OMITTED vs REPEALED

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In law making, proper and meticulous drafting is one most important ingredient! In the past, we all have witnessed many crucial laws had been struck down by various Courts, because of ambiguous words, improper construction and even misplaced punctuations! Despite the same, our law makers still haunt us with their lousy language skills! In this piece let us analyze a latest casualty!

Section 3 A was introduced in the Central Excise Act, 1994 with effect from 14.05.1997, so as to provide for levy of duty of excise on the basis of annual capacity of production. The aim of this scheme was stated to check the extent of evasion from payment of duty in certain industries. This special scheme provided for levy of duty of excise, on the basis of the capacity of production. The goods which were subjected to this novel levy were notified by the Government. Amongst others, Iron and Steel industries bore the brunt of this scheme, with effect from 1st September 1997. In order to put the scheme into effect, certain Rules were also enacted, which *interalia* included, Rules 96 ZO & 96 ZP of the then Central Excise Rules, 1944.

For the wisdom best known to the Ivory towers, the Government decided to bid adieu to this scheme in its budget proposals for the year 2001 and the Finance Bill 2001 proposed to **omit** Section 3 A from the statute book. True to sense, the relevant Rules (96 ZO, 96 ZP, etc.) were also **omitted** with effect from 01.03.2001. When the Finance Bill 2001 became an Act on 11.05.2001, Section 3 A was crucified. Generally, all is well that ends well. But this end was not as well as the revenue bureaucrats have failed to insert a "saving clause", while **omitting** this Section 3 A.

As the litigations hovering around the scheme were continuing even after the demise of Section 3 A, an unique technical defence was taken by the industry that any duty demand confirmed after the **omission** of Section 3 A, i.e. after 11.05.2001 is without the authority of law, as Section 3 A has been **omitted** without a saving clause and hence no action can survive after 11.05.2001. In other words, if any duty demand is confirmed under the scheme, after 11.05.2001, the same is not sustainable on this score.

The above stand of the trade was given a judicial stamp in the case of Mitra Steels **(2005-TIOL-824 CESTAT – MUM)**, wherein the Hon'ble Tribunal held that:

- Section 3 A has been omitted without a saving clause.
- Even, Section 6 of the General Clauses Act (which provides an omnibus saving clause) cannot come to the rescue, as it covers only "repeal" and not "omission".
- "Repeal" and "Omission" were held to be different by the Constitution bench of the Hon'ble Supreme Court in Rayala Corporation case.
- Section 38 A of the Central Excise Act, 1994 also would not come to the rescue as it covers only Rules, Notifications and Orders and not Sections of the Act.

This decision has also been followed in a host of subsequent decisions and the harried revenue hurried to the Hon'ble High Court. Now the Hon'ble High Court of P & H in the case of **Shree Bhagwati Steel Rolling Mills Vs CCE – 2007 – TIOL – 13 HC P&H** seems to have diffused the "Mitra" bomb. But is it so?

The crux of the ratio of the Hon'ble Tribunal in the Mitra case was that whether the provisions of Section 6 of the General Clauses Act which saves all Central Acts "repealed", would come to the rescue of the Government to save the proceedings initiated under Section 3A of the CEA, which was "omitted" w.e f 11.5.2001?

In this connection, the Constitution bench of the Hon'ble Supreme Court has made an emphatic assertion in **Rayala Corporation case (1969 (2) SCC 412).** In its own words,

> *"Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132 A of the D.I.Rs 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.*

Of the above two reasons, the first reasoning alone is relevant for the case on hand. Though the Hon'ble Supreme Court has not elaborated as to what would be the difference between "repeal" and "omission", in no uncertain terms, it has laid down the law, that "repeal" is different from "omission" and Section 6 of the General Clauses Act would apply only for "repeal" and not "omissions".

Here it would also be pertinent to mention that in another case, the Hon'ble Supreme Court has observed that there has been no substantial difference between "repeal" and "omission", **(Ref: General Finance Company: AIR 2002 SC 3126)** but it has not ventured to deviate from the Constitution bench decision in Rayala Corporation case *supra* and has also refrained from referring the issue to any Larger bench.

Though the meaning of the term repeal has been dealt with in many decisions, yet it remains to be laid down in categorical terms as to what would be the difference between "repeal" and an "omission", though such difference was so obvious to the Constitution bench of the Hon'ble SC, as early as in 1969.

It is an undisputed fact that Section 3 A of the Act has only been "omitted" and not "repealed". Hence, following the ratio of the Rayala case *supra,* it appears that the provisions of Section 6 of the General Clauses Act could not obviously render any protection to the pending proceedings in the absence of any saving clause while omitting Section 3 A ibid.

The Hon'ble High Court has observed that the decision of the Hon'ble SC in the Rayala Corporation case was with reference to a temporary statute (Rule 132 A of the Defence of India Rules), whereas, Section 3 A ibid is not a temporary statute. With utmost respect to the Hon'ble Court, we wish to differ from the above observation for the reason that, there is nothing in the said judgement to come to such a conclusion that the said Rule was temporary in nature or it would apply only to temporary statutes. Moreover, Section 6 of the General Clauses Act also does not distinguish between a "temporary statute" and "permanent statute". Though the above observations have been made by the Hon'ble HC, the final decision of the Hon'ble HC was not based on the above observations.

Further, the Hon'ble HC has come to the conclusion that even after the omission of Section 3A, liability of the assessee incurred thereunder was not wiped out, by virtue of Section 38 A of the Central Excise Act, 1944. A reading of the said Section 38 A of CEA would reveal that, it protects only the actions taken under any Rule, Notification or an Order, which has been amended, repealed, superseded or rescinded. It may be observed that Section 38 A of the Act would not save the actions taken under Section 3 A of the Act, for two reasons, viz., (a) Section 38 A protects only actions taken under Rules, Notifications or Orders and not the actions taken under Sections; and (b) even Section 38 A covers only repeal, etc. and not "omissions". But, unfortunately, it appears that the above points have not been put forth before the Hon'ble HC. And so the game is not yet over!!!

Before Parting…

Though Section 3 A has been omitted w.e.f 11.05.2001, the relevant Rules, namely, 96 ZO, etc. have been "omitted" w.e.f 1.3.2001. This leaves a question as to what is the fate of the actions taken during this period, i.e. from 01.03.2001 to 10.05.2001, in terms of the said Rules, as Section 3 A was in force during the relevant period. Though the said Rules have been omitted without any saving clause w.e.f 1.3.2001, it can be argued that Section 38 A will protect such actions till 11.5.2001. But it can also be counter argued that, even in such instances, Section 38 A covers only "repeal" and not "omissions"! Now tell us, is it all required? Instead of "omitting" it could have well been "repealed"?