'Hidden Agenda' in Default Taxes Bill ?

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Default Taxes (Special Provisions) Bill placed on the Order Paper of Parliament on April 7, 2009, was to have been taken-up for Second Reading on April 20, 2009, with only 4 working days in between, due to the intervening seasonal and public holidays, whilst this also was during Court vacation; whereas Article 121 of the Constitution allows only one week for a citizen to challenge a Bill before Supreme Court. The cogent question therefore arises, as to whether this was genuinely accidental, or was schemingly maneuvered to deviously prevent a challenge to the Bill being made by a citizen, thereby denying the Constitutional right of the People ?

This becomes even more cogent, since the challenge to the Bill, in fact, resulted in a very material change being acceded to by the Deputy Solicitor General, appearing as *amicus*, upon concerns expressed by Court, consequent to submissions made. This made the proposed writing-off of defaulted taxes to be strictly restricted to the State institutions defined in Clause 6 of the Bill i.e. Corporations, GOBUs, Ministries, Departments, and Co-operative Societies under Law No. 5 of 1972, including Co-operative Rural Banks. As determined by the Supreme Court, even such write-offs are to be subjected to confirmation being obtained from the Secretary to the Treasury, that such institutions are dependent upon Government funding to meet their such tax liabilities. This only tantamounts to clearing of government accounts.

Exclusion at the instance of Court of the *seemingly innocent* words, 'where necessary' in Clause 7(b) prevented the default taxes of the private sector and the tax paying public, particularly those, who as fiduciary agents of the State, collect indirect taxes, such as VAT, GST, Turnover Tax, Debits Tax, being surreptitiously written-off, thereby preventing an extensive loss of public revenue to the State. The question arises, as to how and who introduced such *seemingly innocent* words, 'where necessary', since the wordings of the other Clauses read very well together therewith, with common reference to 'defaulters' or 'persons' to afford write-off of defaulted taxes.

It is reliably understood, that neither the President, Minister of Finance, nor the Secretary, Ministry of Finance, had been aware of such surreptitious intention to defraud public revenue, causing extensive loss to the State, by deviously writing-off such taxes ! Such a craftily endeavour by the purported Tax Amnesty of 2003 was severely castigated by the Supreme Court, as defrauding public revenue, causing extensive loss to the State. The question arises, as to whether the same *'cabal'* of persons, who devised the purported Amnesty of 2003, were the persons behind such 'hidden agenda', to have manipulated the Clauses of the Default Tax Bill, to be contrary to the noble objects disclosed by its Title and Preamble, which was for the speedy recovery of taxes in default, in a manageable and justifiable manner, and the Officers made more accountable towards the collection of taxes.

Had such challenge not been made to the Supreme Court, the Default Taxes Bill would have enabled the surreptitious write-off of taxes of all persons, and not only those State institutions, that need State funding to pay such taxes ! It would not be the Commissioner General, who would be making such write-offs, but Officers of the Inland Revenue Department, including Assessors, in terms of the delegation of Commissioner General's powers to such Officers in terms of Clause 14 of the Default Taxes Bill. This ought be reckoned in the background of the scandalous massive VAT refunds fraud, for which refunds, monies had been provided by the Treasury. Neither the relevant Secretary to the Treasury, nor the Commissioner General, nor the Commissioner VAT have taken responsible therefor !

Adhoc duty waivers arbitrarily granted purportedly in the public interest to private parties, making a 'mockery' of the tax system, causing a revenue loss of around Rs.8,000 Mn. in the early 1990s, without being *gazetted* and reported to Parliament, which has power to revoke such waivers, is another instance. Also a current case of a well-known Bank, having Appeals pending since 2002 on VAT, PAYE Tax and Income Tax, with taxes held over amounting to Rs.3,466.8 Mn., and a large corporate, not being assessed consequent to a Supreme Court finding of fraud, income taxes retrospectively for all years amounting to around Rs.1,000 Mn., notwithstanding Section 163 (5)(b) of the Inland Revenue Act No. 10 of 2006, whereby the Department had the right to so assess in circumstances of fraud, are other instances, which were cited to Court.

The term 'tax in default' referred to at over 25 places in the Default Taxes Bill, had *intriguingly* not been defined to have included 50% penalties, in terms of the Inland Revenue Act No. 10 of 2006, which does not apply to those, who come within the purview of the Default Taxes Bill. The Deputy Solicitor General concedingly agreed to define what in fact, the Bill envisages as 'tax in default' to avoid any ambiguity and/or loophole. Those whose taxes are in default for a period of over 2 years as at December 31, 2007 are entitled in terms of Clause 9 of the Bill to have such defaults agreed to be re-scheduled to be paid over a period of 3 years, whilst those who had defaulted for a period of less than 2 years do not enjoy such benefit ! There appears to be a lacuna on the right to institute action for recovery, if a defaulter raises objections under Clause 9(2)(b) of the Bill, and fails to reach an agreement on re-determination of the tax liability under Clause 9(4) of the Bill, with the provisions of Inland Revenue Act No. 10 of 2006 also not being applicable to such persons !

The application of the provisions of Clause 9 of the Bill was conceded to be subject to verification of the accuracy of the tax in default from the persons concerned in terms of Clause 7(a) of the Bill. Though this may appear to be so by implication, it would not be expressly so, particularly now with Clause 7 of the Bill exclusively dealing with write-offs of taxes in default, strictly restricted to the State institutions referred to at Clause 6 of the Bill. If the accuracy of the tax in default has been verified from the persons concerned in terms of Clause 7(a) of the Bill, then it being a default of an admitted payment to the State, upon further default reneging on agreement reached, ought not be subject to recovery proceedings in a civil action in the Commercial High Court, as provided for in Clause 10 of the Bill, adding to the volume of its work. On the other hand, commercial arbitration awards are sought to be enforced or set aside in the Criminal High Courts, whereas they ought be before the Commercial High Court, which was established by Act No. 10 of 1996, after the Arbitration Act No. 11 of 1995.

Taxes in default in terms of Section 178 of Inland Revenue Act No. 10 of 2006 could be recovered by the Commissioner General or his Officers under delegated power, by seizure and sale of immovable or movable property, including Bank Accounts, and in terms of Sections 174 and 179 of the Inland Revenue Act No. 10 of 2006 criminal prosecution instituted in the Magistrate's Court against the defaulter and its directors, partners, principal officers. These stringent provisions are applicable to those persons, whose defaults are for a period of less than 2 years as at December 31, 2007. Ironically, those persons who have been defaulters for more than 2 years as at December 31, 2007, having had the benefit of re-scheduling their defaults over a period of 3 years in terms of the Default Tax Bill, and thereafter defaulting on such re-scheduling agreement, are not subjected to such stringent recovery procedure by seizure of property, and criminal prosecution, as per Clause 10 of the Bill !

It is indeed intriguing, that whilst a 'Default Tax Recovery Unit' is to be established directly under the Commissioner General in terms of Clause 5 of the Bill, its only duty is to prepare a Report on taxes in default within 6 months, which itself is an admission that there is no reliable report of the taxes in default ! Intriguingly, having prepared such Report of taxes in default, the 'Default Tax Recovery Unit', has no role, whatsoever, to play in either write-offs of taxes of State institutions referred to or the re-scheduling over 3 years of the taxes in default of those persons of the private sector and the tax paying public ! Thus the very name of 'Default Tax Recovery Unit' is humorously a misnomer ! Clauses 12 and 13 of the Default Taxes Bill intend to restrict the increase in taxes in default to be not more than 3% of the tax collected in the preceding year; whereas if one concedes that the present levels of taxes in default are excessive, then ought not remedial action be taken to reduce such levels, taking into reckoning the ageing of the taxes in default ?

Since the provisions of the Default Taxes Bill are not subject to the provisions of the Inland Revenue Act No. 10 of 2006, the Members of the 'Advisory Committee' to be established in terms of Clause 4 of the Bill, not being public servants, neither come within the purview of the Bribery Act, nor would be subject to the secrecy provisions in Section 209 of the Inland Revenue Act No. 10 of 2006; whereby neither the Finance Minister, nor even Parliament, can have access to tax information of persons, except the Bribery Commission and Courts, as provided for in law. This is simply not salutary ! Even Members of the Board of Review are subject to the foregoing provisions of the Law. Giving credence to the suspicion that there has been an 'hidden agenda' is the curious absence in the Bill of the 'Statement of Legal Effect', explaining to Parliament and the Public the effect of each of the Clauses of the Bill !

A Settlement finalized by Attorney General is pending for nearly 2 1/2 years in a Court of Appeal Writ Application, with the Commissioner Legal & Investigations, Inland Revenue Department, having recently intimated to the Attorney General, that the Commissioner General and his Officers are not competent to comply with the mandatory provisions of the Inland Revenue Act No. 10 of 2006, specifically Sections 209 (4)(b), 209 (10) and 209 (5)(d), whereby they are bounded by Statute enacted by Parliament, to report to the Commissioners of Provisions Councils, Controller of Exchange, Director General of Customs, and the Attorney General, suspected instances *vis-à-vis* turn-over, foreign assets and income, Customs offences and Bribery & Corruption, respectively, for action to be taken thereon by the said statutory authorities.