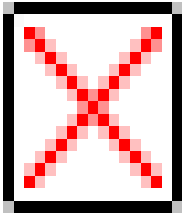


Implications of savings clauses under CGST Act and 101 st CAA & the difference

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By K Srinivasan



1. ISSUES CONNECTED WITH THE OMISSION OF ACT 32 OF 1994 (FA, 1994)

Section 174(2) of the CGST [Act of 2017](#)

provides that the repeal of the said Acts and the amendment of the Finance Act of 1994 (Act 32 of 1994) to the extent mentioned in Section 174(1) or 173, as the case may be, shall not, amongst others,

affect any investigation, enquiry or verification (including scrutiny and audit), assessment proceedings, adjudication or any other legal proceeding or recovery of arrears etc., and all such proceedings may be instituted, continued or enforced as if the Act had not been so amended or repealed.

A conjoint reading of Section 173 and 174(2)(e) would show that while bringing an omission to the provision of Chapter V of the Finance Act of 1994, a savings clause for continuing with the proceedings initiated/to be initiated was also duly provided.

Although Chapter V of the Finance Act of 1994 stood omitted under Section 173, but the savings clause provided under Section 174(2)(e) will enable the continuation of the investigation, enquiry, verification etc., that were made/to be made under Chapter V of the Finance Act of 1994.

A point was raised in Laxmi Narayan Sahu Vs UOI case - [2018-TIOL-2238-HC-GUW-ST](#)

before the Gauhati HC that Section 173 of the CGST Act of 2017, having omitted chapter V of the Finance Act of 1994.

It was argued that no proceeding initiated under Chapter V can further be continued, in view of the legal implication of a statutory provision being omitted, as laid down by the Supreme Court in its decision in Messrs Rayala Corporation (P) Ltd., Vs. Director of Enforcement, New Delhi reported in - [2002-TIOL-295-SC-FERA-LB](#) &

in paragraph Nos. 17 and 18 and in Kolhapur Cane Sugar Work Ltd. and Another vs. Union of India and Others reported in [2002-TIOL-188-SC-CX-CB](#)

in paragraph 37, which was again reiterated in General Finance Co. and Another -vs- Assistant Commissioner of Income Tax, Punjab reported in - [2002-TIOL-1895-SC-IT](#).

Paragraph 37 of Kolhapur Cane Sugar Works Ltd case provides that if a statute stood omitted with a savings clause, the savings clause would not render it impermissible for the proceedings initiated or to be initiated under Chapter V of the Finance Act of 1994, which stood omitted by Section 173 of the CGST Act of 2017, to be continued

However, a contrary view was held by the Gujarat HC that Rule 5A of the Service Tax Rules was not saved by 174(2) in such a manner that the fresh proceedings for audit could be initiated in exercise of powers under the said rule. (**OWS Warehouse Services LLP vs UOI - [2018-TIOL-2194-HC-AHM-ST](#) refers**)

The above view of the Gujarat HC, will find itself hard to pass judicial scrutiny for the simple reason that one finds in this regard, that in page 958 of the Principles of Statutory Interpretation by Justice GP Singh, it had been provided that the passing observation made by the SC in Messrs. Royala Corporation (P) Ltd. and Kolhapur Cane Sugar Works Ltd. (supra) that Section 6 of the General Clauses Act only applies to repeals and not to omissions, needs a reconstruction as omission of a provision results in abrogation or obliteration of that provision, in the

same way as it happens in a repeal.

Moreover, the Gauhati HC has affirmed that such an observation made in the Rayala Corporation (P) Ltd. case Kolhapur Cane Sugar Works Ltd. Case by the SC is to be considered more an Obiter dicta than a ratio decidendi.

The fact that a Central legislation such as Act 32 of 1944 (Finance Act, 1994) despite its omission, has been saved much the same way as a repeal, in such a manner under 174(2) of the CGST Act that fresh proceedings for audit or investigation or scrutiny could be initiated in exercise of powers under the said saving clause.

The said comprehensive power under the saved provisions 174 of the GST Act can be exercised regardless of the omission of a subordinate rule/s governing such standalone functions such as Audit, investigation or scrutiny or assessment or reassessment, having regard to the fact that the old Act provisions is otherwise saved substantially under the new Central GST Act. [Laxmi Narayan Sahu Vs UOI case - [2018-TIOL-2238-HC-GUW-ST](#) refers.]

2. ISSUES CONNECTED WITH NEW/OLD ENTRY 84 OF SCHEDULE VII of LIST I WITH REFERENCE TO THE CENTRAL EXCISE ACT, 1944

Whether old Entry 84 of Union List needs to have been protected after or under the 101 st CAA to enable any action under the Central Excise Act, 1944 by way of Audit/Investigation and the consequential levy and collection/recovery of duty, interest and penalty?

The answer to the above question would appear to be a firm No, for the following reason -

The new Entry 84

covering the six goods mentioned therein, issues out with all retrospective and prospective privileges of levy and collection and the attendant functions governed under it, as the same is outside the purview of repeal of the provisions of the Central Excise Act 1994, by Sec 174(1) of the CGST Act, 2016.

As far all the goods falling under the old Entry 84

of the Union List, the same privileges of levy and collection and the attendant functions of Audit, investigation, scrutiny, etc., are all well preserved by Section 174(2) and more specifically sub-clause (e) under it.

Sec 174 does the Savings of the Repeals done by the GST Legislation, by preserving it with all its extant Privileges and Rights fully and unequivocally.

Therefore, it would be too tentative to argue that all other goods falling under the Old Entry 84 except for the six provided under the new Entry 84, will lose out on actions initiated under the Central Excise Act, post GST.

In the case of Reliance Industries (Reliance Industries vs State of Gujarat- HC of Gujarat - [2020-TIOL-837-HC-AHM-VAT](#)), the Gujarat HC is said to have admitted the challenge to the constitutional validity substantially on the ground that Section 84A of the GVAT Act is ultra vires and hence beyond the legislative competence of the State under Entry 54 of List II of the Seventh Schedule to the Constitution of India, after the introduction of the 101 st Constitution Amendment.

Further, the challenge to the validity is also on the ground that Section 84A of the GVAT Act is arbitrary, unreasonable and, therefore, is violative of Article 14 of the Constitution of India.

Therefore, it would be inappropriate on that score to say that since the goods do not relate to the six goods covered under Entry 54 of List II, Seventh Schedule, levy of tax demanded on such goods after the 101 st Amendment Act is not permissible.

It would be further incorrect to draw a parallel from the above that the decision is equally applicable to central excise duties in respect of goods not covered under the substituted Entry 84, Union List, and that it is impermissible on that ground for any assessment or reassessment or audit or show cause notice for levy of excise duty, as there is no saving clause protecting the old Entry 84 under the 101 st Constitution Amendment.

It was in fact on a different ground of the original propriety and competence of Sec 84A of the GVAT itself being at dispute that it is clearly distinguishable from the legitimacy of extension of protection to old Entry 84 of the Union List under the Constitution Amendment Act, 2016 for future action under it.

And the only way for such action to survive, it should have been initiated prior to the substitution of the new Entry 84 and prior to the 101 st CAA coming into force, would appear equally a lame argument against the Revenue, in light of the above detailed discussion of the dispute.

The Audit function and the resultant actions of notice and recovery of duty, interest and penalty are explicitly provided under Sec 174(2) (e) of the GST Act.

Therefore, in sum it shall exert no adverse effect on the actions of the Department by way of either Audit or Investigation or Scrutiny, assessment or reassessment, leading to recoveries of revenue given rise to by the above said repealed Acts referred under Sections 173 and 174(1) *ibid*.

3. ISSUES CONNECTED WITH INTREPRETATION OF SAVINGS CLAUSE UNDER SEC 174(2) OF THE CGST ACT AS LIMITED TO ONE YEAR FROM COMMENCEMENT OF THE 101 ST CAA, AS PER SEC 19 OF THAT ACT.

It is noticeable that section 19 of the Constitution Act, 2016 states that any provisions of any law relating to tax on goods and services or both in force in any State immediately before the commencement of the Act, which is inconsistent with the provisions of the Constitution as amended by the said Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.

Section 19 of the Constitution Act, 2016, is a transitional provision which saves the provision of any law relating to tax on goods or services or both in force in any State immediately before the commencement of the said Act, which is inconsistent with the provisions of the Constitution as amended by the said Act for a period of one year unless amended and repealed by a competent legislature or other competent authority prior to it, but it was nothing to do with the saving clause incorporated in CGST Act.

Suffice to say that the provision incorporated in the Constitution Act, 2016 as aforesaid, in no manner, restricts the operation of the provisions of section 174(2) incorporated in CGST Act beyond the period of one year, which provides that repeal of the Acts specified in sub-section (1) of section 174 and the amendment of the Finance Act, 1994 to the extent mentioned in sub-section (1) or section 173, as the case may be, shall not amongst others affect an investigation, enquiry or verification (including scrutiny and audit), assessment proceedings, adjudication or other legal proceeding or recovery of arrears etc., and all such proceedings may be instituted, continued or enforced as if the Act had not been so amended or repealed. (Suresh Kumar Singhal Vs Union of India - [2018-TIOL-3109-HC-RAJ-GST](#))

Apparently, section 19 of the Constitution Act, 2016 is a special window created keeping in view of any possible dissidence from any states on the introduction of GST.

Should there be such a critical period as foreseen by the Legislature, it was pre-thought as an important way forward to empower continuation of the extant taxation of goods or services or both by the states for a limited period of one year, with the help of Sec 19 of the CAA, as perceived by the Author.

[The Author is a former Assistant Commissioner of GST, Chennai and a CBIC Master Trainer, GST and currently a Senior Associate, Indirect & Corporate Taxes, at a Chennai-based Law Firm, RANK Associates. The views of the Author are purely personal.]

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