

PERC'S TRANSPARENCY PUT TO THE TEST

The recent decree entered by the Commercial High Court of the Western Province, in Case No. H.C. (Civil) 145/97(1), ordering Tawakkal Ltd, a company incorporated in Pakistan, to pay Puttalam Cement Co, Ltd, a company incorporated in Sri Lanka, a sum of Rs. 900 million together with interest thereof Rs. 455.2 million, amounting to a total of Rs. 1,355.2 million had been dealt with.

In the said case, Puttalam Cement Co. Ltd, had sued Tawakkal Ltd, Karachi, Pakistan, on the premise that Tawakkal Ltd, had wrongfully and illegally, unjustly enriched itself by the sum of Rs.900 million, to the loss and detriment of Puttalam Cement Co. Ltd, by borrowing such money in the name of Puttalam Cement Co. Ltd, and appropriating the same for the benefit of Tawakkal Ltd.-- to pay part of its purchase consideration for the shareholdings of Puttalam Cement Co. Ltd that Tawakkal Ltd, had acquired from the Treasury Secretary (who held the same on behalf of the government of Sri Lanka).

The conclusion thereby is that Tawakkal Ltd, Pakistan, had directly and /or indirectly enriched itself by a sum of Rs.900 million that rightfully and lawfully belonged to Puttalam Cement Co Ltd. Tawakkal Ltd being a company incorporated in Pakistan is a corporate body resident outside Sri Lanka while Puttalam Cement Co. Ltd, being a company incorporated in Sri Lanka is a corporated body resident in Sri Lanka. This distinction of non-resident company and resident company is drawn particularly in the context of the provisions of the Exchange Control Act in the context of the foregoing transaction.

CENTRAL BANK VIS-À-VIS TAWAKKAL AND OTHERS ?

Section 7 of the Exchange Control Act stipulates, inter-alia, thus:

“7. Except with the permission of the bank no person shall in Sri Lanka (a) make any payment to or for the credit of a person resident outside Sri Lanka,.....”

Section 30 (7) of the Exchange Control Act further stipulates: “30(7) Except with the general or special permission of the bank, no persons resident in Sri Lanka shall lend any money either to any firm or company (other than a banking company) which is controlled directly or indirectly by persons resident outside Sri Lanka .” In terms of the exchange control act, ‘bank’ means the Central Bank of Sri Lanka.

Since the matter has now been established in a court of law as complained by Puttalam Cement Co. Ltd itself, one of the parties to the given transaction, would the Controller of Exchange M.R. Fernando, under the direction of the Governor, Central Bank, A.S. Jayawardena, cause an investigation into the said transaction, to ascertain whether such transaction had been perpetrated in violation of the provisions of the exchange control act? If so, would the Central Bank take action against the parties concerned, under and in terms of the provisions of the exchange control act? If not, why?

HEAVY PENALTIES



**Governor, Central Bank A. S. Jayawardena
— What action is being taken on Tawakkal?**

It would be recalled that in the matter of the sale of the shareholdings of Kotagala Plantations Ltd, the controller of exchange was reported to have imposed heavy penalties not only on the parties to the transaction, but also on those who had allegedly aided and abetted in the perpetration of the transaction. Likewise if there has been a violation of the provisions of the exchange control act in the transaction of Puttalam Cement Co. Ltd, would the controller of exchange, deal with all those who had aided and abetted in this transaction, whoever they might be? If not, why?

The reported value of the of the Puttalam Cement Co.Ltd transaction is Rs. 900 million, which is over double the reported value of the Kotagala Plantations Ltd, transaction of Rs. 400 million. Should not the law be enforced on all persons alike without any discrimination whatsoever? The question is, had the Central Bank of Sri Lanka granted permission to Tawakkal Ltd of Pakistan to have perpetrated this transaction? Further, if not, who were the persons, responsible and those who had aided and abetted in perpetrating this transaction? Clarifications in this regard are awaited from the Central Bank governor A.S. Jayawardena.

POLICY ON PRIVATISATION

On the privatisation transactions carried out by the Public Enterprise Reform Commission (PERC), focus is now turned onto an overview the performance by the People's Alliance government on public enterprise reforms—the privatisation programme that had been handled by PERC, in the light of the policy framework on public enterprise reforms, that had been presented to parliament by the PA government on February 8,1995 in its first budget which also provided for the establishment of PERC. The policy enunciated in the PA government's 1st Budget to Parliament on Public Enterprise Reforms is given in the box.

The Government's 1st Budget spelt out the following:

“We shall soon appoint a Public Enterprise Reform Commission, as a government company which will be entrusted with the task of initiating and coordinating strategic alliance between the public sector enterprises and private sector investors. It will facilitate government decisions in coordination with relevant government agencies. It will engage the services of local investment and merchant banks and other professional firms as transaction consultants, on a transparent basis to carry out basic studies to enable policy and strategy formulation, pre-reform packaging and implementation; and the local consultants will be required to obtain relevant international expertise with experience, where necessary. Alternatively, the commission may employ international expatriate consultants with experience, provided they are agreeable to set up local offices.”

**PA GOVERNMENT'S 1ST BUDGET PRESENTED
TO PARLIAMENT ON FEBRUARY 8, 1995**

Public Enterprise Reforms – (Pages 85 - 87)

The draft estimates show a total sum of Rs. 7,500 million as the proceeds from a major reform of some selected public enterprises, where the government will invite the private sector to participate. As I have mentioned earlier, our reform of the public enterprises will be fundamentally different from the chicanery that was called "peoplistation" by the previous regime. We shall soon appoint a Public Enterprise Reform Commission, as a Government Company, which will be entrusted with the task of initiating and coordinating strategic alliances between the public sector enterprises and private sector investors. It will facilitate government decisions in co-ordination with relevant government agencies. It will engage the services of local investment and Merchant Banks and other professional firms as transaction consultants on a transparent basis, to carry out basic studies to enable policy and strategy formulation, pre-reform packaging and implementation; and the local consultants will be required to obtain relevant international expertise with experience, where necessary. Alternatively, the Commission may employ international expatriate consultants with experience, provided they are agreeable to set up local office.

The Commission will consider diverse methods of reform, with a view to maximising the benefits for the country and they would include, amongst other strategies;

- a) the sale or lease of government property/assets, partially or wholly
- b) the sale of government shares in companies, partially or wholly
- c) opening a sector to private sector participation and competition
- d) partnership between public and private sector by the sale of a portion of the shares
- e) management, technical expertise or marketing agreements
- f) direct private sector investments in areas such as infrastructure .

Procedures will ensure that selection is done after a competitive bidding process and the independent evaluation of bids. Where feasible, reform will be accomplished by public share offers which are conducted in a manner which promotes wide participation by the public at large. In the case of each reform the most appropriate package of preferences and benefits to workers will be designed under a set of general guidelines and will be presented to the Cabinet for approval. In this regard, the Commission will prepare necessary guidelines of operation to make the process transparent.

The Government expects that the proceeds from these reforms could be over Rs. 13 billion in 1995. However, all proceeds will not be utilized for the financing of budgetary expenditures. The greater part of these resources will be utilized to retire domestic public debt. For this purpose the government proposes to set up a special account in the Central Bank to credit proceeds. In 1995, the government will use about Rs. 4,000 million for budgetary purposes as against Rs. 7,500 million shown in the revenue estimates and the balance will be credited to the Central Bank, which will be required to retire domestic public debt.

The immediate tasks of the Commission during 1995 will be as follows –

- a) Opening up government monopolies to fair competition
- b) Complete the outstanding reforms
- c) Sale of all or part of Government shares in various companies
- d) Sale/Lease of Government land and properties
- e) Strategic alliances in the Public Utilities / Infrastructure / Services sector
- f) Management of state sector plantations
- g) Any other public enterprises referred to the Commission.

The Government, on the advice of the Commission will determine the share and terms of private sector participation. In all instances, where public and national interest is of paramount importance, the government will safeguard such interest by retaining a substantial share, and where necessary, by possession of a "Golden Share", which will have special powers. In the field of public utilities, traditional regulation of prices, quantity and quality of service will continue to be undertaken. The rights of public sector employees will be fully protected under all circumstances.

In the case of land and property sales, the past practice of secretive and preferential sales of government property will be discontinued. Future sales will be done by open bidding, after maximum publicity, in a fully transparent manner. It is proposed to raise Rs. 500 million from such sales.

Was it not PERC's bounden duty to have implemented public enterprise reforms, i.e. the privatisation programme strictly in conformity with such policy framework enunciated in the PA government's 1st budget? Is it not clear from the above policy dicta that PERC, on a transparent basis, was to engage the services of local investment and merchant bankers and other professional firms, to function as transaction consultants, to professionally handle the privatisation programme? These local transaction consultants, where necessary, were to engage relevant international expertise. PERC also had the option of engaging the services of expatriate consultants with international experience, provided they agreed to set up a local office. Had PERC actually conformed to such policy framework? If not, why?

CONTRARY TO POLICY?

The policy framework further stipulated, that --- "PERC will consider diverse methods of reform, i.e. privatisation, with a view to maximising benefits for the country," and that such methods would include management, technical expertise or marketing agreements.

Extensive exposures on the privatisation of Orient Lanka Ltd, have been made highlighting how the questionable disregard for the strategy of management, technical expertise or marketing agreements had caused/continue to cause tremendous losses for the country, contrary to the policy of maximising benefits for the country.

Given this scenario, the question also arises who were the transparently selected transaction consultants, with international experience and expertise who handled the privatisation transaction of Orient Lanka Ltd? The government had appointed evaluation committee, that had met one of the largest duty-free operators in the world, Weitaneur Group, Switzerland, who had made a valuable franchise proposal on the basis of the strategy of "management, technical expertise and marketing agreements," had been only the visiting consultant from London to the finance ministry, J.M.S. Brito.

The policy framework had clearly spelt out that procedures that would be adhered to by PERC "will ensure that selection is done after competitive bidding process and the independent evaluation of bids. Where feasible, reform will be accomplished by public share offers which are conducted in a manner which promotes wide participation by the public at large."

How does one compare the above with the fiasco of preselecting the management companies to purchase the majority controlling shareholdings of the six most profitable plantation companies, as deemed by PERC, on a ludicrously absurd 'strike price' formula, whereby such majority controlling shareholdings in the plantation companies, Agalawatte, Horana, Kegalle, kotagala, Boagawantalawa and Kelani Valley had been disposed of at the nominal price of Rs.10 per share only, causing colossal losses to the government, contrary to the stipulated policy of "maximising the benefits for the country"?

FREEHOLD LEASES

Ironically, as opposed to the sale of government shareholdings, the policy framework had specifically stipulated "management of state sector plantations." Not only had the government shareholdings in the plantation companies been disposed of, but the respective estate lands had also been made available to the plantation companies on long-term leases to be used as freehold

owners would use, including the right and entitlement to mortgage. Would this not be tantamount to constructive virtual freehold ownership?

The policy framework further spelt out that “in the field of public utilities, traditional regulation of prices, quantity and quality of service will continue to be undertaken.” Contrary to this, in the privatisation of the monopolistic public utility, Colombo Gas Co. Ltd, a minimum annual 10% price increase had been guaranteed and the question of traditional regulation had come into focus only thereafter.

Again in the case of the privatisation of Sri Lanka Telecom Ltd, another monopolistic public utility, minimum annual price increases ranging from 25% to 15% p.a. had been agreed upon after the determination of the valuation of the monopoly, rendering nugatory the traditional role of the regulatory authority in determining and approving future prices.

The policy statement further stated, “in the case of land and property sales, the past practice of secretive and preferential sales of government property will be discontinued. Future sales will be done by open bidding, after maximum publicity, in a totally transparent manner.” As referred to above, procedures were also to ensure that selection was to be done after a competitive bidding process and the independent evaluation of bids.

Would the privatisation of Ceylon Steel Corporation Ltd, with the re-selected party, Hanjung of South Korea, be in conformity with the terms of such policy?

Then again, were there not exposures on the questionable leases of valuable state lands to Pacific Shore Properties Ltd, Hong Kong, on a preferential basis, contrary to the dicta of the enunciated policy?

The policy statement further enunciated that “PERC will facilitate government decisions in coordination with the relevant government agencies....PERC will prepare necessary guidelines of operation to make the process transparent.....where public and national interest is of paramount importance, the government will safeguard such interest by retaining a substantial share.”

Would the privatisation of the national carrier, Air Lanka Ltd be in conformity with such policy framework?

What was the coordination by PERC with the relevant government agency when the Chairman, Air Lanka Ltd, Harry Jayawardena had publicly displayed unawareness of the details of the transaction?

Contrary to the policy of being required to operate on a transparent process, does not PERC, as a condition, insist upon absolute secrecy and confidentiality from the parties that PERC deals with? Why is this?

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