Mala-fides – Whether a property of Assessee only?

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1.0 Background

Being citizens of the world's largest democracy, we enjoy certain fundamental rights. The fundamental rights *inter-alia* protect the citizens against injustice and ensure equality and equal protection of law.

In this article I would like to highlight how the Income-tax Act, 1961 as it stands at present, on the one hand pampers the errant authorities and does not provide a slightest punishment for the mala-fides done by them. On the other hand, it provides for serious punishment to the innocent taxpayers, without any fault on their part. With this idea, this article has been titled as 'Mala-fides – Whether the property of assessee only?'

These situations occur very regularly, like non-acceptance of binding orders, high-pitched assessments, not granting stay in genuine cases, collecting evidences adopting non-genuine practices, not conducting fair proceedings and so on. These circumstances I shall deal in the first part of my article.

It is rightly said that aggression is the best defense. Further in this article, I would like to suggest some remedies or methods to defend the assessee or counter-attack in such situations.

Before I discuss the first part, let us recall some of the provisions of different legislations: -

1. Article 14 of the Constitution ensures equality of law and equal protection of law to every citizen. Also there would be no discrimination on the basis of religion, race, caste, sex or place of birth. Article 18 extends the principle of equality and states that there shall be no title conferred by State.

   Article 39A states that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity. Article 50 requires separation of judiciary from the executive.

2. Article 265 states that no tax shall be levied except by the authority of law. Article 300A states that no person shall be deprived of his property except by the authority of law.

3. Under civil and criminal laws, the burden of proof generally is on the person who wants to move the court. The onus of proof can however be shifted by express or implied intention.

4. Existence of mens-rea is of essence to prove an offence. Mens-rea comprises of proving intention, planning, preparation, commission and damage to the victim. Generally under law, the burden of proving mens-rea is on the prosecution. If the prosecution fails, the

defense wins the battle. However, the onus to prove may be shifted under the law and the defense may be asked to prove that they are not guilty.

5. Absolute and unlimited discretion vested in the Rulers in ancient times. By exercising uncontrolled discretion, punishment and acquittal was given based on whims and fancies of the rulers. In such discretion the ordinary man always used to suffer.

   However, as a blessing in disguise of the British Rule, the democracy of India is based on Rule of Law and thus it shall be anticipated that the discretion should be exercised judiciously and in accordance with the principles of law. Unfettered powers are not available to authorities.

2.0 Assessee's side - Cost of ~~non~~-compliance

Benjamin Franklin compared Taxes with Death by stating *'There are only two certainties in the world - Death & Taxes'*. To worsen the situation, Tim Borten stated *'We will always have death and tax, but death doesn't get worse every year - taxes do'*. The Income-tax Act, 1961 provides for two categories of provisions for saddling the assessees' for their own fault or for the defauly of others.

1. **Shifting of Onus on Defense: -** The first category of provisions is where the onus of proving that there was no mens-rea has been shifted on the assessee, who is the defense. These provisions are contained under Chapters XXI and XXII dealing with penalty and prosecution. Explanation 1 to section 271(1)(c) as well as other penal provisions stating that penalty 'shall' be levied and exception provided in section 273B and also section 278E may profitably be referred in this regard.

   In a recent decision of *Jayalalitha vs ACIT (2007) 288 ITR 225 (Mad.)*, the constitutional validity of section 278E has been upheld by stating that the parliament may shift the onus of proof on the defense.

   Penalty proceedings are quasi-criminal proceedings and prosecution proceedings are purely criminal in nature. For serious offences, the burden has been shifted on accused (assessee) to prove that he was innocent. If he fails for any reason whatsoever, he is held to be guilty. Can such a provision be constitutionally valid which on the face of it is unjust?

2. **Levy without reasonable cause: -** Under the second category of provisions, are those where the law does not provide an opportunity to the assessee to prove that the default was out of a reasonable cause. Provisions of section 201 as well as section 234A-C may be profitably referred. In various cases, one comes across situations where due to one reason or other, he is unable to comply with tax laws. Financial instability, ignorance, no fault on the part of an assessee, mis-interpretation of complex provisions, default inspite of taking reasonable care, wrong advice are very routine causes for non-compliance of provisions. However, the Act does not give this comfort to the assessee. CBDT has relaxed the requirement only in a handful cases. Thus the final outcome is that whatever is the

reason for default, the assessee is liable. The provisions have been held to be constitutionally valid.

3.0 The Other side – IT Department

1. The Income-tax Act, 1961 provides levy of penalty and fines on assessees' for various small and genuine defaults also, however, no penalty is provided under following circumstances: -

(a) Income-tax authorities are **quasi judicial authorities** and shall act independently. They shall form their own opinion, without any bias or prejudice. However, often we see that high-pitched assessments are made on irrational logics, non-existent facts and purely with a biased mind. As the assessment is made, the department starts pinching for recovery. The final outcome of the assessment may come in favour of assessee at a later stage but assessee has to bear the harassment. The Income-tax Act, 1961 does not establish any accountability on such over-zealous officers. On the contrary, there is protection given to such officers' u/s. 293, which I shall discuss later.

(b) The Income-tax authorities are **public servants**. As public servants, their duty is to extract black money and to bring it to tax. We are all aware that the department has been unsuccessful in its efforts in the past. One of the prominent reasons is the inaction of the officers. The lethargic officers are not brought under scanner. No accountability is established on such officers.

In *Banke Bihari Lal Agrawal vs UOI (1997) 226 ITR 498 (Raj.)* the High Court held that it is the personal responsibility of the officers to see that the State Revenue is not lost for any of his act. If the loss of revenue is caused by inaction, he can be made personally responsible.

(c) The Income-tax Act, 1961 empowers the IT authorities with various **discretionary powers** under the Act. In many cases, one notices that the discretion is not exercised judiciously. The assessee is made to suffer the harassment. There is no provision to safeguard assessee against such harassment.

(d) The assessee is required to do everything in a time-bound manner. However, **time bound compliances** are not required under IT Act from the authorities in many cases. Some examples are granting of refunds, registration u/s. 12A, approval under various sections like 10(23C), 10A, 10B, 10C, 35 etc., giving appeal effect, disposing off applications u/s. 154 and so on. No safeguard is provided against such inaction.

2. Being public authorities the IT authorities are safeguarded against acts done or intended to be done in "**good faith**" u/s. 293 of the IT Act. In such a case, no prosecution lies against government and its officers in Civil Court. Under the General Clauses Act, 1897 any act is said to be done in good faith if it is done honestly, whether it is done negligently or not. Exercise of 'due care and attention is not required. Thus the Income-tax Act, 1961 does not intend to punish a careless officer. Further, burden of proving that the act was done in bad faith by the department, lies on the assessee. It will be on the assessee to prove mala-fide intention on the part of a particular authority. With the complex provisions of the act, it would be very easy for any officer to escape himself.

Here it is pertinent to note another section 293A. This section bars the application of section 360 of the Code of Criminal Procedure, 1973, and the Probation of Offenders Act, 1958 for offences committed under this Act. Thus the assessee when he is deemed guilty of default cannot even request for probation. However, when the errant officer is prosecuted for mala-fide act, he would be prosecuted not for offence under IT Act, but under Civil and Criminal laws. Therefore, it seems that he may claim probation.

Thus in my view, the overall designing of these provisions is contrary to Article 14.

To end this part of the discussion, I would like to say that *no person or authority should be allowed to sleep under the umbrella of inconsistent positions.*

4.0 Whether any Solution?

We now know that the act punishes the assessee for bona-fide and non-intentional causes, but gives a shield to the defaulting officers.

This problem is commonly faced and felt by all the tax-payers. Not much of research has been done on the subject as to what can be done if one faces such problems. The following are the probable solutions which one may think of in the present legal system: -

1. ***With-cost orders:*** **-** It is a known fact that every appellate authority has inherent powers to award costs. In all cases relating to the arbitrary assessments, assessments made with biased mind, high-pitched assessments or without following principles of natural justice or made in undue haste, the assessee while filing the appeal should, along with challenging the additions made, also take a ground praying for order to be passed with cost and also for such consequential remedy as the appellate authority deems fit. Further, submissions should be made in respect to passing with-cost orders. It is important to note that awarding costs is simply a compensation for the loss of working capital, time and resources; which if could have been used in business would have yielded profit.

   In the long run, even in a handful cases also if orders come out to be passed with cost, it would create a panic amongst the erring officers. The subsequent step to this is the recovery of cost from the salary of the officers.

   Some of the examples of orders passed with cost are: -

   1. The golden example of this is the decision given in the case of *Sandvik Asia Ltd. vs CIT 280 ITR 643* where the Hon'ble Supreme Court directed that the interest on delayed refunds should be granted. The Hon'ble Supreme Court considered this interest to be compensation in nature. Further passing strictures, the copy of the orders were directed to be given to the Hon'ble Finance Minister for suitable action against lethargic officers, for whose inaction the assessee had to suffer financially and mentally.

   2. In the instant case, search u/s. 132 was held to be illegal and with cost orders had been passed against officer. *Sardar Parduman Singh vs UOI (1987) 166 ITR 115 (Del.) SLP Dismissed (1987) 168 ITR(St.) 3.*

   3. In *Rudul Sah vs State of Bihar AIR 1983 SC 1086,* while directing the State to compensate the assessee, the Supreme Court made the following observations: -

"Article 21 of the Constitution which guarantees the right of life and liberty, will be denued of its significant content if the power of the Supreme Court were limited to passing order of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental right cannot be corrected by any other method open to the judiciary adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of the public interest and which present for their protection the powers of the State as their shield."

4. In yet another decision, the *Rajasthan High Court in Chiranji LAl Tak vs UOI 252 ITR 333 (Raj.)* held that it is not a luxury and/or amusement or entertainment to come to Courts. The petitioner was forced to file writ petition because notices issued by departmental authorities were illegal. Although the notices were subsequently withdrawn, huge cost was paid to advocate. Thus the amount was to be paid by the respondent.

2. ***Plaint in Civil Court: -*** The provisions of section 293 have not been used much. The provisions of section 293 as discussed above make it clear that the authorities may be liable for mala-fides. The person aggrieved may go to a Civil Court and charge the officer. Whatever may be the final outcome of the trial at the Civil Court, there are two benefits of such plaint.

(a) It is said that the fear of death is more painful than the death itself. If such claims are lodged at a large scale, it would automatically act as a check, and the authorities will start functioning judiciously. In some of these trials, the outcome may of course be in favour of the assessee.

(b) There is also a physiological aspect of looking at this. When a plaint will be lodged, the authorities will have to go through the rigors and pains for attending their case before the Civil Court. The point which I want to make is due to stepping in the shoes of assessee, the officers may have a more sympathetic view for the assessee.

Another very important aspect of section 293 is that although it bars jurisdiction of Civil Court, however, the civil court will have jurisdiction where the proceedings are without jurisdiction. *Shiv Kumar Chadha vs Municipal Corporation of Delhi (1993) 3 SCC 161 (SC); Sardara Singh vs Sardara (1990) 4 SCC 90 (SC).* Very often, we challenge the jurisdiction of the proceedings more so in reassessments, revision, initiation of search etc. At the assessment stage the validity of action would be upheld is known to all of us. However, only at the later stage, when the pressure of demand is harping on the assessee, the validity of jurisdiction is decided. In such circumstances, the Civil Courts having independent existence may be called for deciding validity of action. Civil Courts may be called for deciding the question of validity even at the stage of recovery of demand. *ITO vs Miyya Pillai (1965) 55 ITR 84 (Ker.)*

In a survey case, the Survey party abused the power of survey, obtaining signature of assessee without allowing him to read the contents of document thereof and also not allowing the customers at shop to leave the shop, the court held that this was a case u/s. 342/427/384/465/471 r/w. section 120B of the Code of Criminal Procedure, 1908 and the

officer concerned was ordered to face the trial. *Hans Raj Chhabra vs Mukesh Mittal, asst. Commissioner (1994) 77 Taxman 273.*

3. Right to Information Act, 2005 has come out as a silver lining in the dark clouds. With the effective use of RTI one may obtain information concerning the department. One may ask for inspection of work of any authority, inspection of documents, inspection of records, get refund (credit for the same goes to BCAS) and do the unthinkable. One has to put the questions in an intelligent manner and use the information effectively and the Act may do miracles.

   To illustrate, one may ask as to in how many cases strictures have been passed against AOs and what departmental action has been taken, ask for pending cases of corruption, negligence, mis-behaviour during survey/ search, ask for persons responsible for not trapping tax evasion and what actions have been taken against them. Further, what efforts are made for safeguarding assessee against mala-fides and arbitrariness, how such errant officers are identified etc.

4. ***Writ:*** **-** Writ petition is another quick remedy which although has been used in Income-tax cases, but has not very effectively.

   Writ petition lies when there is violation of fundamental rights, exercise of powers without jurisdiction, acts are mala fide, where the orders are arbitrary or principles of natural justice are not grossly complied. Ordinarily the writ court does not interfere where there is alternative remedy, yet the writ court would interfere in the aforesaid cases. *Gujrat Gas Co. Ltd 245 ITR 84 (Guj); Asst. CIT vs Jayanti lal Patel (1998) 244 ITR 500 (Raj.); State of Assam vs Banshidhar Shewbhagavan & Co. (1981) 4 SCC 283; Jagdambika PRatap Narain Singh (Raja) Vs CBDT (1975) 100 ITR 698 (SC); Grindlays Bank Ltd. vs ITO (1980) 122 ITR 55 (SC) and L. Hirday Narain Vs. (1970) 78 ITR 26 (SC)* may be profitably referred to.

   Doctrine of Wednesbury principle (Rule of legitimate expectation) may be referred to here, which states that a person may have a legitimate expectation of being treated by an administrative authority in a certain manner. Where the action is arbitrary, unusual and unexpected, the action may be challenged. *see Associated Provisional Picture Houses Ltd. vs Wednesbury Corporation (1948) 1 KB 223; Ketan (KP) vs UOI (1969) 1 SCR 833.*

5. ***Departmental Inquiry:*** **-** The aggrieved assessee may also lodge a compliant with the CBDT/ Finance Ministry against such erring officers, requesting for a departmental inquiry against such officers. This tool, if used along with Right to information, and writ petition may press on the CBDT/ Finance Ministry to take appropriate action. If no action is taken, one may apply under RTI Act asking what action has been taken till now, why no action is taken, who are officers responsible for not taking action, if departmental enquiry is conducted- what were the findings etc. Based on the reply of CBDT/ Finance Ministry, the assessee may think of suitable action including writ or Public Interest Litigation.

6. ***Contempt Petition:*** **-** Officers acting under the Act are bound by orders of Higher Authorities including Courts and Tribunals. Quite often we notice that the officers do not take into consideration the decisions of Higher authorities, even though if they are specifically pointed out. Under the Contempt of Courts Act, 1971, not following the order of Court with a mala-fide intention amounts to Contempt of Court.

Thus in such circumstances where binding decisions are not followed, the assessee may file a contempt application to the High Court. Two decisions are important in this regard: -

(a) In the celebrated decision of *Kamlakshi Finance Corp. AIR 1992 SC 711*, while deciding that the order of ITAT is binding, the Hon'ble Supreme Court held that not following the order would border contempt of court.

(b) In a recent decision in *Mahindra & Mahindra Ltd. vs AO, TDS Nashik (W.P. No. 2164/ 2007 dt. 02.04.2007*, in a stay matter, the AO did not follow the guidelines for granting stay as given by the High Court in KEC International Ltd. 39 ELT 505 Bom. The Bombay High Court issued Contempt notice to the AO for not following those guidelines.

5.0 Recommendations of Chillah committee

As early as in 1994-94, the Tax Reform Committee under Shri Rajah J Chelliah made many suggestions for establishing accountability and also provide further measures so that such assessments are not made. The recommendations although not implemented are relevant in the present scenario. They read as under: -

"4. **Fear of audit –** this fear of audit leads to a tendency to (i) over assessment and (ii) err on the side of the revenue.
This fear of audit leads the Department to issue demand notices even when the Board thinks or decides that the officer concerned has not erred.
An AO should be protected and defended, if he has obeyed the instructions of the Board and followed case laws, even if the audit has objections against the decision.
No officer should be blamed or given an adverse remark merely because of such objections.

5. **Accountability of the AOs –** At present, an officer who habitually overassesses (or threaten to over-assess) and collects an illegal tribute apparently does not suffer in any way. Even if the additional demands raised by an officer are routinely held invalid by the appellate authorities, the officer can be unconcerned, since there is no commensurate punishment.
The AOs should be accountable for their actions.
If the percentage of demands not upheld by the Tribunal, is higher than a reasonable figure, say 50 %, the officer should be given a black mark and reprimanded.
Adverse remarks should be given to the officers (a) who fail to complete the assessments in time (b) who fail to widen the base (c) who habitually make over assessments and (d) who habitually make under assessment.
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10. **Need for training –** There is lack of proper and adequate training of officers. The AOs epecially those holding senior post should be trained to keep in mind the broader social and economic aspects and the role of taxation in the economic developments and should be made aware of changing international practices."

6.0 To conclude

Although principles of good sense, morality, equity and logic may not sound good in respect to Income-tax provisions and what has to be seen is whether the income is liable for tax. However, the income-tax authorities have not been exempted from these principles. The authorities should

adopt these principles so that the saying of the Legendry philosopher Plato goes wrong who had said :

'When there is an income tax, the just man will pay more and the unjust less on the same amount of income.'