by way of an express omission. This being the case, obviously the word “repeal” in both Section 6 and Section 24 would, therefore, include repeals by express omission. The absence of any reference to Section 6A, therefore, again undoes the binding effect of these two judgments on an application of the ‘per incuriam’ principle.¹

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:

¹ In **Mamleshwar Prasad & Anr. v. Kanahaiya Lal (dead) through LRs.**, (1975) 3 SCR 834, Krishna Iyer, J., succinctly laid down what is meant by the “per incuriam” principle. He stated:

“We do not intend to detract from the rule that, in exceptional instances, whereby obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.” (At page 837)

An interesting application of the said principle is contained in **State of U.P. & Anr. v. Synthetics and Chemicals Ltd. & Anr.**, (1991) 3 SCR 64, where a Division Bench of this Court held that one particular conclusion of a Bench of seven Judges was per incuriam – see: the discussion at pages 80, 81 and 91 of the said judgment.

“....Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word ‘repeal’ is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about

it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted.....” (At page 484)

31. The two later Constitution Bench judgments also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression “repeal” in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in **M.A. Tulloch & Co.** that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression “repeal”, it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression “repeal” in Section 6 of the General Clauses Act.

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 v. 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).”

33. At this stage, it is important to note that a temporary statute does not attract the provision of Section 6 of the General Clauses Act only for the reason that the said statute expires by itself after the period for which it has been promulgated ends. In such cases, there is no repeal for the reason that the legislature has not applied its mind to a live statute and obliterated it. In all cases where a temporary statute expires, the statute expires of its own force without being obliterated by a subsequent legislative enactment. But even in this area, if a temporary statute is in fact repealed at a point of time earlier than its expiry, it has been held that Section 6 of the General Clauses Act would apply. – See: **State of Punjab v. Mohar Singh**, (1955) 1 SCR 893 at page 898.

34. In **CIT v. Venkateswara Hatcheries (P) Ltd.**, (1999) 3 SCC 632, this Court was faced with an omission and re-enactment of two Sections of the Income Tax Act. This Court found that Section 24 of the General Clauses Act would apply to such omission and re-enactment. The Court has stated as follows:

“As noticed earlier, the omission of Section 2(27) and re-enactment of Section 80-JJ was done simultaneously. 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 of enforcement of the re-enacted provision. Viewed in this background, the effect of the re-enacted provision of Section 80-JJ was that profit from the business of livestock and poultry which enjoyed total exemption under Section 10(27) of the Act from Assessment Years 1964-65 to 1975-76 became partially exempt by way of deduction on fulfilment of certain conditions.” (At para 12)

35. For all the aforesaid reasons, we are therefore of the view that on 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 of 1967, declaring Thane to be an urban area, would be continued under and for the purposes of Section 54A.

36. A reading of Section 54G makes it clear that the assessee is given a window of three years after the date on which transfer has taken place to “purchase” new machinery or plant or “acquire” building or land. We find that the High Court has completely missed the window of three years given to the assessee to purchase or acquire machinery and building or land. This is why the expression used in 54G(2) is “which is not utilized by him for all or any of the purposes aforesaid....”. It is clear that for the assessment year in question all that is required for the assessee to avail of the exemption contained in the Section is to “utilize” the amount of capital gains for purchase and acquisition of new machinery or plant and building or land. It is undisputed that the entire amount claimed in the assessment year in question has been so “utilized” for purchase and/or acquisition of new machinery or plant and land or building.

37. The High Court is not correct when it states:-

“31. The word ‘purchase’ is not defined under the Act and therefore, has to be construed in the commercial sense. In many dictionaries, the word ‘purchase’ means the acquisition of property by party’s own act as distinguished from acquisition by act of law. In the context in which the expression issued by the Legislature requires first to be understood and interpretation that suits the context requires to be adopted. Exemption of capital gains under Section 54G of the Act can be claimed on transfer of assets in cases of shifting of industrial undertaking from urban area to any other non-urban area. This exemption may be claimed if the capital gains arising on transfer of any of assets of existing industrial unit is utilized within one year or three years after the date on which the transfer took place for purchase of new machinery or plant for the purposes of the business of the industrial undertaking in the area to which the said undertaking is shifted. The Legislature consciously has not used the expression ‘towards the purchase of plant and machinery’ as in Section 54(4) of the Act in contrast to Section 54(2) of the Act wherein the words ‘towards’ is used before the word ‘purchase’. The expression ‘purchased’ used in sub-clause (a) of section 54G of the Act requires to be understood as the domain and control given to the assessee. In the present case, it is not in dispute that the assessee has paid advance amount for acquisition of land, plant, building and machinery, etc., within the time stipulated in the Section, but it is not the case of the assessee that after such payment of advance amount, it has taken possession of land and building, plant and machinery. In our view, if the argument of the learned Senior Counsel for the assessee is accepted, it would defeat the very purpose and object of the Section itself. By merely paying some amount by way of advance towards the cost of acquisition of land for shifting its industrial unit from urban area to non-urban area, an assessee cannot claim exemption from payment of tax on capital gains. This cannot be the intention of the Legislature and an interpretation, which would defeat the very purpose, and the object of the Act requires to be avoided.” (at para 31 of the impugned judgment)

38. We are of the view that the aforesaid construction of Section 54G would render nugatory a vital part of the said Section so far as the assessee is concerned. Under sub-section (1), the assessee is given a period of three years after the date on which the transfer takes place to purchase new machinery or plant and acquire building or land or construct building for the purpose of his business in the said area. If the High Court is right, the assessee has to purchase and/or acquire machinery, plant, land and building within the same assessment year in which the transfer takes place. Further, the High Court has missed the key words “not utilized” in sub-section (2) which would show that it is enough that the capital gain made by the assessee should only be “utilized” by him in the assessment year in question for all or any of the purposes aforesaid, that is towards purchase and acquisition of plant and machinery, and land and building. Advances paid for the purpose of purchase and/or acquisition of the aforesaid assets would certainly amount to utilization by the assessee of the capital gains made by him for the purpose of purchasing and/or acquiring the aforesaid assets. **We find therefore that on this**

ground also, the assessee is liable to succeed. The appeals are, accordingly, allowed and the judgment of the High Court is set aside.”

Having gone through the second judgment, in the case of *M/s. Fibre Boards, 62Taxmann.com135(S.C.)* (supra), as relied on by the ld DR for the Revenue, we note that Hon`ble Supreme Court has decided the issue in favour of assessee on different set of facts and not in favour of Revenue as contended by ld. Departmental Representative (DR). Therefore, we find that the aforesaid order of Hon`ble Supreme Court is not in favour of Revenue, as contended by ld. DR. The facts of the judgment in the case of *M/s. Fibre Boards(supra)* is that soon after “omission” of Section 280ZA there is re-enactment with modification in Section 54G of the Income Tax Act, therefore, section 24 of the General Clauses Act would apply. Therefore, Hon`ble Supreme Court held that on omission of Section 280ZA of the Act and its re-enactment with modification in Section 54G of the Act, section 24 of the General Clauses Act would apply, and the notification of 1967, declaring Thane to be an urban area, would be continued under and for the purposes of Section 54A of the Act.

Whereas in the assessee`s case under consideration clause (i) of section 92BA was omitted with effect from 01.04.2017 and there is no re-enactment with modification in other sections of the Income tax Act, therefore, in the assessee`s case under consideration it would be treated that clause (i) of section 92BA was never existed in the statute book.

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 of enforcement of the re-enacted provision.

19. Now, we shall address the third grievance of ld DR which is that the judgments of Hon`ble Supreme Court, which were relied by the assessee in its favour, in the case of *Kolhapur Canesugar Works Ltd. V Union of India* (2002) 2 SCC 536 and in *Rayala Corporation P. Ltd. V Director of Enforcement* (1969) 2 SCC 412 and in the case of *General Finance Co. Vs. Asstt CIT* (2002) 257 ITR 338 (SC) were overruled by the Hon`ble Supreme Court by its subsequent judgments in the case of *M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.)*, and *M/s. Fibre Boards 62 Taxmann.com 135 (S.C.)*, therefore, the assessee can not use them in his favour.

We do not agree with such contention of ld DR, rather, we have noticed after going through the subsequent judgments of Hon`ble Supreme Court in the case of *M/s. Shree Bhagwati Steel Rolling Mills (supra)* and *M/s. Fibre Boards (supra)* that these previous judgments in the case of *Kolhapur Canesugar Works Ltd (supra)* and in *Rayala Corporation P. Ltd (supra)* were appreciated and accepted by the subsequent judgments of the Hon`ble Supreme Court. In one of the subsequent judgments, in the case of *M/s. Fibre Boards (supra)*, both these judgments were appreciated in the following words:

“19. But then Shri Arijit Prasad put before us two roadblocks in the form of two Constitution Bench decisions. He cited **Rayala Corporation (P) Ltd. 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. He argued based upon these two judgments that an “omission” would not amount to “repeal” and that since the present case was concerned with the omission of Section 280ZA, Section 24 would have no application.

20. Shri Prasad is correct in relying upon these two Constitution Bench judgments for they do indeed say that in Section 6 of the General Clauses Act, the word “repeal” would not take within its ken an “omission”.

Therefore, the judgments of the Hon'ble Supreme Court in the case of Kolhapur Canesugar Works Ltd (supra) and in the case of Rayala Corporation P. Ltd (supra) were not overruled by the Hon'ble Supreme Court by its subsequent judgments in the case of M/s. Shree Bhagwati Steel Rolling Mills vs. C.I.T. Excise & Others - 2015(326) ELT 209(S.C.), and M/s. Fibre Boards 62 Taxmann.com 135 (S.C.). Therefore, contention of ld DR that these judgments were overruled is not tenable.

20. We are of the view that at this juncture it is necessary to examine, the meaning of saving clause? As Per the law.Com Law Dictionary & Black's Law Dictionary 2nd Ed, the saving clause has been defined as follows:

“A saving clause in a statute is an exception of a special thing out of the general things mentioned in the statute; it is ordinarily a restriction in a repealing act which is intended to save rights pending proceedings penalties etc. from the annihilation which would result from an unrestricted repeal. In contracts it is a clause that states that ambiguities should not render a contract void or voidable but the contract should be enforced in all other respects provided it can still exist as a valid and binding agreement.”

Thus, the Saving clause means a clause which denotes a reservation or exception. As per Find Law Legal dictionary, saving clause means a clause in a statute exempting something from statute's operation.

Having discussed the meaning of saving clause, it has become quite clear that at the time of omission of clause (i) of section 92BA with effect from 01.04.2017 the Legislature did not mention any terms and conditions to the effect that after omission of clause (i) of section 92BA, pending proceedings/penalties etc, till the date of omission (01.04.2017) will survive. That is, the Legislature did not insert new section in the Income Tax Act to the effect that pending proceedings/penalties etc in relation to clause (i) of section 92BA will survive even after omission, (that is, after 01.04.2017). Hence, we note that these terms and conditions, as discussed above, are absent in case of omitted clause (i) of section 92BA of the Act, therefore as per the law laid down by the Hon'ble Supreme Court in the case of Rayala Corporation (supra) and Kohlapur Cane Sugar (supra), it will be presumed that clause (i) of section 92BA never existed in the Statute Book, meaning thereby it is obliterated from the very beginning and hence the jurisdiction exercised by the Ld. PCIT u/s. 263 of the Act invoking clause (i) of section 92BA, for reference by A.O. to TPO is null in the eye of Law, as clause (i) of section 92BA is “omitted” and not “repeated” and there is no provision in any other section of the Income Tax Act saving the pending proceedings initiated under the omitted provision [(clause (i) of sec, 92BA)] as the said clause (i) was omitted on 01.04.2017, therefore, subsequent revision proceedings by ld. PCIT u/s. 263 on dated 08.03.2019 would be invalid. As we noticed above that an ‘omission’ of a provision is different from a ‘repeal’ and section 6 of the General Clauses Act applies to a repealed law and not to ‘omission’ of law, therefore section 6 of the General Clauses Act does not apply. So in the assessee's case it is noted that in the Income Tax Act, clause (i) of section 92BA was omitted from the Act and not repealed, hence pending proceedings/ prosecution could not have been launched or continued by invoking section 6 of the General Clauses Act after its omission.

21. We note that the Coordinate Bench of ITAT Indore in the case of Swastik Coal Corporation Pvt. Ltd, in ITA No. 486/Ind/2018, order dated 26.07.2019, has quashed the order of ld PCIT under section 263 of the Act, on the identical facts, as narrated above. The findings of the Coordinate Bench is reproduced below:

“8. We find that the above view of the Ld. Pr. CIT is not correct. In view of the aforesaid discussion, moreover, the coordinate bench has also examined the issue in the case of Texport Overseas Pvt. Ltd. in IT(TP)A No.1722/Bang/2017. Admittedly, in this case, the order has been

revised purely on the basis that the assessing officer has not referred to determine the arm's length price to the TPO. Since the provision itself stood omitted at the time when the order was passed by the Ld. Pr. CIT, under these undisputed facts in the light of the Judgement of the Hon'ble Supreme Court rendered in the case of General Finance Company (supra) as well as the order of the coordinate bench rendered in the case of Texport Overseas Pvt. Ltd. (supra), the impugned order cannot be sustained, hence is hereby quashed. The order impugned is thus quashed and the grounds raised in the appeal are allowed."

22. To conclude: 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 of General Clauses Act 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. 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 reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

In this case, Clause (i) of section 92BA was omitted w.e.f 01.04.2017, and after its omission the ld. PCIT passed order u/s. 263 on 28.03.2019. Since clause (i) of section 92BA was unconditionally omitted without a saving clause in favour of Pending Proceedings therefore ld. PCIT ought not to have proceeded u/s. 263 of the Act, since the omission took place prior to 08.03.2019 and such omission in clause (i) of section 92BA is unconditional, that is, it does not say that Pending Proceedings under clause (i) of section 92BA would continue in future, even after its omission on 01.04.2017. Therefore, Ld. PCIT erred in exercising his jurisdiction u/s. 263 of the Act, so far clause (i) of section 92BA is concerned, reason being, in the eyes of law after omission of clause (i) of section 92BA, it would be treated as if it never existed in the Statute Book. In other words, clause (i) of section 92BA, was omitted w.e.f 1.4.2017 unconditionally and without a saving clause therefore section 6 of the General Clauses Act has no application.

We note that ld PCIT issued the above show cause notice u/s 263 in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act which was omitted with effect from 01.04.2017, and effect of such "omission" of clause (i) of section 92BA means that this provision never existed in the statute book, since clause (i) of section 92BA never existed in the statute book therefore, ld PCIT cannot exercise his jurisdiction under section 263 of the Act in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act. Therefore, the action of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances as narrated above. Thus, the usurpation of jurisdiction of exercising revisional jurisdiction by the Principal CIT is "null" in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 of the Act by the Principal CIT. Therefore, we quash the order of the Principal CIT dated 08.03.2019 being ab initio void."

11. Therefore based on the above judgements of the Coordinate Benches, [in the case of Swastik Coal Corporation Pvt Ltd and in the case of M/s Raipur Steel Casting India (p) Ltd-supra)] we hold that since clause (i) section 92A was omitted with effect from 1st April, 2017 and the effect of such omission is that the said clause(i) was never existed in the statute. Hence, Ld. PCIT can not exercise the jurisdiction u/s 263 of the Act.

As the issue is squarely covered in favour of the assessee by the decision of the Coordinate Benches (supra), and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of Coordinate Bench.

Respectfully following the above binding precedent, we uphold the contention of the assessee and quash the order passed by the Id PCIT under section 263 of the Act.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 17.06.2020

Sd/-
(A.T. VARKEY)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

दिनांक/ Date: 17/06/2020
(Biswajit, Sr.PS)

Copy of the order forwarded to:

1. M/s. Bhartia-SMSIL (JV).
2. ITO, Ward – 3(1), Guwahati.
3. C.I.T(A)-
4. C.I.T.- Guwahati
5. CIT(DR), GauhatiBench, Guwahati.
6. Guard File.

True copy

By Order

Senior Private Secretary / DDO / H. O. O
ITAT, Gauhati Bench