

OPINION ON THE ESSENTIAL COMMODITIES (AMENDMENT AND VALIDATION) ORDINANCE, 2009

The Essential Commodities (Amendment and Validation) Ordinance, 2009 introduced significant changes in section 3 of the Essential Commodities Act, 1955. The same is discussed herein.

PURPOSE OF ORDINANCE

In its essence, what the Ordinance seeks to achieve is, inter alia, to avoid having to factor in the following *while fixing levy sugar price*:

- Additional Price of sugarcane under Clause 5A of the Sugarcane (Control) Order, 1966,
- State Advised Price for cane and
- Any cane price agreed to between the producer and farmer or society.

NATURE OF CHANGES INTRODUCED

To achieve the above objective, the changes introduced are essentially in two parts, each covering a different period. They are:

Period between 1st October 1974 and 30th September 2009 : By *insertion* of Explanation II to Section 3(3C) of the EC Act vide Clause 2(a) of the Ordinance

Period commencing on 1st October 2009. : By *substitution* of new Section 3(3C) in place of the Old Sub section vide Clause 2(b) of the Ordinance

As such, Section 3(3C) stands amended w.e.f 1-10-1974. Two fresh provisions are to govern the sub-section from that date onwards. There is however one exception where the old unamended provision will still apply. That is for provisional determinations made up to 1-10-2009.

Each of the above is discussed hereunder separately as both are mutually exclusive.

PERIOD BETWEEN 1ST OCTOBER 1974 AND 30TH SEPTEMBER 2009

As already noted above, changes were introduced for this period by the devise of *insertion* of Explanation II to Section 3(3C). For ease of reference, the said explanation is extracted hereunder:

“For the removal of doubts, it is hereby declared that the expressions “minimum price” referred to in clause (a), “manufacturing cost of sugar” referred to in clause (b), and “reasonable return on the capital employed” referred to in clause (d) do not

include the additional price of sugarcane paid or payable under clause 5A of the Sugarcane (Control) Order, 1966 and the price paid or payable under any other order or enactment of any State Government and any price agreed to between the producer and the grower of sugarcane or a sugarcane growers' co-operative society' ;"

Period of applicability

It is specifically provided that the above explanation "*shall be deemed to have been inserted*" with effect from 1-10-1974. (The said date is not a random date. That is the date on which Clause 5A was incorporated in the Sugarcane (Control) Order, 1966 introducing Additional Price). It is concluded that this provision is meant for the period mentioned above because separate provision is made for the period commencing from 1st October 2009.

Meaning of 'Minimum Price' clarified

On a reference to the extract, it is clear that the term "minimum price" occurring in clause (a) is not disturbed. However, the meaning thereof is clarified. This clarification is for the purpose of making it clear that there is no scope for consideration of Additional Price or SAP or agreed price while determining levy for the concerned period.

Effect of insertion

The obvious effect is that since 1-10-1974 while fixing levy price, Additional Price, SAP or any Agreed price cannot be accounted for, subject to exception made.

No writ will lie against the Central Government compelling it to take those into account so long as the provision is not declared invalid because legislation (present amendment) restrains the government from doing so.

Exception to the rule of exclusion of Additional Price, SAP and Agreed price

The above rule is not made applicable to provisional determination of levy price up to the sugar season 2008-09 (*vide Proviso to Clause 2(b) of the Ordinance*). The said proviso provides that for such cases, the final determination may be done under the sub-section, as it stood immediately before the 1st day of October 2009.

Effect of amendment on claims relating to the period

(Please refer portion dealing with Ouster of Jurisdiction)

PERIOD COMMENCING ON 1ST OCTOBER 2009

As already noted, changes were introduced for this period by the devise of wholesale *Substitution* of Section 3(3C) itself.

Although it is a substitution, it retains the content of the previous provision with only one slight modification (although that slight modification is

significant in so far as its effect is concerned). Further, in addition to this modification, there are significant additions made by way of explanations.

For ease of reference, the said substitution is extracted hereunder (*fresh modification and additions introduced by the amendment are italicized*):

“(3C) Where any producer is required by an order made with reference to clause (f) of sub section (2) to sell any kind of sugar (whether to the Central Government or to a State Government or to an officer or agent of such Government or to any other person or class of persons) and either no notification in respect of such sugar has been issued under sub-section (3A) or any such notification, having been issued, has ceased to remain in force by efflux of time, then, notwithstanding anything contained in sub-section (3), there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to—

- (a) the *fair and remunerative price*, if any, fixed for sugarcane by Central Government under this section ;
- (b) the manufacturing cost of sugar;
- (c) the duty or tax, if any, paid or payable thereon; and
- (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar,

and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar:

Provided that where only provisional determination of price of levy sugar has been done in respect of sugar produced upto the sugar season 2008-09, the final determination may be done under this sub-section as it stood immediately before the 1st day of October, 2009.

Explanation.- For the purposes of this sub-section,-

- (a) *“fair and remunerative price” means the price of sugarcane fixed by the Central Government under this section;*
- (b) *“manufacturing cost of sugar” means the net cost incurred on conversion of sugarcane into sugar including net cost of transportation of sugarcane from the purchase centre to factory gate, to the extent it is borne by the producer;*
- (c) *“producer” means a person carrying on the business of manufacturing sugar;*
- (d) *“reasonable return on the capital employed” means the return on net fixed assets plus working capital of a producer in relation to manufacture of sugar including procurement of sugarcane on fair and remunerative price fixed under this section’.”*

Period of applicability

It is specifically provided that the above substitution “*shall be deemed to have been substituted*” with effect from 1-10-2009.

No specific embargo against Additional Price or SAP for period commencing October 09

Conspicuously absent for this period is any specific embargo against either Additional Price or SAP unlike for the period prior to 1-10-2009. This is evidently because close on the heels of the Ordinance, the Sugarcane (Control) Order, 1966 was heavily amended dropping altogether clause 5A thereof dealing with Additional Price. Further, the liability of SAP has been passed on to the concerned State fixing SAP.

Effect of substitution

Since the term 'minimum price' has been replaced with the new term '*fair and remunerative price*' and further, since the terms *fair and remunerative price, manufacturing cost of sugar, producer, reasonable return on the capital employed* have all been given rigid definitions, there is no more occasion to claim that Additional Price, SAP or Agreed price is to be accounted for under any of those factors while determining levy price from 01-10-2009.

Clearly it is the intention of the Ordinance that the sugar mills should not be burdened with Additional Price or SAP. Since there would no more be any occasion for a mill to pay an Additional Price or SAP (owing to deletion of Additional Price and shifting of SAP burden to States), any specific embargo against Additional Price and SAP would have become a legislative surplusage.

States power to fix SAP vanishes altogether

A significant question of legislative competence that is posed with the promulgation of the Ordinance is if the States still retain power to fix SAP. This question is all the more significant since the Ordinance seems to indicate that the Union is not against States fixing SAP altogether. This is because of the nature of wording employed in the newly inserted Explanation II to Section 3(3C). It says, "...minimum price ... manufacturing cost of sugar ... and reasonable return on the capital employed ... do not include ... the price paid or payable under '*any other order or enactment of any State Government*' ..."

However there are two strong reasons that would indicate that the Union does not suggest that the States may continue fixing SAP.

One reason is that the above wordings occur in that portion of the Ordinance that is meant to cover period between 1-10-1974 and 30-09-2009 only. There is no similar indication in the portion that is intended for prospective operation (which is the period commencing on 01-10-2009).

The second and more compelling reason lies in the position of law declared by the Constitutional Bench of the Apex court in the *U.P. Co-operative Cane Unions Federations Case, (AIR 2004 SC 3697)*.

The position of States power to fix SAP that prevailed prior to the Ordinance may be recalled to examine this position. The Supreme Court said that the CG fixes only the MINIMUM PRICE. It has reserved power to fix only 'minimum price' under the Sugarcane Control Order. It does not fix a 'Higher price'. The

Order does not contemplate fixation of 'Higher Price' by the CG. This is clear from the following extracts from the judgment:

Para 12

"A whole reading of the 1966 Order would ... show that the Central Government shall fix the minimum price of sugarcane but there can be a price higher than the minimum price which may be in the nature of agreed price between the producer of sugar and the sugarcane grower or the sugarcane growers' co-operative society. So the field for a price higher than the minimum price is clearly left open in the 1966 Order made by the Central Government."

Para 37

"Under Sub-section (1) of Clause 3 of the 1966 Order, the Central Government can only fix a minimum price of sugarcane."

In view of the observations of the Supreme Court extracted above, it is evident that the Court itself was of the view that the state price fixation is sustainable ONLY BECAUSE *"the field for a price higher than the minimum price is clearly left open"* and that *"Under Sub-section (1) of Clause 3 of the 1966 Order, the Central Government can only fix a minimum price of sugarcane."*

Therefore, even according to the apex court, the State was able to fix higher price only because the CG was fixing only a "minimum price".

It was not the case of the Apex Court that the Parliament did not have the power under the Constitution to legislate on a 'Remunerative Price' for an essential commodity. It was not the case of the Apex Court that the CG did not have the power under the EC Act to reserve the power to fix a 'Remunerative Price'. Its only case was that the Union had simply not bothered to activate powers available.

However with the specific incorporation of "fair and remunerative price" in the enactment, the position changed completely and States have completely lost the power to fix SAP.

OUSTER OF JUDICIAL REVIEW

The Ordinance has also incorporated an Ouster of Judicial Review vide Clause 3(1). A validation provision is also included therein. However it does not have prospective effect for anything beyond 2009 as will be explained later on.

The ouster clause reads:

"3.(1) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority-

- (a) all things done or all actions taken by the Central Government under the specified orders shall be deemed to be and deemed to have always been done or taken in accordance with law;*
- (b) no suit or other proceedings shall be instituted, maintained or continued in any court, tribunal or other authority for the payment or adjustment of any*

- payment in relation to the determination of price of levy sugar under any specified order;
- (c) no court shall enforce any decree or order directing any payment in relation to the determination of price of levy sugar under any specified order;
 - (d) no claim or challenge shall be made in or entertained by any court, tribunal or other authority on the ground that the Central Government did not take into consideration any factors specified in sub-section (3C) of Section 3 of the principal Act in the determination of price of levy sugar under any specified order.”
- (2) In this section, “specified order” means any order relating to the determination of price of sugar issued under sub-section (3C) of section 3 of the principal Act before the commencement of this Ordinance in relation to sugar produced in any sugar season up to and including sugar season 2008-09.

Effect of Ouster Clause

Right to judicial remedies is a fundamental Right guaranteed under the constitution. The same cannot be taken away by an ordinary enactment of parliament. In fact, the constitutional bench of the Apex court has held that it is one of the basic structures of the constitution. It has been further held that the basic structure of the constitution cannot be altered even by a constitutional amendment.

In the light of the position of law, generally the writ court would try to place a purposive interpretation to the clause to save it from invalidity and is likely to hold, as it has held in various similar situations in the past, that the clause is not meant to cover pursuit of remedies under Article 32 and 226 of the Constitution and as such the same will not stand in the way of a writ petition. It would hold that the clause only prohibits moving the ordinary civil courts.

Ouster Clause does not operate on sugar seasons following 2008-09

A notable facet of applicability of the ouster clause is that the Ordinance specifically ruled out its applicability for the future. This is by the terms of Clause (2) following ouster which defines “specified order” occurring in clauses (a) to (d) preceding it.

It may be noted that it has stated that specified order “*means any order relating to the determination of price of sugar issued under sub-section (3C) of section 3 of the principal Act before the commencement of this Ordinance in relation to sugar produced in any sugar season up to and including sugar season 2008-09.*”

It is important to note that it did not say specified order “shall also include” or specified order “also means”. It has clearly specified that specified order “means any order ...” For the said reason, there is no question of applicability of the ouster clause for anything beyond the given sugar year.

As such, it is to be concluded that the entire ouster clause only has retrospective operation and is not meant for prospective effect.

Validating Provision

Clause 3(1)(a) is re-extracted herein below for separate discussion because, the same is a validating clause incorporated along with the ouster clause. Extract:

“all things done or all actions taken by the Central Government under the specified orders shall be deemed to be and deemed to have always been done or taken in accordance with law;”

The above is a well-known validating clause. However its own validity will depend on the peculiar purposes which it is meant to serve. Although it is not possible to foresee all possible instances where the executive will try to press it into service, it would be possible to consider certain clear possibilities.

In the event a given party desires to challenge an action arising from Section 3(3C) which falls in the period covered by the ouster clause, the Union government is liable to seek the protection of the above extracted clause.

In such event, the writ court is liable to take the view that no retrospective validation is permissible unless the cause of invalidity itself is cured. The courts have time and again held that a mere declaration of validation will not save an otherwise invalid act. In short, if the cause of invalidity itself is not cured with retrospective effect, this clause will be of no avail to the Union executive.

Effect on claims

In short, in so far as the effect on Ouster of judicial review and retrospective validation on possible claims is concerned, the writ court is liable to hold that:

- The ouster clause is not meant to usurp and/or cannot usurp the constitutional power of judicial review conferred on writ courts,
- The whole of the ouster clause does not apply to sugar seasons following 2009,
- The mere declaration of validity contained in clause (a) cannot by itself save an otherwise invalid action,

SCOPE OF CHALLENGE OF ORDINANCE

It may be noted that the scope of challenging provisions of the Essential Commodities Act was practically non-existent in view of the fact that the enactment was included in the 9th Schedule of the Constitution.

9th Schedule to the Constitution and Article 31B

The 9th Schedule to the Constitution is referable to Article 31B inserted in the Constitution of India vide the Constitution (1st Amendment) Act, 1951, with

retrospective effect.

It provides that Acts and Regulations specified in that Schedule shall not be void on the ground that it adversely impacts the rights conferred by any provisions of Part III of the Constitution, which embodies the Fundamental Rights. It further insulates those laws from any judgment, decree or order of any court or tribunal.

As such, Section 3(3C) was completely insulated by the 9th Schedule protection and on account of the same it was never open to challenge and was indeed never challenged. Whatever relief a petitioner wanted had to be worked around its framework. The same placed serious fetters on claiming reliefs.

Section 3(3C) is no more insulated by 9th Schedule protection

It is significant to note that although the EC Act continues to enjoy the 9th Schedule protection, the present ordinance enjoys no such insulation. This is because of the position of law that the protection offered by the 9th Schedule is confined to the Acts and Regulations mentioned in that Schedule and the provisions thereof. It cannot be extended to provisions, which were not included therein, irrespective of the Act whether the provision to which the protection is sought to be extended deals with new *substantive* matters or it deals with matters, which are, incidental or ancillary to those already protected.

For the above reason, the Ordinance in its entirety is liable to be tested for constitutional validity in all its facets as and when challenged notwithstanding the ouster of jurisdiction clause incorporated therein.

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