The Return of the Dragon' in Service Tax! – Mar 9, 2008

'The Return of the Dragon' in Service Tax!

MARCH 9, 2008

By S Sivakumar, CA

I must thank my esteemed friends, K S Naveen Kumar, Advocate and Madhukar Hiregange, Chartered Accountant, highly respected for their indepth knowledge of indirect tax, for coining these catchy words in their seminar on the Budget proposals held recently in Bangalore, to denote the re-introduction of Section 72 in the Finance Act 1994 which effectively brings back the 'Inspector Raj' in the indirect tax regime.

Let's look at Section 72 of the Finance Act, as proposed to be amended, reads as follows :

72. If any person, liable to pay service tax,—

(a) fails to furnish the return under section 70;
(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.'

The provisions related to 'Best Judgement' are not new to the service tax law, though. In fact, when the service tax levy was first introduced in 1994, the then existing Section 72 of the Finance Act, 1994, read as follows:

Best judgment assessment. 72. — If —

any person fails to make the return required by any notice given (a) under sub-section (2) of section 70 and has not made a return or a revised return under sub-section (3) of that section, or

any person having (b) made a return fails to comply with all the terms of a notice issued under sub-section (1) of section 71, or the Central Excise Officer is not (c) satisfied with the correctness or the completeness of the accounts of the assessee,

the Central Excise Officer, after taking into account all the relevant material which he has gathered, shall, by an order in writing, make the assessment of the value of taxable service to the best of his judgment and determine the

sum payable by the assessee or refundable to the assessee on the basis of such assessment.

It will do us good to remember that the concept of Best Judgement Assessment, as prevailing in the statute books in mid 1990s has always coexisted with the concept of 'Assessment', which was contained in Section 70 of then prevailing Finance Act, 1994. This Section 70 dealing with Assessment, as it stood in 1994 read as follows:

Assessment. 71. For the purposes — (1) of making an assessment under this Chapter, the Central Excise Officer may serve on any person, who has furnished a return under section 70 or upon whom a notice has been served under sub-section (2) of section 70 (whether a return has been furnished or not), a notice requiring him on a date therein to be specified, to produce or cause to be produced such accounts or documents or other evidence as the Central Excise Officer may require for the purposes of this Chapter and may, from time to time, serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

The Central Excise Officer, after considering such accounts, (2) documents or other evidence, if any, as he has obtained under sub-section (1) and after taking into account any relevant material which he has gathered, shall, by an order in writing, assess the value of taxable service and the amount of service tax payable on the basis of such assessment.

The Section 72 underwent thro' many amendments and in 2001, the powers of best-judgement were taken out of the Superintendents and given to the Assistant and Deputy Commissioners of Central Excise. Recognizing the concept of self assessment, Mr Chidambaram deleted Sections 71 and 72, to the relief of the industry, in the 2004 Finance (No.2) Act, only to bring back the dreaded Section 72 this time around. Section 72 makes a grand comeback, with a renewed vengeance, to haunt the industry, in as much as, the powers of the best judgement are now vested with the Superintendents and upwards.

The added tragedy is that, the new Section 72, as proposed to be amended, has undergone a very important change, though. This new Section talks about the powers of the Central Excise Officer to do a best judgement when an assessee, having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder. Now, who will determine if the assessee has properly 'assessed' the service tax, when there are no provisions in the law related to 'assessment'? The only assessment that is now available in the Finance Act 1994 is 'self assessment'. And, more importantly, where can one have the concept of 'best judgement assessment' where there is no concept of 'assessment' in the first place?

At least, in the late 1990s and early 2000s, Section 72 dealing with 'best judgement assessment' and Section 71 dealing with ' assessment' co-existed, as aforesaid. One can see some fundamental logic in the co-existence of the two Asura Brothers. We had thought that both the Asuras had been killed, when the Finance Act of 2004 deleted these two Sections. Not, the more powerful among the Asura Brothers

seems to have made a great comeback from the gallows, as it were, with more deadly weapons.

Needless to state, the new Section 72 is clearly obnoxious and can result in a lot of harassment for the industry and especially for the 'soft ' industry comprising of the IT and services sector. Given the fact that Section 72 is open ended, any Superintendent of Service tax / Central Excise can now walk into any corporate's office and do a 'best judgment ' assessment of any tax payer at any point of time and for any number of times, resulting in unreasonable and frivolous tax demands. The introduction of Section 72 makes a complete mockery of the 'self assessment' system that is in vogue over the last few years.

One last word, though. Where is the justification for the FM to bring in this draconian section, at a time when the service tax collections are booming, confirming to large scale compliance by the industry. The existing provisions related to dealing with cases of under payment of service tax and other noncompliance with the law are already well established with the Department authorized to issue Show Cause Notices and to follow up on the adjudication process. At a time when the industry is justificably feeling that the Department is going over board on the issuance of SCNs, if the decisions given by the various benches of the CESTAT are any indication, the new development involving introduction of Section 72 is bound to increase the harassment.

Mr Chidambaram repeatedly talks of an efficient and friendly tax administration which would work with little harassment to the tax payers. This is what he does to the industry which has been largely complying with the tax provisions and been filling the Government coffers, year after year.

The Industry Associations would do well to ask for the complete scrapping of this obnoxious Section 72, for their own sake.

Naveen Kumar and Madhukar Hiregange couldn't have thought of a more appropriate phraseology to denote the re-birth of Section 72, perhaps.