

The Taxation (C) Laws (Amendment) Bill, 2005

(S.Jaikumar & G. Natarajan, Advocates)

Mr. Evergreen: Hi! Bhaiya! How are you? Long time no see!

Mr. Nevergreen: Hello brother! Am fine! I was out of town for a month. By the way, how are you and your taxes?

Mr. Evergreen: Yeah! Am ok! But am not sure of the taxes!

Mr. Nevergreen: Come on Evergreen! You can't sound this down! Why? What happened to the taxes?

Mr. Evergreen: I was going through the proposed Taxation Laws (Amendment) Bill, 2005. The proposals are so very punitive that, if they are incorporated as such, it's nothing but a doom for the trade!

Mr. Nevergreen: That's too caustic a comment! I also went through the Bill. The *Statement of Objects* of the Bill proclaims a noble intent. It seeks to carry out the proposed amendments in the Customs Act and Central Excise Act to facilitate voluntary payment of tax dues, provide a mechanism for resolving disputes at the earliest, facilitate recovery of the amount dues to the Government and, of course, to incorporate certain measures to curb evasion of Customs and Central Excise duties. I feel all of them are need-of-the-hour proposals! How can you pass such an off-the-cuff remark?

Mr. Evergreen: Yes! The intent of the *Statement of Objects* is noble! But the proposals do not seem to be so! We are dealing with taxpayers and not with terrorists! In tax collection, one should always remember the golden words of the all-time-great taxman Mr.Chanakya. In his Arthsastra, he vividly observed that the tax laws should be like taking the honey without plucking the flowers!

Mr. Nevergreen: That may a selling concept during the Golden age of the Guptas and Mauryas. But, in this 21st century, it's thoroughly alien and highly impractical.

With the white collared crime rate rising vertically steep, it's no more flower plucking! We need stringent laws to govern tax administration.

Mr. Evergreen: Fine dear! But whatever be the measure of stringency, it shall always remain within its prescribed limits. But these present proposals seem to be an overdose and subtly convey a vindictive attitude and a quest for arbitrary power.

Mr. Nevergreen: It's too much! Now you either justify the reasons for your verbal assault or be ready for a defamation suit!

Mr. Evergreen: No probs, dear! I will detail one by one. As the Excise proposals are akin to the Customs, let me elaborate on the Customs front, which applies to the Excise Act also.

Mr. Nevergreen: Ok. Carry on!

Mr. Evergreen: Firstly to the amendment to Section 18 of the Customs Act. It proposes insertion of three Sub-Sections after the existing Sub-Section (2). Sub-Section (3) proposes to impose an interest liability on the importer/exporter, at the rate fixed under Section 28AB of the Act, on the differential duty payable by him. This interest liability is consequent to the final assessment order passed under the existing Sub-Section (2) of the said Section. The interest is calculated from the first day of the month in which the duty is provisionally assessed till the date of payment thereof. Sub-Section (4) provides for an interest on the refund to the importer/exporter at the rate under Section 27A of the Customs Act. Such interest is calculated after the expiry of three months from the date of final assessment under Sub-Section (2) of the said Section, till the date of refund.

Deleted: Commentary on the proposed "The Taxation Laws (

Deleted: proposes

Deleted: 3

Deleted: of the said Section

Deleted: Proposal: . ¶

Deleted: Sub-section 3 proposes to impose interest liability on the importer/exporter, at the rate fixed under Section 28AB of the Act, from the first day of the month in which the duty is provisionally assessed till the date of payment thereof. This interest liability is consequent to the final assessment order passed under the existing sub-section 2 of the said Section.¶

Sub Section 4 provides for a refund to the importer/exporter at the rate under Section 27A of the Customs Act, from the date after the expiry of three months from the date of final assessment under sub-section 2 of the said Section till the date of refund.¶

Deleted: are

Mr. Nevergreen: Fine! But, before that tell me what is that Section 18 is all about! I don't have the Customs Act right now!

Mr. Evergreen: Oh! Am sorry! Section 18 of the Customs Act, deals with the provisional assessment of duty. The provisions of the Section 18 would get attracted when there is an ambiguity in respect of an assessment, which, either the importer / exporter or the Customs officer is not capable of resolving at the time of assessment.

Mr. Nevergreen: Good! Now tell me what's wrong in charging interest on the differential duty payable arising out of finalising such provisional assessments? It's a matter of Government policy and you should appreciate that the proposal is both ways! Whereas Sub-Section (3) imposes interest on the differential duty payable, the proposed Sub Section (4) provides for interest on refunds too!

Mr. Evergreen: Am not against the interest proposal. In fact, I would appreciate the policy, if it is with equity! But, unfortunately, here it is an unfair proposition.

Whereas, Sub-Section (3) provides for an interest to the Department, from the first day of the month in which the duty is provisionally assessed, Sub-Section (4) proposes interest to the importer / exporter only from the date of expiry of three months after the date of final assessment.

Deleted: as per

Deleted: ,

Deleted: is entitled to recover interest

Deleted: were given the interest benefit

Deleted: from

Mr. Nevergreen: Considering the processing time and cost involved, it could have been a conscious decision! How can you say it is an inequity?

Mr. Evergreen: I know you will say so! But I have a strong justification for my argument. Provisional assessments are under Central Excise too! Rule 7 of the Central Excise Rules, 2002, which are in pari materia to Section 18 of the Customs Act, governs Provisional assessments under Central Excise. As per Rule 7(4) of the Central Excise Rules, 2002, which deals with the payment of interest, an assessee is liable to pay interest on any differential duty, consequent to the final assessment, from the first day of the month succeeding the month for which such amount is determined, till the date of payment. Similarly, as per Rule 7(5) of Central Excise Rules, 2002, where there is a refund consequent to the order of a final assessment, an assessee is entitled for an interest on such refund, from the first day of the month succeeding the month for which such refund is determined, till the date of refund. Now tell me Sir, is it not inequity?

Deleted: Provisional assessment under Central Excise is covered under Rule 7 of Central Excise Rules, 2002, which are in parie materia to Section 18 of the Customs Act. As per Rule 7 (4) and (5) of the Central Excise Rules, 2002, which deals with the payment of interest, an assessee is liable to pay interest on any differential duty consequent to the final assessment from the first day of the month succeeding the month for which such amount is determined till the date of payment. Similarly, as per Rule 7(5) of Central Excise Rules, 2002, where there is a refund consequent to the order of final assessment, an assessee is entitled for an interest on such refund from the first day of the month succeeding the month for which such refund is determined, till the date of refund.¶

¶
Going by the above provisions, whereas under the provisions of Central Excise there is an equity available for payment of interest in cases of finalisation of provisional assessment, it is apparently distorted under the proposed amendment to Section 1 of the Customs Act.

Mr. Nevergreen: I think you have a point. Good. Next?

Mr. Evergreen: Now to the proposed amendment to Section 28 of the Customs Act. It is the recovery Section which is in pari materia to Section 11A of the Central Excise Act. The amendment to Section 28 of the Customs Act, proposes insertion of

Sub Section (1A) after the Sub Section (1) and addition of two provisos under Sub-Section (2) of the said Section.

Mr. Nevergreen: Fine. What are they?

Mr. Evergreen: As per the proposed Sub-Section (1A), an importer / exporter / agent / employee of such exporter / importer, to whom a notice under Sub-Section (1) of Section 28 has been served, is given an option to pay duty **in full or in part as may be accepted by him** along with the interest under Section 28 AB and penalty equal to 25% of the duty specified in the notice or the duty so accepted by him, within 30 days from the date of receipt of such notice. The two proposed provisos to Sub-Section (2), provides for exoneration of the persons on whom the notice is served under Sub-Section (1) of the said Section, from the provisions of Section 135, 135A and 140 of the Customs Act, provided that the entire duty along with the interest and penalty under the proposed Sub-Section (1A) is paid, **in full**. It also provides for, that in case of part payments, the Customs officer shall determine the duty payable along with the interest, only to the extent of the balance amount payable from such person, which is in excess of the part payment already paid by such person.

Mr. Nevergreen: Ok. What's your grouse about this?

Mr. Evergreen: There are two parts to the proposed Sub-Section (1A), whereby, the noticee is required to pay the duty demanded along with applicable interest and 25% penalty on the duty demanded, **either in full or in part thereof**. The proposed proviso to Sub-Section (2) provides for immunity under Section 135, 135A and 140, only, if such person pays the duty along with the interest and penalty under the proposed Sub-Section (1A), **in full**. Otherwise, there is no immunity. In other words, if a noticee pays the duty along with the interest and 25% penalty on a part of the alleged amount, then there is no immunity, whatsoever. If that being the case, what is the relevance of providing for a part payment in the proposed Sub-Section (1A)? Further, even the immunity proposed under the proviso to Sub-Section (2), provides for immunity, only under the provisions of Section 135, 135A and 140. Under Chapter XVI of the Customs Act, prosecution is envisaged under Sections 132, 133, 134, 135, 135A and 140. That being the case, providing for immunity only

under Section 135, 135A and 140 and leaving the noticee vulnerable to the prosecution under the other menacing Sections like 132, 133, 134 etc., is nothing but a crazy proposition. Tell me, would any prudent noticee opt for this partial immunity? Would you?

Mr. Nevergreen: Why me? I will never import or manufacture anything in my life! But these provisions really appear to be crazy! Ok. Next?

Mr. Evergreen: Another significant amendment has been proposed by insertion of a new Section 28BA to the Customs Act. By this new Section 28BA of the Customs Act, a Customs officer is empowered to attach provisionally, **any** property belonging to the person, on whom a notice is served under Sub-Section (1) of Section 28 or Sub-Section (2) of Section 28B, with the previous approval of the Commissioner of Customs. This proposed Section is aimed at “protecting the interest of the revenue”. This provisional attachment shall have an effect for six months and shall be further extended by the Chief Commissioner of Customs for a total period of two years.

Mr. Nevergreen: I feel it is a welcome proposal to curb the fly-by-night evaders! Are you upset with this proposal too? If so, I can’t subscribe to your grumble!

Mr. Evergreen: Don’t get carried away brother! What is the percentage of the so-called fly-by-night compared to the genuine taxpayers? It shall be negligible! You can’t frame such a ruthless law for a miniscule fraction. In the guise of “protecting the interest of the revenue”, the officers are given sky-high discretionary powers to provisionally attach any property belonging to a person, on whom the notice is served. Any proceeding under the Customs Act or the Excise Act starts with issuance of a Show Cause Notice. A notice, *per se*, cannot be a determination of a liability but it is only an apprehension by the Department. Providing for attachment of any property of the noticee, at the nascent stage of Show Cause Notice itself, would only feed the highhandedness of the Department, thus leading to absolute corruption.

Mr. Nevergreen: Ok! Do you have any alternate suggestion?

Mr. Evergreen: Yes! Instead of this menacing proposition, a codified judicial process may be identified, whereby, if the Department is apprehensive about a

Deleted: Suggestion:¶

¶
In stead of this menacing proposition a codified judicial process be identified, whereby, fly by in operators and hard grow factors are properly nailed. If, for any reason, the Department apprehends that the noticee may either indulge in a mis-chief or flee from the proceeding, then the Department may approach Court of Justice for attaching the property of such _____. Suitable provisions may be made to enable the revenue to attach the properties with a clout of judicial. Providing for an offense list provision to the revenue authorities will only make the situation further more chaotic.¶

¶
Proposal:¶

¶
The proposed amendment to Section 104, whereby the existing sub-section 1 is proposed to be substituted with new sub-section 1. By this new proposition, the Commissioner of Customs is empowered to arrest a person for any offense punishable under Section 132,133,135, 135A and 136. Earlier the Commissioner of Customs was when with the power to arrest only in cases where the offense punishable under Section 135. Even though, the other Sections like 132, 133, 135A and 136 provides for an arrest and imprisonment thereof, the Commissioner of Customs is to take an arrest warrant from the Magistrate for arresting the persons under the above said Section. When the proposed amendment to Section 104, the Commissioner of Customs is empowered to issue arrest warrant for the persons under the said sections too.¶

¶
Commentary:¶

¶
This expansion of powers under Section 104 of the Customs Act to the Commissioner shall yield undesired results. For example, an offense under Section 132 is a false declaration, which is punishable with an imprisonment. As on date, the Customs officer has to obtain the arrest warrant from Judicial Magistrate to arrest a person under Section 132. To obtain the arrest warrant under Section 132, the Customs officer has to demonstrate before the Judicial Magistrate that such offense under Section 132 has lead to evasion of duty and apprehension under Section 135, based on which the Magistrate issues arrest warrant who is committed an offence under Section 132, if he has satisfied to do so. With the proposed amendment to Section 104 this power to arrest a person under Section 132 is conferred to the Commissioner of Customs who can arbitrarily exercise such power to arrest a person und¶

noticee, who may either indulge in a mischief or flee from the proceeding, then the Department shall approach the Court of Justice, for attaching the property of such miscreant. Suitable provisions may be made to enable the Revenue to attach the properties with a judicial approval.

Mr. Nevergreen: I don't think it will be a fenceless provision that it can be so misused. The Revenue would definitely come with some definite regulations and parameters, whereby, the miscreants and hard-core evaders are only nailed. That's it or anything more?

Mr. Evergreen: Now to the climax! A new Section 154B has been proposed to be inserted to the Customs Act, whereby, the Central Government is empowered to publish the names of any person and any other particulars relating to any proceedings or prosecution under the Customs Act, in respect of such person, in such manner as it thinks fit. An Explanation is proposed to this vindictive Section which explains that, in case of a firm / company / association of persons, and then such publication would include the name of the partners, directors, managing agents, secretaries and treasurers, managers of the Company or the members of such association. The said Section also provides for an exclusion from publication, cases relating to any penalty imposed under the Customs Act, until the time of presenting an appeal to the Commissioner (Appeals) under Section 128 or an appeal to the Hon'ble Tribunal under Section 129A, as the case may be, and in cases where such appeal is presented, the time till such appeal has been disposed off.

Mr. Nevergreen: Oh! What a nice way to get popularity, without any expenditure!

Mr. Evergreen: No jokes please! This is a shameful proposition, whereby, the Revenue threatens to barge inside the human rights of an individual, which has to be condemned with will and heart. By this proposition, the Revenue shall publicize the name of the person / persons, during the any stage of proceeding, starting from the issuance of Show Cause Notice, except during the appeal period mentioned in Sub-Section (2) of this proposed Section. Even the Sub-Section (2), excludes such publication only till the time of filing/disposal of an appeal before the Commissioner (Appeals) / Honourable Tribunal. This funny proposition allows the Revenue to publicize the names and particulars, during the course of issuance of Show Cause

Notice, adjudication, appeals to the Revisionary authorities, appeals to the High Court and appeals to the Supreme Court. Further, as per the Explanation to this proposed Section, various persons including secretaries, treasurers and managers of the company are made vulnerable to this **"Most Wanted"** list, which needs to be condemned at the threshold. As this Section provides for publication of the names, in any manner, at any stage of the proceeding, there is every likelihood that the Revenue shall misuse this provision to coerce the victims, to suit their designs. Imagine the irreparable injury that could be caused to a person, due to such malign publication, without any conclusive proof or determination. Ultimately, if the case is decided in favour of the assessee, who will redeem the loss of face in the society and loss of goodwill in the market?

Mr. Nevergreen: Oh! No! That calls for a sheer disaster!

Mr. Evergreen: Dear brother, now tell me, whether the defamation suit is against me or...?

Mr. Nevergreen: !!!!!

Suggestion:

In stead of this menacing proposition a codified judicial process be identified, whereby, fly by in operators and hard grow factors are properly nailed. If, for any reason, the Department apprehends that the noticee may either indulge in a mis-chief or flee from the proceeding, then the Department may approach Court of Justice for attaching the property of such _____. Suitable provisions may be made to enable the revenue to attach the properties with a clout of judicial. Providing for an offense list provision to the revenue authorities will only make the situation further more chaotic.

Proposal:

The proposed amendment to Section 104, whereby the existing sub-section 1 is proposed to be substituted with new sub-section 1. By this new proposition, the Commissioner of Customs is empowered to arrest a person for any offense punishable under Section 132,133,135, 135A and 136. Earlier the Commissioner of Customs was when with the power to arrest only in cases where the offense punishable under Section 135. Even though, the other Sections like 132, 133, 135A and 136 provides for an arrest and imprisonment thereof, the Commissioner of Customs is to take an arrest warrant from the Magistrate for arresting the persons under the above said Section. When the proposed amendment to Section 104, the Commissioner of Customs is empowered to issue arrest warrant for the persons under the said sections too.

Commentary:

This expansion of powers under Section 104 of the Customs Act to the Commissioner shall yield undesired results. For example, an offense under Section 132 is a false declaration, which is punishable with an imprisonment. As on date, the Customs officer has to obtain the arrest warrant from Judicial Magistrate to arrest a person under Section 132. To obtain the arrest warrant under Section 132, the Customs officer has to demonstrate before the Judicial Magistrate that such offense under Section 132

has lead to evasion of duty and apprehension under Section 135, based on which the Magistrate issues arrest warrant who is committed an offence under Section 132, if he has satisfied to do so. With the proposed amendment to Section 104 this power to arrest a person under Section 132 is conferred to the Commissioner of Customs who can arbitrarily exercise such power to arrest a person under Section 132 without justifying that such offense has culminated into an evasion under Section 135. Further, there is no rhyme or reason as to why this power of arrest under Section 104 has to be extended to a revenue officer, by and large is revenue biased.

Suggestion:

This proposed amendment is unwarranted and let the power of arrest under the above said Sections be retained with the judiciary and not be extended to the revenue officers, whereby inviting gross misuse.