

Clause 20 and Clause 33: (Provisional Attachment to Protect Revenue in certain cases)

51. Clause 20 of the Bill reads as under:

After section 28B of the Customs Act, the following section shall be inserted, namely:--

"28BA. Provisional attachment to protect revenue in certain cases.--(1) Where, during the pendency of any proceeding under section 28 or section 28B, the proper officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Customs, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 28 or sub-section (2) of section 28B, as the case may be, in accordance with the rules made in this behalf under section 142.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under subsection (1):

Provided that the Chief Commissioner of Customs may, for reasons to be recorded in writing, extend aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:

Provided further that where an application for settlement of case under section 127B is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 127C is made shall be excluded from the period specified in the preceding proviso."

52. Clause 33 of the Bill relating to the Central Excise Act reads as under:

After section 11DD of the Central Excise Act, the following section shall be inserted, namely:--

"11DDA. Provisional attachment to protect revenue in certain cases.--(1) Where, during the pendency of any proceeding under section 11A or section 11D, the Central Excise Officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Central Excise, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 11A or sub-section (2) of section 11D, as the case may be, in accordance with the rules made in this behalf under section 142 of the Customs Act, 1962(52 of 1962).

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

Provided that the Chief Commissioner of Central Excise may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:

Provided further that where an application for settlement of case under section 32E is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 32F is made shall be excluded from the period specified in the preceding proviso."

53. The Background Note of the Ministry on the provisions of Clause 20 and Clause 33 reads as follows:

“Often, after the proceedings for evasion of duty are initiated against an importer/ exporter/ assessee, he alienates his property by way of creating encumbrance or by sale or transfer. By the time the proceedings are completed, no property or assets are legally available with the defaulter for effecting recoveries of dues. This creates serious handicap before the Government and manipulative defaulters contrive to thwart the recoveries of dues.

To remove the aforesaid situation, a new provision is proposed to be inserted to enable the Government to provisionally attach the property belonging to such offenders during the pendency of proceedings relating to the determination of Customs/Excise duties evaded. The proposed provisional attachment may be done only with the previous approval of the Commissioner of Customs/Central Excise and it shall be valid only for six months. However, in suitable cases, the Chief Commissioner of Customs/Central Excise may, for the reasons to be recorded in writing, extend the aforesaid period subject to the condition that the total period of extension shall be limited to only two years.

Such a proposal is in line with the similar provisions already contained in Section 281B of the Income Tax Act 1961.”

54. An expert, in his written comments on the amendments, stated that the provisions are repugnant to Principles of fairness and natural justice; that most of the cases are settled in favour of the assesseees and in case of companies with manufacturing facilities, the proposed provisions may hamper the manufacturing operations, which may impact adversely on excise revenues in the event of stoppage of production. Similar views were expressed by other interested bodies as well.

55. On the point that the concept of provisional attachment of property before adjudication was repugnant to the principles of fairness and natural justice, the Ministry, when asked to comment, replied as under:

“Provisional attachment is resorted to only after the proceedings for evasion of duty are initiated against an importer or exporter to ensure that he does not alienate such property by way of creating encumbrance or by sale or transfer. This provision can be resorted to only with the previous approval of the Commissioner of Customs/Central Excise, by an order in writing and in respect of the property belonging to the person to whom notice is served under sub-section (1) of section 28 / sub-section (2) of section 28BA. This shall be valid only for six months period and only in suitable cases, the Chief Commissioner of Customs/Central Excise, for the reasons to be recorded in writing, can extend the aforesaid period subject to the condition that the total period of extension shall be limited to only two years. Hence the power of provisional attachment is to be exercised with adequate care and caution at senior level and is proposed to be resorted to only in deserving cases to protect the interests of revenue. Further, the procedure relating to actual attachment of property envisages following of the principles of natural justice by issue of notice of attachment to the assessee as prescribed under section 142 of the Customs Act, 1962. Hence it can be said that principles of fairness and natural justice will be followed even for exercising the powers of provisional attachment of property.”

56. The representatives of the industry expressed the concern that the provisions relating to provisional attachment of property can be used by junior officers to harass the industry by the power given to them to issue show cause notice. Further, they felt that attachment of movable property may lead to closing down of the business. As regards the similar provisions contained in the Income Tax Act, providing for provisional attachment of properties, it was pointed out to the

Committee that the interaction between the industry and the Customs and Central Excise Officers was more frequent and hence would lead to harassment.

57. When asked to furnish data relating to the success ratio on settlement of litigations involving the Customs as well as the Central Excise Departments, the Ministry furnished the following information:

“The expert group set up by the Department collected relevant data from **Customs field formations** for the period 1998-99 to 2001-02. The range of success ratio at various appellate levels is indicated below:

Sl. No.	Appellate Authority	Success Ratio
1	Commissioner (Appeals)	41% - 45%
2	Tribunal	32% - 49%
3	High Court	51% - 66%

The data for the later period 2004-05 (upto December 2004) indicate the following:

Sl. No.	Appellate Authority	Success Ratio
1	Commissioner (Appeals)	33%
2	Tribunal	58%
3	High Court	56%
4	Supreme Court	60%

The C&AG in its report no. 11/2003 pertaining to **Central Excise and Service Tax** highlighted *inter-alia* the poor success ratio of the Department in defending its cases. This conclusion was arrived on the basis of sample study by audit of 29 commissionerates for the period 1998-99 and 2000-01. The expert group set up by the Dept collected relevant data from 64 Central Excise commissionerates for the period 1998-99 to 2001-02. The range of success ratio for the above four year period at various appellate levels is indicated below:

Sl. No.	Appellate Authority	Success ratio
1	Commissioner(Appeals)	37%- 47%
2	Tribunal	30% -32%
3	High Court	51%-65%
4	Supreme Court	29%

De-novo orders only remand the matter for a fresh look by the adjudicating/appellate authority and are not to be taken as adverse decisions.

The data for the later period 2004-05(upto December 2004) indicate the following:

Sl. No.	Appellate Authority	Success ratio
1	Commissioner (Appeals)	41.2%
2	Tribunal	37.4%
3	High Court	53%
4	Supreme Court	29.5%

58. Asked to detail the means by which the concerns expressed from various quarters on preventing harassment, ensuring that manufacturing activities were not hampered etc., could be addressed, the Ministry responded by *inter-alia* proposing as follows:

“It is emphasized here such attachment will not hamper the manufacturing activities. The business activities of the assesseees will carry on in the normal fashion. The Government will only provisionally attach the property so that the evaders cannot alienate or create encumbrances by way of sale or transfer of the property.”

“....In order to ensure that there is no harassment to the assesseees, the Government proposes to issue administrative instructions that the value of the property attached will be equal to the duty liability only. The Government will attach only the immovable property and only if the duty liability is not covered, then the movable property of the company will be provisionally attached. The personal property of the proprietor/Directors will not

be provisionally attached on any account. As regards the initial order of provisional attachment, it is proposed that the Commissioner will order such attachment only after the receipt of a report from the jurisdictional Deputy/Assistant Commissioner justifying the reasons for seeking provisional attachment and duly certified by the controlling Additional/Joint Commissioner. It is envisaged that the report will be in the nature of a speaking order giving the reasons, backed by sufficient evidence to justify such provisional attachment.”

59. The Committee note that though the proposal to incorporate provisions enabling for provisional attachment of property in the Customs as well as the Central Excise Acts is akin to the existing provisions under the Income Tax Act, serious apprehensions and misgivings have been expressed on this count. The apprehensions expressed, particularly by the representatives of the Trade and Industry include, the adverse affect the move may have on business activities of manufacturing units and the possibility of harassment in the hands of tax officials owing to enhanced powers.

60. The Committee's questioning on the means by which such concerns are to be addressed evoked the response from the Ministry that administrative instructions would be issued to effectively address the apprehensions expressed. As informed by the Ministry, the administrative instructions would clearly stipulate that the Commissioner of Customs/Excise would order attachment of property only upon receipt of a report from the jurisdictional Deputy/Assistant Commissioner, which would be in the nature of 'speaking order' detailing the reasons, evidence, and justification for the provisional attachment. Also, the value of the property attached would be equal to the duty liability only; the possibility of attaching moveable property would be considered only if the duty liability is not covered by attaching the immoveable property; and the personal properties of Directors/Proprietors would not be provisionally attached on any count. The Government have also expressed in clear terms that the move 'will not hamper the manufacturing activities' and 'the business activities of the assesees will carry on in the normal fashion'.

61. The Committee recommend that apart from ensuring proper usage of the provision, appropriate disciplinary action should be initiated against such tax officials who may be found to exercise the proposed powers frivolously and without sound reasons.

Clause 24 (Insertion of new section 114AA)

62. Clause 24 of the Bill reads as follows:

After section 114A of the Customs Act, the following section shall be inserted, namely:--

"114AA. Penalty for use of false and incorrect material.--If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

63. The information furnished by the Ministry states as follows on the proposed provision:

“Section 114 provides for penalty for improper exportation of goods. However, there have been instances where export was on paper only and no goods had ever crossed the border. Such serious manipulators could escape penal action even when no goods were actually exported. The lacuna has an added dimension because of various export incentive schemes. To provide for penalty in such cases of false and incorrect declaration of material particulars and for giving false statements, declarations, etc. for the purpose of transaction of business under the Customs Act, it is proposed to provide expressly the power to levy penalty up to 5 times the value of goods. A new section 114 AA is proposed to be inserted after section 114A.”

64. It was inter-alia expressed before the Committee by the representatives of trade that the proposed provisions were very harsh, which might lead to harassment of industries, by way of summoning an importer to give a ‘false statement’ etc. Questioned on these concerns, the Ministry in their reply stated as under:

“The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported but papers are being created for availing the benefits under various export promotion schemes. The apprehension that an importer can be summoned under section 108 to give a statement that the declaration of value made at the time of import was false etc., is misplaced because person summoned under Section 108 are required to state the truth upon any subject respecting which they are being examined and to produce such documents and other things as may be required in the inquiry. No person summoned under Section 108 can be coerced into stating that which is not corroborated by the documentary and other evidence in an offence case.”

65. The Ministry also informed as under:

“The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes.”

66. The Committee observe that owing to the increased instances of wilful fraudulent usage of export promotion schemes, the provision for levying of penalty upto five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The Committee, however, advise the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment.

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[MAJ. GEN. (RETD.) B.C. KHANDURI]
Chairman,
Standing Committee on Finance