

SENTENCE BEFORE TRIAL

(By S. Jaikumar & G. Natarajan, Advocates)

"Diwan Lagaan Singh Bahadur could not sleep properly for long as the new position was like a thorn bed! When he got promotion from Zamindar to Diwan he was literally in cloud nine, with lot of hopes and dreams! But as days passed, he felt the real vacuum in that post, as the new position was virtually powerless! Though it was a position of very high order, what is the purpose? During his earlier days, even as a Gumastha, he had so many powers vested with him that he had constant public interactions which made his livelihood purple! But now? No one comes to him but for his subordinates! He groaned that his new promotion has become a curse in disguise! This despair made him go wild and crazy that he wanted to do something immediately! Finally he decided to formulate a draconian rule and enforce it ruthlessly!"

Alert No. 1! This is not the title of the next movie of Actor Govinda- Director Rakesh Roshan combination, but a full page advertisement given by the CBEC on all leading newspapers across the nation, during the first week of January 2007! Of late, media advertisements have become a fancy for CBEC! We all witnessed irrelevant and hair splitting advertisements for service tax in the past! Towing the trend, now comes this "Most Wanted" advertisement, whereby, the CBEC has tried to terrify the entire nation with various draconian penal measures for certain irregularities, by the Notifications 30, 31 & 32/2006 CE (N.T), all dated 30/12/2006.

First let us understand what these Notifications are all about! Notification 30/2006 inserts a new Rule 12 CC in the Cenvat Credit Rules, 2004 whereby the Government has enabled itself to issue suitable notifications, for imposing various punitive measures (barring utilization of Cenvat Credit, suspension of registration, etc.) if misuse of Cenvat Credit Scheme is noticed. Similarly Notification 31/2006 has introduced Rule 12 AA in the Central Excise Rules, 2002, enabling the Government to issue suitable notifications, for imposing several punitive measures, if evasion / default in payment of duty is noticed.

In exercise of these powers *supra*, Notification 32/2006 has been issued to operationalise these draconian measures. Though the contents of this Notification is by now made by heart by all concerned, a capsule of the same is worth consuming, though not digesting!

- Details of cases where the punitive measures can be invoked are contained in this notifications, viz., removal without payment of duty, in correct valuation, irregular availment of Cenvat credit, etc. The amount involved in such cases shall be more than Rs.10 lakhs.
- The details of the facilities which can be withdrawn are also contained in this notification, viz., withdrawal of monthly duty payment facility, barring the utilization of Cenvat Credit and clearance under the supervision of officers for committing the specified acts for the second time.
- Procedural aspects. The investigating officer has to send a report in this regard to his Chief Commissioner / Director General in this regard, containing the recommendations. The CC / DG shall examine the proposal and also hear the assessee and finally send his report to the designated officer, i.e. the Member (C.Ex) of the CBEC, who will pass the orders under these provisions.

As per these provisions, extreme measures of withdrawing various facilities and imposing various conditions can be taken at the time of investigation itself. In other words, they can be ordered even before a show cause notice is issued for the alleged evasion of duty / mis-use of Cenvat credit. It is a common fact that only a fraction of the cases made out by the department stand up to judicial scrutiny. Though there could have been real evasion in some such cases, the department is losing the cases due to frivolous investigation and various other technical reasons. Need of the hour is an introspection in this regard to avoid such mishaps. Instead the panic stricken revenue has tried to camouflage their inefficiency by these proposed draconian restrictions at the time of the investigation itself, which needs to be condemned by all quarters, for its autocracy and absurdity along with patent illegality.

Further it is anybody's guess that the ongoing investigation and the later adjudication would be definitely influenced by this decision of the Member (C.Ex), CBEC. Tell us, today, is there any audacious subordinate officer available in the department who can dare to drop the investigation / allegations once His Highness Member is convinced of the ***prima facie offence*** and has already imposed these restrictions? Not even a hair pin in a haystack! That being the ground reality, would it not be an undue interference/influence in a quasi judicial function by the Member (C.Ex)?

Coming to the cardinal principles of natural justice, the situation is more pathetic! It is a settled cardinal rule of jurisprudence that whoever has heard the case only has to adjudicate the case! Here the Member (C.Ex) who passes the order will NOT hear the parties in the proceedings but curiously, the Post Master General, sorry, the Director General / Chief Commissioner, whose role is merely to forward the proposal to our beloved Member will hear the party and based on such couriered data His Highness would pass the orders! *Lo and behold dear brethren!* This order of our mighty Member has no statutory appeal! Mockery of justice would be an ordinary phrase to describe this state of affairs.

Punishing the culprit is never a grouse. But punishment should be the culmination of a due judicial process. It is the fundamental legal principle that, no one shall be condemned unless he is proved guilty. Even a person who has committed a broad day light murder can defend himself, saying that he was insane, under the influence of liquor, self defence, etc. It is also a proverbial saying, (many film heroes have echoed in million films) that, "Hundred culprits may escape but not a single innocent shall be punished!" The judicial process in our country has meticulous provisions to govern a fair trial, admit evidences and administer justice. Further it is considered to be one of the best and time tested! When the whole nation look upon the judiciary as Saviours there is one segment who always disregard it, because of their sheer greed for supremacy and autocratic power and the above Notifications are the latest testimony to their ugly thirst! These Notifications are a beginning to the barbarian era of "*sentence before trial*" which needs to be nipped at bud or the nation will witness many heads being chopped by this Hitler's guillotine.

Notwithstanding the above, it is axiomatic that any penal measure can only be prospective. In other words, these penal measures can be taken only if the alleged offence is committed after the issue of these notifications. But, the over zealous Board has already given retrospective effect to these provisions, throwing all norms of justice and judicial pronouncements to wind.

Before Parting...

Let us look at an example! Say the punishment for rape is seven years of rigorous imprisonment. Knowing well about the punishment, Mr. X ventures to commit it and consequentially now undergoing the imprisonment! If the law is so amended today that the said offence is punishable with a death sentence, can he be hanged tomorrow? If he had known that the penalty for the crime is death penalty, at the time of committing it, he might not have ventured it at all! At least, does this simple logic appeal to you, *Diwanji!*