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Crossing the Rubicon: What Ails Indian Intelligence Agencies?

"If you do not know others and do not know yourself, you will be in danger in every single battle."-

Sun Tzu, *Art of War*

"To lack intelligence is to be in the ring blindfolded." -

Former Commandant of the Marine Corps, **General David M. Shoup**

India has been a victim of numerous terrorist attacks, which has cost the country dear in both human and material terms. The latest being the deadly attack outside the Delhi High Court. The time to ask some serious questions has arrived. We engage in collective mourning after a terrible attack and console ourselves with shallow statements like “never say die spirit of Delhi/Mumbai etc” and go on with our lives. The Nation continues to bleed. A diffuse but highly networked group of terrorists, driven by a dangerous dose of extremist ideology and a simmering sense of anguish and revenge, currently pose a serious threat to India's economic and social structure. The militants exploit gaping holes in India’s counter-terrorism architecture and strategy as well as the nation’s ambivalent policies toward religious minorities. (The Jamestown Foundation Study on Indian Intelligence)

The key to preventing acts on terror in the humble opinion of the author, is not training of commandos and purchase of sophisticated weaponry. These things do matter, however these are by their very nature “responsive”. The need of the hour is to lay emphasis on the “preventive” and this is where the role of Intelligence agencies becomes paramount. The

primary task of intelligence is to predict and prevent an event before it actually happens. The moot question is “How have Indian Intelligence Agencies fared when it comes to fighting terrorism?”

In order to understand this one must have an idea of the Intelligence structure is our country. At the top of the intelligence pyramid is the National Security Council Secretariat (NSCS), headed by an all-powerful, politically-appointed National Security Advisor (NSA), who often has much more than terrorism on his mind. Intelligence operations within the country are carried out by the Intelligence Bureau (IB) and its wide network of officers and men, all reporting to the Ministry of Home Affairs. The ministry is headed by a cabinet minister and one or two ministers of state—besides a secretary and other senior officials—who often get tempted, at least close to the elections, to utilize the IB for assessing the electoral chances of their party while spying on their rivals. EM Rammohan, a former member of the National Security Advisory Board, notes: “Instead of concentrating on security issues, they are busy chasing the Opposition so that the ruling party is kept in power. Is that the job of the IB?” (outlookindia.com, July 31, 2006).

External intelligence is the responsibility of the Research and Analysis Wing (RAW), working directly under the Cabinet Secretary but reporting to the NSA for all practical purposes. RAW keeps a sharp eye on the activities of terrorist groups with bases in foreign countries. According to former IB joint-director Maloy Krishna Dhar, RAW’s reluctance to share information with IB is legendary. Sometimes petty rivalries between these two important agencies have been a major obstacle in the fight against terrorism. (Open Secrets,M.K Dhar,2007). There have also been instances where personality clashes have deterred effective coordination between the NSA and RAW chiefs. These differences have existed since the days of the formation of the RAW. However the agency was headed by a giant Rameshwar Nath Kao, who proved to be a visionary and great leader to the intelligence community.(The Kao Boys of R&AW,B.Raman)

What ails Indian Intelligence Agencies? Why are we so poor when it comes to predicting attacks? During my conversations with a former R&AW chief, I was told about how inter-agency cooperation is abysmal in India. Each agency is hyper-sensitive about its 'turf'. Another senior intelligence official told me that India lacks an 'Intelligence Culture' and cited the fact that most of the agencies are manned by police officers. There are very few

academics and scholars who are specialised in certain areas working as full time intelligence officers. An interesting contrast is the CIA of the United States which has highly qualified scholars, lawyers and area specialists working for them. In India a police officer who is deputed to intelligence is expected to 'transform' into a super spook. Police officers are primarily trained for investigation purposes and to maintain law and order. Some of them may be exceptional in the area of intelligence gathering as well (R.N Kao, M.K Narayanan,G.K 'Gary' Saxena etc),however it is time to inject fresh blood into these agencies.

Our Intelligence agencies still suffer from a 'Colonial Hangover'. The British had created these bodies primarily as law and order enforcement agencies and to 'spy' on rivals. This continues even today as the Intelligence Bureau (IB) is used by their political masters to predict election results or spy on their competition. The State Intelligence has also suffered the same fate. How can these agencies focus on 'Hard Intelligence' when they are involved in such petty chores? My own experience with counter-terrorism agencies at the State level left me perplexed. The key to locating terrorists and gathering information is the regular 'beat' constable. While senior officers know details about the most wanted terrorists, the beat constables do not even have photos of these men! There is a eerie karmic sense of complacency when it comes to tackling terror.

There have been attempts to review this state of affairs. Girish Chandra Saxena's report on the area of intelligence is without doubt the most substantial one. Prepared with former Foreign Secretary K. Raghunath and former I.B. chief M.K. Narayanan, the meticulously researched report calls on India's intelligence establishment to take "an honest and in-depth stock of their present intelligence effort and capabilities to meet challenges and problems". The report calls for a wholesale upgrading of technical, imaging, signals, electronics counter-intelligence and economic intelligence capabilities, as well as a system-wide reform of conventional intelligence gathering.(Praveen Swami,Frontline).The moot question is -How much of this has been implemented? Why is it that we have repeatedly failed to prevent such attacks? At the bottom of the pyramid are the state police, whose intelligence networks remain the primary source of information and main agency for implementing action on the ground. The most critical element in this structure is the investigative branch of the local police forces. These go by various names, such as the Criminal Investigation Department, the Special Branch or the Crime Branch. There is no uniformity in responsibilities or operational duties. Typically these units carry out the investigation and prosecution of terrorist, hawala, arms and

counterfeit cases, placing them in the unique position of being able to detect the emergence of terror networks or coalitions. Unfortunately they remain the weakest link in the intelligence chain as these units carry the burden of acting as colonial-style law enforcement agencies and not as modern units capable of organizing preventive measures based on intelligence collection. These forces are commonly afflicted with poor morale and problems related to accountability, pay and training. (The Jamestown Foundation Study on Indian Intelligence)

These are the areas that require a major revamp. The author also has in mind some suggestions. It is not merely enough to keep complaining about our weaknesses without attempting to offer some prescriptions.

1. It is high time that intelligence agencies in India become streamlined. We could create something along the lines of the Director of National Intelligence (DNI) of the United States. The DNI'S primary goal is to ensure that timely and objective national intelligence is provided to the President and oversee coordination of relationships with the intelligence or security services of foreign governments and international organizations. It has to ensure the most accurate analysis of intelligence is derived from all sources to support national security needs. The R&AW, IB and other related agencies could come under one DNI like body. This would avoid a lot of confusion and overlap.

2. Create the post of National Intelligence Advisor, who would be the principal advisor on intelligence issues. The National Security Advisor has too much on his plate to do justice to Intelligence matters.

3. Improve coordination between central and state level agencies. The Multi-Agency Centre (MAC) and a Joint Task Force on Intelligence (JTFI) have not been efficient by any stretch of imagination. They lack resources, man power and technical expertise to fulfil their obligations. They have no real-time links to state police forces or other intelligence agencies.

4. Increase the number of field agents. For a country of a billion plus people, a few thousand field agents is a cruel joke. There would be the perennial nay-sayers who would complain about the cost. One can remind them that while freedom is essential for any society, it is meaningless without security.

5. Increase the informer base among the Muslim community. Recruit Muslims in intelligence and security forces. Field intelligence remains very poor on this community in various states.

This could be a fatal flaw. The community itself abhors terrorism and would be more than willing to support the state to weed out the violent fundamentalists from its brood. Sincere and patient effort must go into this plan.

6. Introduce weekly meeting between the State Intelligence chief (usually an IG of the IPS cadre) and the station chief of the IB in that particular state. These meetings could prove crucial in collating information and executing plans. Both these organisations need to know what the other is doing.

7. Hire people from non-police backgrounds. Intelligence is very challenging field and would attract many talented people who could contribute immesensly in areas of analysis and policy prescriptions. This will only enrich and empower our intelligence culture. This is something we can learn from many foreign agencies. This should not make the serving police officers insecure. They should welcome this infusion of new talent and embrace it. What matters most is national interest.

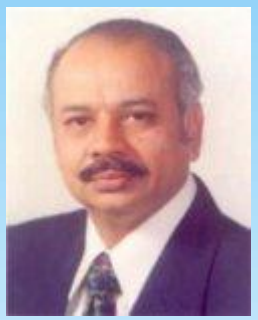
8. Empower local police stations. The local police station should become the hub of all intelligence gathering in that particular area. The station in charge must be privy to all information in his area, ranging from the presence of suspicious strangers to the sale of substances that can be used to inflict damage to people and property. Sadly the station head is more pre-occupied in dealing with his local MLA'S shenanigans or some VIP visit. (Discussion with a former Special Secretary R&AW)

These are only some humble ruminations by an ordinary citizen of this great nation. I am sure that there have been numerous other policies and suggestions. However i wish to invoke a great Indian thinker Kautilya who once said “Before you start some work, always ask yourself three questions - Why am I doing it, What the results might be and Will I be successful. Only when you think deeply and find satisfactory answers to these questions, go ahead.”One can only hope that the wise men who rule us would pay heed to this and secure our lives to the best of their ability.

Contributor: - **Dr. Arvind Radhakrishnan (Asst. Prof.)**

Legal Vision

Interview with Hon'ble Justice V.C Daga



Hon'ble Mr. Justice V.C Daga, a legal luminary whose inspirational legal journey commenced when he joined the Bar on 21st June 1972 and practised before the Nagpur Bench of the Bombay High Court as well as Supreme Court of India and various High Courts. He was appointed as an Additional Judge of the Bombay High Court on 13th December 1999 and retired from the said position on the 18th February 2011.

1. Has the adversarial system of justice outlived its purpose in India?

No. Litigation is always between two persons. In order to deal with increasing litigation, we can have other modes such as arbitration, conciliation and mediation. Therefore, adversarial system has to remain and it cannot be abrogated.

2. There is immense workload in the Apex Court as the judges have to hear magnanimous number of cases on day-to-day basis. Does Your Lordship view that enhancing the infrastructure i.e. increasing the number of fast track courts and tribunals will reduce the sheer burden on the ultimate arbiters of justice?

No, merely increasing the number of fast track courts will not solve the problem. It will be temporary measure. The strings of judges should be increased for a long term solution.

3. What skills and expertise should the lawyers aspiring to be Judges acquire in order to take Law to its logical end?

The lawyer should possess an eclectic mix of the following qualities – capacity to dissect facts and law, good character, gives a patient hearing to lawyers and advocates and exhibits high moral values. In a nutshell, he should be a good human being.

4. What is Your Lordship's message for budding and young law students so that they can uphold the high values of the legal profession?

There is no substitute for hard work, patience and capacity to wait for good results. Students at no point in time should opt for shortcuts and should be honest in their approach. All these qualities put together will make you a good leader.

Contributor: **Shinjni Kharbanda** (IV year)

Cartoon: **Mahit T Anand (**III Year)

Legal Newswire

JUSTICE SOUMITRA SEN'S RESIGNATION: AN ESCAPE ROUTE FROM IMPEACHMENT

Mr. Soumitra Sen, former Justice of the Calcutta High Court, faced impeachment proceedings in the Parliament on the grounds of misconduct. He was appointed as a Court Receiver for a case and had Rs 33.23 lakh under his receivership. He misappropriated this money, depositing it in his own account rather than depositing it in another account opened exclusively in discharge of his office as receiver. He contended that it was wrong of him to have deposited the money in his own account but it was not misappropriation since the money was returned. Therefore, the allegation made was an infructuous one.

Further, he contended that he was a "sacrificial lamb to cleanse the judiciary". The Rajya Sabha voted in favour of the impeachment in a very high majority. Soon after this, former Justice Sen tendered his resignation. On his resignation, the Lok Sabha voted to drop the motion of impeachment as the resignation rendered the motion infructuous.

The pertinent question that this issue puts forth is - whether a resignation renders an impeachment motion infructuous and should Justice Sen be entitled to escape the motion in progress with regard to his misconduct by tendering his resignation?

Sources: Lok Sabha TV, Rajya Sabha TV, Economic Times, Daily Bhaskar.

Contributor – **Mukta Batra** (II Year)

SC DISPOSES COMPLAINT AGAINST MODI

Ehsan Jafri, MP and 36 others were killed in Gulberg Society Housing Complex in Ahmadabad on the 28th February, 2002, after the police failed to respond to the pleas for help. Zakia Jafri, ehsan jafri's wife, submitted a complaint to the Gujarat high court against the Gujarat police's failure to file an FIR against Narendra Modi and 62 others. The Supreme Court in the recent orders passed directed a trial court in Gujarat to take a final decision on the complaint filed by Zakia Jafri, the

court also asked special investigation, headed by former CBI director R.K.Raghavan, to submit its final report to the trial court. However, in May, 2010 Special Investigation Team (SIT) had submitted its report but the curt had asked the CBI director to review the report and the witness, since there were certain doubts raised about the SIT investigation.

A three-judge Bench headed by Justice D K Jain directed the SIT, which is probing the riot cases, to submit its final report before the Magistrate. The apex court asked this lower court to decide whether to proceed against Modi and 63 others among whom there are senior government officials.

After the SIT filed its probe report in a sealed cover, the court had also asked senior advocate Raju Ramachandran, to analyze the SIT probe findings and file a confidential report on it. Ramachandran's report filed in a sealed cover had analyzed the SIT probe findings and evidence adduced by it in the case. Ramachandran, assisting the bench in nine riot cases, had submitted his report on the direction of the apex court

Following this report the bench made it clear there was no need for it to further monitor the riot cases. The bench, also comprising justices P Sathasivam and Aftab Alam, said in case the magistrate decides to drop proceedings against Modi and others, he has to hear the plea of slain MP Ehsan Jafri's widow Zakia Jafri, who had filed a complaint against the Gujarat chief minister.

Zakia said she was disappointed by the Supreme Court's ruling, as she has been "waiting for justice for nine years". She said she had pinned her hopes on the apex court ruling in her favor.

Sources: Outlook and Hindu.

Contributor: **Ann J Kynadi** (II Year)

DEATH PENALTY AND ITS NEW DIMENSION

The assassination of then Prime Minister, Rajiv Gandhi took place in Sriperumbudur in Tamil Nadu on 21st May 1991. The assassination was carried out by Thenmozhi Rajaratnam who was linked with LTTE. After the assassination the NGOs were quickly off the mark. The political parties joined in and they demanded commutation of the sentence. There were massive campaigns along with rallies, human chains and public meetings that took place under the name of Save Three Tamils Lives Movement. Panelists on television made a heated debate about

the agonies of the families of the prisoners and also adding a case for abolition of death penalties.

On 29th August a stay order was passed for the three condemned prisoners in the Rajiv Gandhi assassination case which was to be carried out on September 9. The Division Bench said that the matter involved substantial of law and granted a temporary injunction. the consideration in the question of law, the petitioners were being admitted and there would be a temporary injunction. Senior advocates Mr. Ram Jethmalani, Mr. R. Vaigai and Mr. Colin Gonsalves, appearing for the prisoners, argued that the long delay rendered the death penalty illegal and unconstitutional. The High Court and eventually the Supreme Court ruling on the present matter will have implication for high profile convicts on death row, who have considered that the lengthy delay in the disposal of their own mercy petition as ground for mercy. Santhan and Murugan submitted that the jurisprudence in this issue was clearly developed by the Supreme Court. The consistent position was that if the delay was shown to be excessive and unjustified in the facts of the case, execution of the death sentence would amount to harsh and inhuman punishment violative of Article 21. The court should commute the death sentence.

The case of assassination of Rajiv Gandhi renewed the debate on death penalty. The court noted that globally the movement was away from death penalty, but said that the judiciary cannot stop using the capital punishment for "rarest of rare" cases so long as it was provided for under the law. The question is why continuing the barbaric practice? But the entire heat of the argument leaves behind the original victims who have been waiting for justice for eleven years. The family suffered due to the unjust act of the LTTE activist. If it is time that is taken into consideration then it is easy for the guilty to escape punishment in India because court takes a very long time to decide the judgment. Time is a great healer but the healing touch cannot be selective.

By: **Shreya Mazumdar** (II Year)

Source: Times of India and Hindu.

COMPARITIVE ANALYSIS OF THE LOK PAL AND THE JAN LOK PAL BILL

The Government's Lok Pal Bill has been criticised by people to a large extent, who want the same to be replaced by Anna Hazare's Jan Lokpal Bill. The two Bills differ in various respects and it is the object of this article to highlight these

differences. Understanding these differences will provide the readers with a sense of discrimination as to which of these two Bills must be preferred and why it should be preferred. The main differences of the Bills are highlighted as follows:

1) **Jurisdiction in respect of inquiry**: Chapter VII of the Jan Lokpal Bill provides for investigation and prosecution against high functionaries. It provides that the investigations could be made against the Prime Minister or any other members of the Council of Ministers, any judge of the Supreme Court and the High Courts and any member of the Parliament.

But, the Government Lokpal Bill excludes the Prime Minister from its purview. Further, the said Bill only covers Group 'A' officers who have served in connection with the Union. It leaves out those officers who are lower in rank than the Group A officers. It should be understood that the menace of corruption should be tackled from the lowest level, which the Government's Bill fails to provide.

2) ***Suo-Moto* powers of the Lokpal**: Chapter III of the Jan Lokpal Bill provides for the functions and powers of the Lokpal, one of them being, *inter alia*, to initiate *suo moto* action under the Act on receipt of any information from 'any source' about any corruption. The term 'any source' is wide enough to include within its ambit any persons from the public. Hence, it gives the common man the power to make any complaint to the Lokpal with respect to corruption, thereby involving the public. The Lokpal in the Government's Lokpal Bill cannot take *suo moto* action against any public official or even receive complaints of corruption from the public, thereby, not allowing participation from the public, who are the most affected in cases of corruption.

3) **Investigation of corruption cases**: The Jan Lokpal Bill provides that the Central Bureau of Investigation (CBI) would be under the Lokpal while investigating corruption cases. The CBI will only supplement in the investigation of such cases. Whereas, the Government's Lokpal Bill provides for the establishment of an Investigation Wing, which will have the powers of police and will inquire only on directions of the Lokpal.

4) **Protection to whistleblowers**: From a plain reading of s. 2(m) of the Jan Lokpal Bill, 2011, it defines the term whistleblower as a person who provides information to the corruption in a public authority and who is a victim of

professional harm, physical harm or any other form of harm. Also, Chapter XI of the Bill is dedicated to the protection of whistleblowers, *inter alia*, by protecting them from professional or physical victimisation and by protecting their identity.

Whereas, the Government's Lokpal Bill does not contain anything for the protection of whistleblowers. It is important that a Bill contains such provisions so as to encourage the persons to give information to the Lokpal regarding any form of corruption.

5) **Offences covered by the Bill:** The Jan Lokpal Bill deals with the offences committed under the Prevention of Corruption Act, 1988, the Indian Penal Code, 1860, victimisation of whistleblowers and repeated violation of the citizen's charter. Hence, the offences covered by the Jan Lokpal Bill are wide in its ambit as compared to the Government's Lokpal Bill. The Government's Lokpal Bill only deals with offences committed by public servants under the POCA, 1988.

6) **Nature of Lokpal under the Bills:** From a plain reading of the two Bills, it can be noted that the Lokpal under the Jan Lokpal Bill is not merely an advisory body. It will have the powers to initiate prosecutions after the completion of investigations by it. Hence, it is a body which will carry out investigations, supplemented by the CBI and initiate prosecution against public officers. Whereas, the Lokpal sought to be established by the Government is merely of an advisory nature. It will conduct an enquiry and will forward the report to the competent authority to initiate prosecution.

Hence, such are the contrasting features of the two Bills. From the perspective of a common man, the Jan Lokpal Bill is more appealing than the Government's Lokpal Bill as the jurisdiction of the Lokpal is not limited to the high level officers but also covers other officers, thereby, helping in tackling corruption from the lowest level. Also, the said Bill ensures public participation in tackling corruption. It is now a matter to wait and watch as to which of these two Bills would receive the Presidential assent.

Sources: http://yellowsunday.pbworks.com and http://www.prsindia.org

Contributors: **Roshil Nichani** (III Year) and **Himanshu B.** (II Year)

Legal Jargon

WAR ON TERROR: DISTINGUISHING MYTH AND REALITY

The 9/11 incident is one horror struck incident that changed the tide of the world politics. Even a Superpower like United States turned weak when confronted by non-state actors. This has ushered the age of 'war on terrorism' where Britain and United States have resorted to brutal measures which include illegal detentions, anti-terrorism control orders and suspects being subject to various restrictions in spite of having no criminal records. United Nations and various other countries have followed the footsteps of these democratic and developed nations.

In India, TADA and POTA have been repealed due to a lot of criticism being voiced from the civil society. But the government seems to be in the mood to repeat past mistakes. It introduced yet another anti-terrorist law that jeopardizes human rights in its entirety. The Unlawful Activities Prevention Act, 1967 (UAPA) was brought about in a hurried manner after the 2008 Mumbai Blasts incident that raised a very important question – how safe are we in our own country? Unfortunately UAPA has incorporated various perverse provisions of the previous anti-terrorist laws. Especially the definition of terrorist act that bears close resemblance to the one provided in POTA. The most contentious issue is the following part of 'terrorist act' definition -:

> "*by any other means of whatever nature*" and "*any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country".*

It can be construed in any manner by the Executive. This is a rather dangerous scenario as the police can arrest or detain anyone on mere suspicion and label it as a terrorist act. This amended definition is not in conformity with the UN's Special Rapporteur on safeguarding human rights while countering terrorism. Another unwarranted provision is Section 43D of the Act which states that bail cannot be granted to the accused when the court has reason to

believe that the allegations made against him are true. This clearly denies a person the right to seek bail as the court in majority cases will not grant bail as the facts are always presented in an exaggerated manner. Also if the accused person belongs to a foreign country and has arrived in the country in an unlawful manner, no bail shall be granted to him. Whereas the UN Special Rapporteur states that the State must not grant bail only if it suspects that it will lead to tampering of evidence or he/she may involve in more criminal acts.

In UK, the anti-terrorism laws are time bound and subject to judicial review. This trend is being followed in various countries. Whereas in India, except TADA and POTA which were enforced only for 8 years and 3 years respectively, the UAPA is not time bound and has been incorporated in the criminal law seamlessly. The provision of UAPA is not subject to mandatory review and is left to the discretion of the government. Also, the repeal of POTA did not have retrospective effect on the pending cases under this act. Therefore, justice has been denied to the accused under this Act.

India has been belittled by numerous separatist movements in the past decades. The Kashmir issue and North-east states and Naxalite problem are testimonies to this reality. The State has been very harsh in its approach while negotiating with them and has inflicted torture on the victims under their repressive anti-terrorist legislations. It makes one wonder about the credibility of today's anti-terrorism laws – Are they tools of repression and state violence or to punish persons who terrorize people? Therefore the impact of anti-terrorism laws on enjoyment of human rights is so adverse that the entire objective of counter-terrorism can be termed as a 'myth'. Anti-terrorism laws clearly depict that the 'State' has the sole monopoly over violence. The need of the hour is that the State should curb its atrocities and grant the right to self determination to the people inhabiting areas of conflict so that the plague of terrorism can be eradicated from this country.

Contributor: **Shinjni Kharbanda** (IV year)

THE GENERAL ANTI-AVOIDANCE RULE IN DIRECT TAXES CODE, 2010

The Direct Taxes Code Bill, 2010 will usher in the General Anti-Avoidance Rule (GAAR) in India when it comes into effect on April 1, 2012. The clauses relevant to our discussion on GAAR in the DTC are clauses:

Clause 123 provides that any arrangement may be declared as an impermissible avoidance arrangement and the consequences of the arrangement may be determined by disregarding, combining any step, part or whole of the impermissible avoidance arrangement; by treating it as if it had not been entered into or carried out; treating or disregarding any accommodating any other party as one and the same; deeming connected persons as one and the same. These four situations are encompassed in the GAAR where the Commissioner can disregard the corporate veil of a company due to an impermissible avoidance arrangement. There are two requirements that act as a necessary pre-condition for invoking GAAR provisions: an arrangement should obtain a tax benefit for the assessee and should fulfil one of the four conditions envisaged in this clause. These provisions envisage issue of conditions and guidelines for exercise of power under them.

"Arrangement" has been defined to include any step in, part of whole of any transaction, scheme, agreement or understanding, whether it is enforceable or not. "*Bona fide* purpose", *inter alia*, does not include anything that would result in misuse or abuse, directly or indirectly, of DTC provisions. "Impermissible avoidance arrangement" has been defined to mean an arrangement, in whole or part or step in, whose main purpose is to obtain a tax benefit and it results in misuse, abuse of DTC; lacks commercial substance in whole or in part; not entered into or carried out or employed for *bona fide* purposes. An arrangement shall be deemed to lack commercial substance, in whole or part or step in, *inter alia*, if the substance or effect of the arrangement as a whole differs from the legal form of its individual steps.

Due to the broad definition of 'impermissible avoidance agreement', the use of almost every form of device for tax planning becomes difficult. For instance, it will be difficult to prove that 'obtaining tax benefit' is not the primary purpose of the corporate entity, even though it is an incidental purpose.

Clause 125 (1) creates a presumption that requires an assessee to prove that obtaining a tax benefit was not the main purpose of an arrangement. This presumption that an assessee is

guilty until proven otherwise is against the basic tenet that a person is presumed not guilty unless proved otherwise.

Clause 154 empowers the Commissioner to issue notice on an assessee to produce evidence or particulars in supporting his claim that cl. 123 does not apply to him. After hearing the evidence and taking into account the particulars, the Commissioner may pass an order declaring an arrangement as being an impermissible avoidance arrangement, and he shall issue directions to the Assessing Officer to make necessary adjustments to the tax liability of the assessee. The Commissioner will be required to follow principles of natural justice in determination of such an arrangement.

Clause 291 (9) (a) provides that the GAAR in cl. 123 shall override the agreements entered by Central Government with foreign countries, irrespective of whether such agreements are beneficial to the assessee.

Various concerns have been raised by taxpayers and analysts alike, regarding the permissibility of such a wide power of disregarding the form used for minimising tax liability. On one hand, the judicial distinction that the form vs. substance debate has garnered will be settled, with the triumph of substance over form – with adequate legislative backing. While on the other, the terms in which this codification is couched has caused much dismay to many who fear all their existing commercial arrangements may be subject to stringent scrutiny by the taxman. The DTC is a radical movement away from the existing direct tax regime in our country, the jury is out on how effectively can the GAAR battle the problem of flight of capital abroad and tax avoidance.

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Cartoon: Mahit T. Anand

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