

## **BACK TO THE FUTURE**

**(By S. Jaikumar, Advocate)**

Last Friday, I met a Senior Advocate in the quadrangle of the Hon'ble High Court of Madras during the lunch hour. He was enquiring about the status of the Writ petition filed against the controversial Explanation inserted to Sec 65 (105) of the Finance Act, 1994, in the Hon'ble High Court of Madras. I was explaining to him that it was an Interim stay order for four weeks, which is valid till 3/3/2006. He immediately quipped, "Oh! March 3<sup>rd</sup>! So you need not apply for extension!" Surprised by his remarks, I asked him "Why, Sir?" He spontaneously replied, "Beware dear! It may be revalidated on the 28<sup>th</sup> Feb!" Even though on the surface, it appears to be on a lighter vein, I honestly feel that it is an expression of awe and despair about the on going trend of "revalidations", which is turning out to be a mockery of the administration, judiciary and the legislation and ultimately making all the citizens as hapless witness to this contemptuous but contentious ridicule!

In the Indian democratic triangle there are three vertices, namely, Legislature, Judiciary and Bureaucracy. Often, we all wonder, out of these three, which is the top vertex! The contest has always been between the Legislature, being the voice of the people and the Judiciary being the voice of God, and it appears that the Bureaucracy was never in the reckoning! But is it so? Here is an attempt to spot the real powerhouse, at least in the area of taxation!

"*Revalidation!*" The most torrid and horrid word in the world of taxation! First let us understand as to what is a "revalidation?" By the literal and legal meaning, "revalidation" means the re-establishment of the validity of a provision, from a past period. In general, it is a retrospective amendment to a law or a statute. In other words, by means of a "revalidation" the legislature shall make good the defects in the statute or law, retrospectively. This exigency for a "revalidation" may be due to a variety of reasons, of which, the poor drafting of our bureaucratic Babus is paramount. Before proceeding further, let us understand as to whether such "revalidations" done at a distant date to cover up the lacunae, is legal and proper and in consistent with the public policy?

All of us, have read, interpreted, and analyzed the celebrated judgement in the case of M/s Ujagar Prints & Others vs UOI {2002-TIOL-02-SC-CX}. Till date, the said judgement has been rated as the Holy Bible on the issue of job work valuation. But in this celebrated judgement, the Hon'ble Supreme Court has also held as under:

*"A Competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating in factors noticed in the declaratory-judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the Legislature - granting legislative competence - the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant.*

*Such legislative expedience of validation of laws is of particular significance and utility and is quite often applied, in taxing statutes. It is necessary that the*

*legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognized and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation."*

Thus the Apex court has emphatically approved the legal sanctity of the "revalidations". While approving the legality, the Hon'ble Supreme Court has also laid down the circumstances calling for such retroactivity as under:

*"In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1) (g), the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck-down by courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period etc."*

Having understood the concept and the elements of a valid "revalidation", now let us analyse two very important "revalidations" effected in the recent past. Remember Rule 57CC of the then Central Excise Rules (presently Rule 6 of the Cenvat credit rules 2004)? This Rule casts an obligation on the manufacturer of both dutiable and exempted goods, either to have a separate inventory and take credit only for dutiable goods or pay 8% (now 10%) on the sale price of the exempted goods. (It also provides for actual reversal of credit in certain specified commodities and transactions). The original Rule 57CC did not have any demanding provision in it, in case of non payment of the required 8% amount. The Hon'ble Tribunal in the case of M/s Pushpaman Forgings vs CCE, Mumbai-VII {2002 (149) ELT 490} had held that, as there is no recovery mechanism provided under the Act or the Rules to collect such 8%, the same is not recoverable. This ruling of the Tribunal was upheld by the Hon'ble Supreme Court {2003 (153) ELT A89 (SC)}. This is a serious legal defect which was neither foreseen nor intended. If this defect is allowed and accepted then the Rule itself would become a mockery and would defeat the intention of the legislation. This defect had all the ingredients spelt out by the Apex Court in the case of Ujagar Prints (*supra*) which needs to be remedied by way of a "revalidation". In the recent Budget 05-06, by way of clause 85 of the Finance Act, 2005, a retrospective amendment has been introduced to the erstwhile Rule 57CC and its successor Rules, wherein, appropriate recovery mechanism has been introduced to the relevant Rules during the relevant period of time. In effect, the defect in the said Rule was cured by the said "revalidation". Applying the ratio laid down by the Apex Court in the case of Ujagar Prints (*supra*), it is a pristine and classic example of proper and a valid "revalidation", even though a bit late. But as it is said, better late than never.

Having dealt with a valid "revalidation", let us see the other side of the coin. In the annals of automobile sector, the date 16/3/1995 is as good as (or as bad as) 6/8/1945, the date on which the deadly atom bomb was dropped on the Japanese city Hiroshima! By Notification 11/95-CE (NT) dated 16/3/1995, a new sub-rule 57F (4A) was introduced to the then Central Excise Rules, 1994, by which, the credit of duty lying unutilized on 16/3/1995, with the certain automobile manufacturers, was sought to be lapsed. This draconian sub-rule not only jolted the automobile sector but shook the confidence of the entire industry, for its thorough arbitrariness.

This unreasonable Rule was challenged before the Apex Court and the Hon'ble Supreme Court in the case of M/s Eicher Motors Limited vs Union of India {2002-TIOL-149-SC-CX} had quashed the said Rule on various grounds including esteemed legal principles. But the greedy Revenue, by way of clause 131 and 132 of the Finance Act, 1999 amended Section 37 of the Excise Act and also retrospectively validated Rule 57F(4A), thus overruling the ratio of the Hon'ble Supreme Court (*supra*). It could be well seen that, in this case, none of the ingredients set out in the ratio of the Ujagar case (*supra*) has been met out. When the Apex Court has struck down the Rule for its arbitrariness, based on well founded legal principles and not based on any defect in the statute, it was an appalling exhibition of the ugly revenue thirst. This abuse of the "revalidation" tool, in the above case, is a serious violation of the fundamental rights under Article 19(1)(g) of the Constitution and needs to be condemned with heart and will.

Now let us come to the moot question as to who is the real powerhouse in the tax administration? The Judiciary is out of the race, as they are the prime causalities of these "revalidation" tools! Coming to the Legislature, it's everybody's wisdom that the Hon'ble Members of the Parliament have much more serious business to concentrate than looking into such microscopic "revalidations" thus leaving the Bureaucrats as the lone player left in the fray. As already observed, bulk of the "revalidations" are effected to cure the defects in the statute caused by the loosely drafted laws by our beloved Babus of the North block (at least on taxation)! When such loosely drafted laws undergo the test of judicial scrutiny, they miserably fail and get quashed. Even after getting the beating from the judiciary, our beloved Babus hibernate on the issue for years. One fine day, suddenly awakening from the slumber, they propose and initiate a "revalidation" to cover up their blunders. Such "revalidation" proposal is silently presented among the piles of budgetary proposals which get ultimately enacted! In effect, the so-called Bureaucratic underdogs (when compared to the Legislature and the Judiciary), are the real powerhouse, who appear to have the combined strength of both the Goliath and David, with this menacing "revalidation" tool! Dear Netizens, Budget 06-07 is round the corner! Don't be surprised if my Senior's apprehension in the opening paragraph becomes a reality!

### **Before Parting...**

Leave alone the "revalidations!" The bureaucratic interventions using the mask of legislature in the quasi judicial administration is also worth a sword! Restricting the adjournments to three, in respect of the pending cases before the quasi judiciary and the Hon'ble Tribunals, without going into the reason behind such adjournments, is nothing but a strangle to the free and fair administration of justice which would only pressurize the judicial system. Similarly, the *suo moto* vacation of the stay granted by the Hon'ble Tribunal under Section 35 C of the Excise Act is nothing but a shameful teaser! Even though the Hon'ble Apex court has struck down the same in the case of CCE vs Kumar Cotton Mills Pvt. Ltd {2005-TIOL-42-SC-CX}, hundreds of miscellaneous petitions (with Rs.500/- as fees) are filed everyday in all the Tribunals, across the nation, seeking extension of stay! Oh! My dear learned mandarins, as it is said, "To (en) **act** is easy but to **think** is hard!"