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The Institute of Public Auditors of India (IPAI)

The Institute of Public Auditors of India (IPAI) was established in 1996 with the main objective of assisting the authorities in establishing sound accounting, auditing and financial management practices. The Institute has established itself as a leading Institute in the country in the areas of management consultancy, audit and investigative examination, evaluation of programmes, system appraisals and setting up systems for efficient functioning of the organisation / departments of the central and state governments and local bodies. IPAI has a presence across the country through its eighteen Regional Chapters located at Ahmedabad, Allahabad, Bangalore, Bhopal, Bhubaneshwar, Chandigarh, Chennai, Guwahati, Hyderabad, Jaipur, Kolkata, Lucknow, Mumbai, Patna, Ranchi, Shimla, Srinagar and Thiruvanthapuram. Each Chapter is equippred to undertake consultancy assignments and organize training programmes.

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INVITATION FOR ARTICLES

The Indian Journal of Public Audit and Accountability welcomes original articles of professional interest. The articles should broadly cover aspects relating to Public Accountability, Financial Management, Accounts, Audit, Public Administration with focus on Good Governance. These may also cover topic of current interest and innovations in public sector auditing, public financial management, public sector accounting, programme evaluation. management of state and central schemes, financial management in the Panchayati Raj Institutions and urban local bodies, fraud awareness and fraud prevention in these institutions, whistle blowing, legislative oversight on the public finances, capacity building in the areas of audit and oversight in the country and international field and any other related matter of accountability and oversight.

Institute encourages critical thinking, research and originality in interpretation and presentation of views and factual correctness of the information adduced in the articles for our Journal. The decision of the Editorial Board in the matter of selection and editorial issues will be final. Ideally the article should be between 3000 and 3500 words and should not normally exceed 5000 words. Short articles on topical interest are also welcome which can be included in Commentary Section of the Journal. They should preferably be between 1000 and 2000 words.

Two printed copies of the articles should be submitted along with a soft copy in a word processing format. Articles can also be sent by e-mail followed by hard copy with a duly signed forwarding letter by post.

EDITORIAL

I am happy to present the 16th issue of the Journal that presents a bouquet of scholarly discourses on public policy and governance, especially in areas of fiscal management, taxation and implementation of major socio-economic programmes for the disadvantaged sections of the society. Two articles on the audit of major scams, one recent and one of some year's standing have a bearing on good governance and probity in public administration.

The article on "Budget Deficit - Use and Abuse" analyses long term fallouts of deficit budgeting. Budget deficit refers to a fiscal situation where a government spends more money than it receives as revenue, the difference being financed by borrowing or minting new funds. While presenting a sweep of the budget deficit across US, European Countries and India, Dr. Subra Ramamurthy, argues that while budget deficit may be used to stimulate the economy in short spells, as experience of various countries has shown since World War II, its use over long term invariably leads to dependence on such measures and its abuse resulting in worsening ratio of public debt to GDP, erosion of investor confidence, rise in interest payments, loss of jobs and fall in GDP. The unintended consequences would be the lowering of governance standards, wasteful spending and widespread tax evasion.

In India the situation is stark with rising budget imbalance and government sector debt and the article cites the recent Audit Reports exposing the humongous revenue losses and wasteful expenditures signalling falling governance standards and concludes that those in stewardship of public finances must not be allowed to ignore their accountability.

D P Sengupta raised the issue of tax avoidance by the better off sections of the society and how it violates the concept of equity and fair play. General Anti Avoidance Rule (GAAR) was conceived in many centuries to deal with the problem of tax avoidance. Following the 2008 financial crisis, revenue starved nations, the world over, are looking for ways to boost tax revenue.

Increasing attention is being given to tackle the phenomenon of tax avoidance.. In 2009 the provision for GAAR was included in the DTC bill. Ever since, the interested parties launched a campaign against such a provision. The protests intensified after the actual passage of the Finance Bill, 2012 containing the GAAR provisions. The government of India appointed a committee to finalise guidelines in this regard. Acting on the recommendations of the committee, the government has deferred the implementation of GAAR in India by three years.

D P Sengupta's article examines the response of the administration and the judiciary to the phenomenon of tax avoidance in India and shows that GAAR is necessary in the Indian context. However, considering the response of the government, the article concludes that it is unlikely that India will have an effective GAAR any time soon.

Ajit Patnaik recalls how the economic decision making process in regard to exploitation of natural resources like coal since the opening up of the market raised many questions in public mind. Audit was a target of virulent criticism as well as appreciation for its reports on the government decisions in the economic sector. The Audit report on coal block allotments in the concatenation of reports made by CAG takes a critical look at how decisions were delayed in implementation. The idea for competitive bidding in allocation of coal blocks floated in 2004, concretised only in 2008 to tap a part of 'windfall gains' of the captive block allottees. The imperative of transparency was not followed as the Screening Committee deliberated over the allotment of captive coal blocks. The financial gain to the allottees was estimated to be in the region of Rs 1.86 lakh crore benchmarking Coal India costing for the year 2010-11. As Coal India Limited did not meet the targets set by the Planning Commission for production of coal, there was all round shortage of coal thus affecting the plan for energy security in the country. This in turn contributed to power production deficit and current account deficit because of partly possible import substitution.

Did Audit overstep into the domain of policy? Was the estimation of gain to private parties overestimated? Was the methodology for estimating on notional basis justified? Ajit Patanaik's article responds to these questions in an incisive and objective analysis of the report of CAG and its background.

P K Mukhopdahyay recalls the grotesque situation in Bihar Government in the 90s when the fence was eating the grass. The Finance Department that is considered the sentinel to safeguard the public funds and ensure effective financial management, directly and actively abated and facilitated unauthorised and fraudulent drawl of huge funds by the Animal Husbandry Department officials. CAG's Audit reconstructed the extensive violation of the public Trust by the highest level of the political and administrative leaders of the State.

CAG's report set at rest all doubts about where lies the responsibility of the fraud and for the loot of the treasury.

Coal continues to be 'hot' and so in our regular feature Auditor's Notebook, Dharam Vir analyses the salient observations of the Thirty First Report of the Parliament's Standing Committee on Coal and Steel on "Review of allotment, development and performance of coal/lignite blocks" April 2013 which has echoed the major findings contained in the CAG's Audit Report on the same theme presented in July 2012. Dharam Vir discussed how the two reports raise important governance issues including the remedy available to the Ministry's Secretary if his advice is not accepted. He rues the other issues raised by the two reports, namely, policy formulation, transparency in administration, delays in decision-making, adequacy of the existing control mechanisms including the Results Framework Document and the Outcome Budget and finally public accountability.

The second discussion in the Auditor's Notebook on the submission of Audit Reports to the legislatures is a sequel to Dharam Vir's earlier article published in this journal captioned "Audit Reports and Legislatures" that appeared in July-December

2008 issue of this Journal. The author had taken a fresh look at Article 151 of the Constitution and strongly argued in favour of direct submission of the Audit Reports by the CAG to the President/Governor bypassing the Government. Dharam Vir now invites attention to the Order dated March 2011 of the Jodhpur Bench of the Honourable Central Administrative Tribunal where the Honourable Tribunal has *inter alia* held that it is one of the basic features of the Constitution that the people have a right to know the financial position of the nation directly and as expeditiously as possible, that the Constitution has prescribed the CAG as the authority to report on the financial position through his Audit Reports and according to the Constitution these Reports should reach the representatives of the people directly and as expeditiously as possible bypassing the executive machinery of the State.

Dr S C Pandey while analysing the system of poverty assessment and relevant operational issues draws attention to the deliberations of the Parliamentary Standing Committee on Finance in this regard. Citing the details from Jammu & Kashmir, he brings forth the risks arising from lack of authentic BPL lists. The publication of latest estimates of poverty in the country by the Planning Commission in July 2013 and passage of the NATIONAL FOOD SECURITY ACT, 2013 seeking to provide heavily subsidised food grains to 67% of the country's population (75% of the rural population and 50% of the urban population) in August 2013 have brought into spotlight an important implementation issue.

As India's economy grows and cities increasingly become centers of economic activity for the burgeoning population, strengthening urban governance becomes a challenge. JNNURM is a reforms driven fast track programme aiming at planned development of infrastructure of the identified cities and towns and improve service delivery mechanisms, through community participation and enhanced accountability of ULBs and parastatal agencies. The programme was planned to operate on a mission mode by facilitating large scale investments in the urban sector, policy and institutional reforms, leading to sustainable socio-economic growth in the cities.

As India needs about 500 cities in the next two decades at the current rate of urban migration, developing well governed smart cities, remains a core challenge of the national urban mission. Sasidharan's article 'JNNURM': Issues of Implementation' gives an update of the flagship programme vis - a vis CAG's observations on the implementation of the project. He has highlighted the constraints in effective implementation of the project and suggested measures for better implementation. He emphasizes the need for proper auditing and accountability framework for JNNURM.

"The Pension Fund Regulatory and Development Authority Act, 2013" passed recently was the culmination of long deliberations in the Parliament. In the document Section, we have included a copy of this Act for our readers.

Editor-in-Chief

DISCLAIMER

Views and opinions expressed in the articles published in the Journal are entirely those of the contributors and are in no sense official. Neither the Institute of Public Auditors of India nor the Editorial Board is responsible for them.

BUDGET DEFICIT- USE AND ABUSE

Dr. Subra Ramamurthy*

Introduction:

Budget deficit, deficit financing, and expansionary budget practices are interrelated and they refer to a fiscal situation where a government spends more money than it receives as revenue, the difference being made up by borrowing or minting new funds. The influence of government deficits upon a national economy may be very great. While it may be used to stimulate the economy in short spells as experience of various countries has shown (discussed below)), its use over long term generally leads to dependence on such measures leading to abuse with adverse effects on inflation, current account balance, investor confidence and job growth. The unintended consequences may include: lowering of governance standards, wasteful spending and widespread tax evasion.

Budget deficit is now the subject of intense scrutiny and debate and a source of serious concern in the U.S. Europe and India and other developing countries.

Ronald Reagan (US President 1981-89) is quoted as saying famously when questioned about the ballooning budget deficit during his presidential term: What budget deficit? It has grown big enough, it can take care of itself. He was lucky that his era was marked by economic growth and falling unemployment in the US-helped, according to skeptics of his supply-side economic policy, by other favorable factors. Other countries were not that lucky.

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* Dr. Subra Ramamurthy, FCCA (UK), FCIS (UK), Ph. D (USA) has been working with the IMF since 1991, initially as full time IMF resident budget advisor in some countries and currently as a Public Finance Management Specialist on specific assignments

The term- budget deficit- had no Russian equivalent until the breakup of the Soviet Union in 1990.The main reason was that once the budget was approved in the Soviet union it was passed on to the central bank (which had a nation-wide network of branches) for implementation. Capturing of transactions was done by the central bank branches who also controlled the collection of revenues and spending by the government units according to the pre-determined ceilings set by economic categories. If the government were to run short of cash to meet expenses, the central bank would automatically cut off spending or mint money. The Central Government did not have to bother about budget deficit (so the term was unknown) or public debt and related issues. But once the new nations that succeeded the Soviet union were forced to face the reality, following their economic collapse, by the market forces and strict conditionality of the IMF and other international agencies that assisted them during the difficult years to observe fiscal discipline, these terms came into vogue[1]with the need for balancing their budgets without the props provided by the central banks.

In fact budget deficit was not the main concern of the Western countries till a few years ago as it was regarded balancing the economy was more important than balancing the budget, and deficit financing was used to drive the economy.

Immediately after World War II, the countries in the West ravaged by the war embraced Keynesianism and used expansionary budget (unmindful of its impact on budget balance) and increase in government services to stimulate the economy. These measures made a healthy impact characterized by high economic growth, widespread improvements in productivity and the overall standard of living, and low rates of inflation and unemployment. Economic expansion allowed incremental budgeting, which concentrated governmental attention and policy decisions on the size and allocation of spending increases allotting a rising share of national

[1]Please see the Working Paper No 02/129-IMF 2002- (**S. Ramamurthy and E. Tandberg**) on *Reforms in Kazakhstan – Model for Other Countries*

output to public programs. Accordingly, total government outlays in the Organization for Economic Cooperation and Development (OECD) community rose from 28% of GDP (1960) to about 35% (1974)[2]. One reason for this public sector growth was that fiscal policy was geared to the potential of the economy, and it seemed proper that the public share rise during cyclical bouts of weakness. **Deficit financing and balancing the economy were seen as essential to accelerate growth and employment**.

The shortcoming of such an approach became evident to the Western nations during the oil shocks in 1973-74 and later in 1979 forcing them to transform budgeting from an engine of government expansion into a process for restraining growth in the public sector.

Oil prices were quadrupled by the Organization of Petroleum Exporting Countries (OPEC) in January 2004 after years of acrimonious negotiations between them and Western oil companies over pricing levels.

The US was not very much buffeted by the oil shock (primarily because of the use of US dollar as the medium of pricing of oil contracts and for trade settlement and depositing of huge dollar surpluses by OPEC in the US banks). The Soviet Union was also not affected as it had adequate oil reserves to meet its needs. The industrialized nations in the West and Japan (besides the import dependent developing countries) however felt the full impact of the oil shock. It jarred the economic and political stability enjoyed by them, bringing in its wake stagnation, soaring inflation, and unemployment, and a slowdown (or halt, in some countries) in the productivity gains that had previously made it possible for both public expenditure and private disposable incomes to rise. Some industrialized countries responded to the first oil shock as if it was a conventional cyclical downturn. They tried to reflate their economies by expansionary budget practice focusing on job-creation schemes and tax relief, and they accepted the upsurge in deficits as the normal countercyclical response. But recovery

[2]Allen Schick in *Government Financial Management-Issues and Country Studies*- Edited by Premchand, IMF publication

generally was short-lived and sluggish. Caught in the grip of stagflation, various governments found that policies aimed at combating unemployment worsened inflation and added to the budget deficit and public debt without accomplishing their objectives. They came to see high unemployment as a structural problem that could not be significantly remedied through short-term interventions. **Yet they persisted with the use of deficit financing**.

Second oil shock in 1979 caused by the Iranian Revolution and the Iran-Iraq war causing disruption of supply lines and the soaring oil prices (from \$15.85 to \$39.50 per barrel) unsettled again the economies of several countries that were dependent on oil imports. Still reeling from the aftereffects of the previous tremor only five years earlier, industrialized countries quickly came to the conclusion that they could not respond this time with countercyclical prescriptions. Instead, they began to shift gears from incremental to decremental behavior establishing cutback norms and other reforms.

Thus by 1980s the industrialized countries gave up deficit financing and interventionist policies, although belatedly, and adopted budget norms that aimed at balancing the budget by managing expenditure within fixed targets.

Recent financial crisis has made it necessary to re-evaluate the budget norms -

We are now in the middle of another major crisis emanating from reckless sub-prime lending by the US banks. The residual sub-prime lending in the US grew from \$100 billion (1995) to \$1.5 trillion (2006). The lending was fueled by growth of credit derivatives such as Collaterized Debt Obligations (CDO) and Credit Default Swaps (CDS). This phenomenal but poorly regulated growth led to merger and acquisition boom, and rise of asset prices and their subsequent collapse.

The end of Lehman Brothers (fourth largest investment bank in the US) in February 2009 marked the beginning of a major banking crisis caused by large scale sub-prime lending and collapse of housing market in the US. It created pressure on the US government to bail out a number of major banks while allowing collapse of over 300 smaller banks in the US during 2009-10 alone. The banking crisis had a serious impact on the European banks holding "toxic assets" issued by the US banks- made worse by their high risk exposure to East European and emerging market lending, and generated global credit crunch affecting inter-bank lending and consumer spending leading to serious economic downturn with rapid fall in GDP in most countries, and caused rise in unemployment and fall in household incomes. The banking crisis soon transformed into fiscal crisis and called for urgent reappraisal of the fiscal policies of 1980s. Government intervention became necessary in most countries to address the disaster.

Pre-crisis there were earnest, although not robust, efforts to bring budget deficit to sustainable levels and to avoid its abuse-

A few years before the current financial crisis became global, a number of countries woke up to the need to restrict the budget deficit to safe limits.

Euro zone countries

The Maastricht treaty creating the European Union and the subsequent agreement called "Copenhagen criteria" required that the countries adopting euro as their common currency should be open market economies with healthy fiscal management. Their budget deficit was not to exceed 3% of GDP and their public debt stock limited to 60% of GDP.

India

In India a major legislative step was taken by the adoption of the Fiscal Responsibility and Budget Management (FRBM) Act in 2003. It came into effect on July 5, 2004, along with FRBM Rules 2004. The Act lays down fiscal management principles and mandated **elimination of revenue deficit by March 2008** and reduction of fiscal deficit (to 3% of GDP, mandated by the Rules) and more importantly, prohibited the Centre from borrowing from the Reserve Bank of India. In order to extend the deficit control measures to the States, they were persuaded to pass similar legislation by the Centre providing monetary incentives.

The United States

Through the 1980s, the United States had divided government, not only in the sense that the Republicans controlled the presidency and the Democrats controlled one or both houses of Congress, but also in the sense that the two branches warred over budget policies and priorities. President Reagan was determined to downsize domestic government, but after initial success in 1981, he faced a Congress determined to maintain social programs against presidential attack. The result was a protracted impasse, with Congress unable to get the President to agree to sizable tax increase and the President unable to get congressional approval of further cuts in domestic spending. This resulted in passing of the Gramm-Rudman-Hollings (GRH) law, a measure that promised to restore budgetary balance through annual deficit targets. If the estimated deficit exceeded the target, funds would be automatically cancelled from all programs through *sequestration* providing for automatic cuts. In reality the sequestration process did not work although the actual deficit exceeded the target due to the government's strategy of postponing fiscal adjustments to future years conveniently using, a*ccording to Allen Schick*[3]*, University of Maryland,* questionable methods and deceptive budget practices.

With the onset of the financial crisis in 2008 the concern over budget deficit disappeared yielding to large fiscal stimulus measures and expansionary budget pushing up public debt-

India

In India (and China) large outlays were made for stimulating demand and to create jobs. In India, for instance, the stimulus package included: Plan and non-plan expenditure of Rs.320,000 crore, tax concessions, export incentives, incentives for loans on housing, rise in infrastructure funding etc. These measures were taken with the knowledge that they would have adverse impact on budget deficit (and public debt), contrary to the goals of the Fiscal Responsibility and Budget Management Act (FRBM).

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[3]*Government Financial Management –Issues and Country Studies*, IMF publication

Thus, the outturn of the 2009-10 budget was deficit of 6.9% of GDP leaving the then Finance Minister to mention in his 2010-11 budget speech that the FRBM goal would be postponed for the future in view of the measures to be taken to meet the challenge posed by the global financial crisis. He also pointed out the previous two years had been challenging due to the global financial crisis, causing an economic downturn, growth posting 6.7% in 2008-09 against the average 9% in the three preceding years justifying counter-cyclical fiscal stimulus package with fiscal expansion and "liberal" monetary policy support.

The fiscal stimulus measures using deficit financing did bring about a turnaround in the economy renewing the momentum in the manufacturing sector and exports, greater internal demand and easing of credit to the private sector creating the prospect of restoring the growth rate of economy to over 8% of GDP and for gradual exit from the stimulus measures and budgetary expansion. **Nevertheless, it was recognized that the fiscal space for continued adoption of expansionary budget was limited due to weak mechanism for strict monitoring of the growth of government expenditures at the national and sub-national levels in the preceding years, resulting in large revenue and fiscal deficits at the Central and State levels and the consequent growth of public debt and interest payments and the emergence of double digit inflation.** He promised, accepting the fiscal risk inherent in the use of expansionary fiscal stance, to adopt a calibrated exit strategy from it and capping the debt of the Centre and States at 68% of GDP by 2014-15.

The United States:

Following the onset of fiscal and banking crisis a stimulus package was worked out soon after Barrack Obama was elected President, and the Congress gave it the final approval in February 2009 by passing the American Recovery and Reinvestment Act which included tax concessions, relief to housing mortgagees and a Troubled Asset Relief Program (TARP) to rescue the major banks with huge "toxic assets" in their balance sheet.

Euro zone countries

Seventeen countries in the European Union (EU) have **euro** as their common currency. Most of these countries have also been hard hit by the global financial turmoil, exacerbated by home-grown imbalances in some countries. According to an IMF review in 2011 there were two feedback loops operating: one across borders owing to the tight financial and trade integration of the region, and another between the financial sector and the real economy, with the recession adding to the financial sector's woes. Bank lending remained subdued and financing conditions relatively tight.

Although the budget imbalance should not exceed 3% of GDP, the real level was much higher. Budget deficit ranged from 5.6% in Germany to 9.5% in Greece and 11.6% in Spain (March 2010[4]).

Relative to the size of the fiscal stimulus package of the US (5.6% of GDP), the packages announced by Germany and France were smaller- Germany 2.7% of GDP, and France0.6%; Italy had not adopted fiscal stimulus and countries like Greece had no fiscal space. Their budget deficit is not therefore the result of one-time fiscal stimulus package.

As the case of Greece shows, there has been concealment of the real level of budget deficit so that Maastricht treaty condition is not seen to have been breached. The concealment of the magnitude of the budget deficit and the membership of euro zone made it easy for countries like Greece, Spain, Portugal, Ireland and Italy raise funds by issuing bonds at competitive interest rates to meet resource gap allowing unsustainable level of government spending until the market realized their fiscal state.

The Case of Greece

Greece is a classic case of fiscal profligacy and deliberate concealment of real level of budget deficit with disastrous consequences. The real picture was not known until the new

[4] *The Economist* 3 April 2010

government took over in October 2009 under George Papandreou when prompted by deteriorating fiscal position, he disclosed the true state. He revealed that its finances were far worse than previous announcements, with a budget deficit of 12.7% of GDP, four times more than the euro zone limit, and a public debt of $410 billion exceeding its GDP. Creative accounting helped the past concealment.

According to the Article IV consultation report of the IMF mission (May 2010) pre- October2009 period saw that taking advantage of euro accession and cheap loans available, Greece enjoyed steady growth "marked by upswing in per-capita incomes approaching the euro area average... However, since October 2009, with limited reforms and insufficient policy adjustment, competitiveness deteriorated. Consequently, catching up was largely financed by (more) debt, generating large fiscal and external imbalances. The current global crisis has started to affect Greece and marks a turning point in economic conditions going forward. Necessary policy adjustments are inevitable to correct the imbalances. Delaying adjustment could lead to extended slow growth".

The mission report also highlighted: "Consumer and business confidence, industrial production, and retail sales have dropped sharply" with Greece plunging into a sharp recession.

The report recommended a comprehensive medium-term policy program to bolster confidence and boost potential growth by reducing public debt and budget and current account deficits to create space for the private sector and to improve competitiveness. Papandreou had to respond on pressure from France, Germany, and the IMF, by promoting austerity measures, reducing spending, increasing taxes, and introducing measures aimed at combating rampant tax evasion and reducing the country's bloated public sector. The announced austerity program- resulting from pressure from Germany and other major countries- caused a wave of nationwide strikes, but yet did not fully satisfy the EU.

Spain and Portugal with large budget deficit were not far behind-

While Spain's economy was not in such a bad shape as Greece's, its unemployment rate had reached 19.5%- far worse than that of Greece by 2010. The budget deficit was already far above the euro-zone recommended limits, touching 11.6% of GDP. It had the added problem of a banking sector saddled with subprime lending. Portugal was also a candidate for global bail out with burgeoning budget deficit (9.5% of GDP in 2009), stretched out banking sector, high cost sovereign bonds and rising public debt. There were other euro-zone countries in similar plight. The contagion was thus spreading from Greece to other euro area countries that had high budget deficit, rising level of public debt and banking sector woes. According to one survey, the risk exposure in these three countries alone was about€1.2 trillion[5].

Chronic use of budget deficit has now left the countries with recession, productivity loss and large-scale unemployment and the question now is not if the deficit should be cut, but when?

The United States

Following the 2008 financial crisis and the injection of funds under the stimulus package to save the major investment banks in disarray, tax benefits and investment in reconstruction programs, as stated earlier, the US economy after showing signs of recovery by last quarter 2009 went into a swoon again. In his second term as the President, Mr. Obama is locked in battle at this writing with the Congress on capping of government debt versus spending cuts to limit the budget deficit. Like GDP, employee compensation and proprietors' incomes grew at the slowest pace since the mid-1930s over the past five years, making rising debt levels increasingly difficult to service.

The US government deficits are likely to keep the credit and foreign exchange markets on edge over the near term. Washington's ability - or inability- to work down its massive debt

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[5]Sources: Bank for International Settlements and *The Economist*.

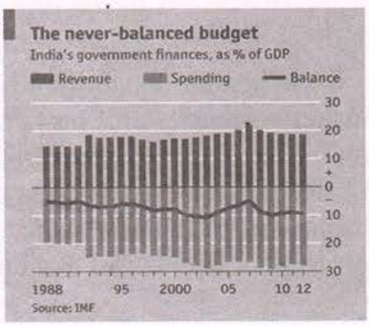
obligations (standing at 96% of GDP in 2011) and worsening current account deficit remain a key wild card of the financial markets.

Euro zone countries

Major countries in the zone save Germany are mired now in the longest slump since World War II and suffered sixth-straight quarter of recession in the first quarter of 2013. Borrowing costs for business are significantly higher in these countries impeding investment and job creation[6]. The youth not in employment, education or training (NEET) has increased between 2007 and 2012 with Greece topping at 25% of the population and Italy following closely[7]. According to the WSJ[6], "the medium-term prospects for the region remain deeply troubled".

India

According to the recent issue of *the Economist* , *India's economy is a concern. Growth is running at about 5%, nearly half what it once was. The external deficit is at a record, while inflation remains stubbornly high. Last year India faced the threat of a downgrade of its credit rating to "junk" status. Thankfully, Mr. Chidambaram has shaken Congress from its stupor. The party is to blame for the present budget mess, having launched a pre-election spending spree in 2008 that continued. Subsidies, mainly of fuel, almost doubled, to 2.4% of GDP. The Central Government's deficit has been 5-6.5% of GDP. Add in spending by the states, and India's overall budget deficit has been running at a wild 8-10% of GDP.*



The present Finance Minister presenting his 2013-14 budget emphasized again the constraints to economic space "because of a high fiscal deficit; reliance on foreign inflows to finance the current account deficit, lower savings and lower investment, a tight monetary policy to contain inflation, and strong external headwinds".

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[6] *The Wall Street Journal (WSJ)* May 16, 2013
[7] *The Economist* April 27,2013

policy to contain inflation, and strong external headwinds".

Spelling out his recommended measures to address these problems he cited the government's resolve to implement fiscal consolidation measures [8] such as: Drawing red lines for the fiscal deficit at 5.3 percent of GDP during 2012/13 fiscal and 4.8 percent of GDP in 2013-14.

As stated in the *Economist*, if the general government sector budget (i.e. Union and state governments with their independent bodies that provide non-market goods and services) is considered the deficit will be much larger (*See picture above*). For instance the West Bengal and Uttar Pradesh governments alone have forecast deficits of Rs 83,700 crore and 24,000 crore respectively for 2013-14. If as set out in the IMF GFS guidelines the deficit of public sector (comprising the general government sector and government owned commercial undertakings) is reckoned the deficit will be even larger. For instance Air India has a debt load of Rs400bn with a loss of Rs60bn in 2012-13 and Bharat Sanchar Nigam suffered a loss of Rs 16bn on an investment of 1.66trillion. There are many state owned electricity undertakings (such as in Tamil Nadu) which carry huge losses in their balance sheets and continue to suffer losses due to government policy of providing electricity free or at below economic prices. According to *the Economist*, the RBI "keeps the debt market under its thumb. It forces banks to buy bonds, and has propped up prices by buying bonds itself. It now owns 16% of the public debt, not far off the level in the crisis year of 1991".

When the economy was zipping along, the borrowing did not matter so much. But now, with slower growth, a debt spiral is a real risk with public debt already touching 70% of GDP. Borrowing has taken a heavy toll. It has fuelled inflation and a balance-of-payments gap, while crowding out the private investment in factories and infrastructure that India badly needs.

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[8] Based on report of Dr Vijay Kelkar's committee, set up by the Government of India in August 2012, on fiscal consolidation roadmap.

Rise in debt level will increase interest burden on the Union budget from Rs 316674crore (2012-13) to 370684crore (2013-14), that is from 31.58% to 37.33% of revenue expenditure, squeezing out resources from other items of expenditure.

Long periods of "borrow and spend" policy have resulted in erosion of checks and balances in the system, large tax evasion[9] and wasteful expenditure besides pressures from coalition partners to overlook corrupt practices and political intimidation on investigating agencies that led recently to the exit of Law Minister following Supreme Court's adverse comments.

Activism of the Supreme Court and fiercely independent Supreme Audit Institution provide some hope for relief from the current situation.

Expose by the Audit Reports of crores of rupees of revenue forgone (such as 2G scam, in the allotment of coal blocks etc.) and the instances of irregular expenditures incurred in various schemes and projects such as Commonwealth Games has set new standards. The Comptroller and Auditor General (Mr. Vinod Rai) -whose tenure expired recently- had adopted in pursuit of his constitutional duties the difficult task of bringing home to those responsible for stewardship of public finances that they can ignore their accountability to the public at large only at the risk of public exposure.

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[9] A recent report by the IMF compares India with other countries, adjusting for their wealth. It implies that India's government revenues should be 25% of GDP. At present they are just 18%.

THE BIRTH PANGS OF GENERAL ANTI- AVOIDANCE RULE (GAAR) IN INDIA

D.P. Sengupta*

Tax avoidance is a favourite pastime of tax planners across the world. Successful tax planning leading to legal avoidance of tax saves crores of rupees or millions of dollars of tax revenue. Till recently, not much was known about the shenanigans of corporates or High Net worth Individuals (HNIs) who manage to pay very little taxes. However, the world is passing through tough times ever since the financial crisis erupted in 2008. Governments world over are taking stock of their tax revenues and startling facts are coming into the open. Recent press reports suggest that Google, Starbucks, Amazon, all American multinationals, having revenues from their world wide operations have managed to substantially lower their tax outgo in the UK through various structures routed through tax havens and low tax jurisdictions. According to a Reuters report - 'How Starbucks avoids UK taxes'- since it opened in the UK in 1998, the Starbucks UK subsidiary had made over 3 billion pounds in coffee sales, opened 735 outlets but paid only 8.6 million pounds in income taxes.[1] That works out to a royal .28%.Hence when governments announce expenditure cuts and austerity measures, there is public outcry and call for concerted action against sharp practices adopted by some taxpayers. A protest group called 'UK uncut' has sprung up in the UK to protest against tax avoidance. According to a press release of the group, on the 8th of December 2012, over 40 protests across the UK took place at Starbucks shops. Protesters staged sit-ins and transformed

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[1] Available at http://www.reuters.com/article/2012/10/15/us-britain-starbucks-tax-idUSBRE89E0EX20121015

Starbucks into refuges, crèches and homeless shelters in protest against impact of government's cuts on expenditure. [2] In an unprecedented move Starbucks announced: "We listened to our customers in December and so decided to forgo certain deductions which would make us liable to pay £10 million in corporation tax this year and a further £10 million in 2014. We have now paid £5 million and will pay the remaining £5 million later this year."[3]

Similar protest have also been organised in the USA and also in other European countries. The UK Public Accounts Committee (PAC) examined the functioning of Google, Starbucks and Amazon in the UK and had stinging criticism against such companies. Similarly, in the USA, the tax practices of Apple Inc. have also come in for scrutiny. These movements and public hearings are forcing the concerned governments to act by taking various coordinated measures. Reducing tax avoidance is now included in the agenda of G-20 as well.

By contrast, in India, there is hardly any public outcry against tax avoidance. If at all, the pink press and the business news channels actively campaigned against even the feeble attempt of the government to bring in a General Anti- Avoidance Rule (GAAR). The attitude of Indian courts towards tax avoidance has also been rather mild. However, for a time, after the financial crisis of 2008, there was a campaign against corruption and in that context, there was some call for revealing the names of Indians having accounts in foreign banks. In 2009, some renowned citizens led by Mr. Ram Jethmalani filed a writ in the Supreme Court of India alleging inaction by the government of India in properly investigating black money, alleged to have been generated in India and stashed in foreign banks abroad. While disposing of the writ, the Supreme Court made certain caustic observations that are relevant in the context of the economic philosophy of the

[2] UK uncut press release available at: http://www.ukuncut.org.uk/blog/press-release-over-40-uk-uncut-actions-across-uk-successfully-target-starbucks-over-tax-avoidance-and-impact-of-government-cuts-on-women

[3] Starbucks agrees to pay millions in British corporation taxes available at: http://rawstory.com/rs/2013/06/23/starbucks-agrees-to-pay-millions-in-british-corporation-taxes/

government and has a bearing on the attitude adopted towards tax avoidance.[4] It may be worthwhile to note one such observation which sums up the rather permissive attitude of the government towards tackling tax avoidance.

> "... [I]t would also appear that in this miasmic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable, and the wealthy viewed as demi-gods, the agents of the State may have also succumbed to the notions of the neo-liberal paradigm that the role of the State ought to only be an enabling one, and not exercise significant control. This attitude would have a significant impact on exercise of discretion, especially in the context of regulating economic activities, including keeping an account of the monies generated in various activities, both legal and illegal. Carried away by the ideology of neo-liberalism, it is entirely possible that the agents of the State entrusted with the task of supervising the economic and social activities may err more on the side of extreme caution, whereby signals of wrong doing may be ignored even when they are strong. Instances of the powers that be ignoring publicly visible stock market scams, or turning a blind eye to large scale illegal mining have become all too familiar, and may be readily cited. That such activities are allowed to continue to occur, with weak, or non- existent, responses from the State may, at best, be charitably ascribed to this broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite - those who wield the powers of the state, and those who fatten themselves in an ever more exploitative economic sphere- can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes." [Para.15][5] [Emphasis added]

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[4] Ram Jethmalani Vs. Union Of India [2011-TII-05-SC-INTL]

[5] Ram Jethmalani Vs. Union Of India [ibid].

Compliance scale- Tax mitigation, Tax Evasion and Tax Avoidance

But before going any further it is necessary to understand what tax avoidance is and why the same should be a worry for any government. In tax literature, tax avoidance is distinguished from tax evasion. Tax evasion is a crime while tax avoidance is generally considered to be legal. There is also another expression that is found in the literature- tax mitigation, which is perfectly legal and is encouraged by the government itself. For example, the government wishes to encourage savings. With that end in view, currently, it gives, a deduction of up to Rs 1 Lakh from the total income of an individual taxpayer. Therefore, if I, an individual tax payer having a taxable income of Rs 10 lakh, contribute to Personal Provident Fund (PPF)[6] or such other avenues and take deduction of Rs 1 lakh and pay tax on rupees 9 lakh instead of on Rs. 10 lakh, there is pure tax mitigation and no one can argue that I ought to have paid tax on the entire Rs 10 lakhs. But if I omit to include income of Rs 1lakh in my income tax return that is pure tax evasion and is illegal. In between this two falls tax avoidance that amounts to following the letter but not spirit of the law. It is somewhat difficult to define tax avoidance in precise terms but one can recognise one when one sees one. The OECD defines tax avoidance as follows: a "term used to describe an arrangement of a tax payer's affairs that is intended to reduce his liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow".[7] It will be easier to understand the concept of tax avoidance through an example.

Example of tax avoidance and response of Indian judiciary

Cholamandalam Mutual Fund advertised in newspapers asking investors to invest in its scheme before March 24, 2000 to get double benefit- 100% investment in high growth technology

[6]Public Provident Fund (PPF) is a savings-cum-tax-saving instrument in India. It also serves as a retirement-planning tool for many of those who do not have any structured pension plan covering them.

[7] OECD, Glossary of tax terms.

stocks-, a 40% tax free dividend with a 2% entry and 2% exit load. M/s Walfort stock Brokers invested in the Chola scheme.[8] On 24/3/2000, it bought 45,53,215,709 units of the Mutual Fund @ Rs 17.57 per unit for Rs 8 crores. 25/3 and 26/3 were Saturday and Sunday. On 27/3, Walfort redeemed the units @ Rs 12.57/ unit for Rs 5.90,55,207. Walfort was in the business of buying and selling shares and stock. Since it purchased the units for Rs 8 crores, and sold for Rs 5,90,55,207, it apparently incurred a loss of Rs 2,00,44,793. But for this transaction, it had a business profit of Rs 9,70,52,757 and was to pay tax on the same. But because of this transaction, it paid tax on Rs 7,70,07,954, thereby saving tax of more than 60,00,000 (assuming a tax rate of 30%). Let us now look at its cash flow. Walfort had paid Rs 8 crores, got back Rs 5.90 crores. It also got a dividend of Rs 1.82 crores @ Rs 4/ per unit and got an incentive of Rs 23,76,778 thereby recouping the loss. The beauty of the scheme is that the dividend is tax-free under section 10(33) of the Income Tax Act.[9] Therefore, just by writing a cheque for Rs 8 crores for 1 day, Walfort managed to reduce its tax liability by Rs 60 lakh without any impact on its cash flow.[10]

As for the legislative intent, it was with a view to encourage and promote the development of the capital market that the government of India, first exempted dividend income in the hands of the individual investors in the year 1997 and subsequently extended the same to mutual funds in the year 1999. While introducing the exemption provision, the legislature definitely had not intended nor anticipated that some resourceful taxpayers would exploit the price differential between cum-dividend and ex-dividend units to generate loss and thereby reduce their taxable incomes.

When the matter reached the Supreme Court, however, the court, inter-alia, held as follows:

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[8] Based on the decision of the Supreme Court in the case of Commissioner of Income tax Vs. Walfort share & Stock Brokers Pvt Ltd [2010-TIOL-47-SC-IT].

[9] At the relevant time. Currently Mutual Fund dividend is exempt u/s 10(35).

[10] It might have had to pay some amount for arranging the fund for one day but that should not be very significant.

"With regard to such cases we may state that on facts it is established that there was a "sale". The sale-price was received by the assessee. That, the assessee did receive dividend. The fact that the dividend received was tax-free is the position recognized under Section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction..."

One can indulge in endless sophistry as was done by the Supreme Court in the above mentioned case about whether there was any abuse of the law by the taxpayer concerned, but at the end of the day, the stark reality was that the taxpayer, by merely writing a cheque for a day, generated a tax loss and by setting the same off against its business income saved more than Rs 60 lakh. To put in another way, the exchequer was poorer by Rs 60 lakh, which now has to be made up by other taxpayers who do not have at their disposal expert advice, time and money. Even if it is not illegal, question can be asked whether such a system is fair. And one must remember that fairness is at the heart of a good taxation system in a democracy.

There are many more examples of such unfair redistribution of tax burden because of some taxpayers resorting to egregious tax planning. The reaction of the government of India in such cases has been either to let the system continue or take reactive actions by plugging the particular loopholes. For example, while dividend stripping transactions had been going on for quite some time, it was only in the year 2001 that the government introduced section 94(7) by stipulating that the loss in such cases will be disallowed unless the holding period of the share/unit was at least for a certain period.[11] This could then prevent some of the same type of cases.

[11] Section 94(7) states:

Where—

(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;

(b) such person sells or transfers—

(i) such securities within a period of three months after such date; or

However, soon tax planners figured out that the same game could be played with bonus. There will be a price differential between cum- bonus units and ex- bonus. Therefore the government again acted reactively and in 2004 introduced section 94(8), this time to include within its ambit even the cases of bonus striping. [12] But by that time enough damage has already been inflicted on the revenue.

Tax avoidance and tax treaties: Treaty shopping

The game of tax avoidance can be played much more easily if international transactions are involved. The rules here are somewhat complicated and arcane and could be beyond the comprehension of some of our judicial minds so far trained at most to deal with only cases of physical exports of goods. The fact is that the Indian economy is now well and truly integrated with the world economy and instruments and methods of tax planning techniques are mind-boggling. We can mention here one game that is being constantly played out in India – 'treaty shopping' and the

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(ii) such unit within a period of nine months after such date;
(c) the dividend or income on such securities or unit received or receivable by such person is exempt,
then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.

[12] Section 94(8) states:
Where—
(a) any person buys or acquires any units within a period of three months prior to the record date;
(b) such person is allotted additional units without any payment on the basis of holding of such units on such date;
(c) such person sells or transfers all or any of the units referred to in clause (a) within a period of nine months after such date, while continuing to hold all or any of the additional units referred to in clause (b),
then, the loss, if any, arising to him on account of such purchase and sale of all or any of such units shall be ignored for the purposes of computing his income chargeable to tax and notwithstanding anything contained in any other provision of this Act, the amount of loss so ignored shall be deemed to be the cost of purchase or acquisition of such additional units referred to in clause (b) as are held by him on the date of such sale or transfer.

government of India is yet to come up with a coherent answer to the problem.

Countries enter into bilateral double tax avoidance agreements with each other in order to encourage mutual trade and investment. Since most countries tax their residents on their worldwide income, in the absence of a relief mechanism, the tax burden can be prohibitive. Therefore there is a genuine need to prevent double taxation. These treaties work on the basis of an agreed allocation of taxing rights between the two parties to the agreement. Normally the country where the income is earned i.e., the source country gives up its right of taxation over certain heads of income either wholly or partially in favour of the country of residence of the investors. These treaties are based on certain models- the prevalent ones are the OECD model and the UN model. The OECD model is suitable for treaties between capital exporting countries since in such cases the trade and investment between the countries concerned are more or less in balance. Therefore, overall the tax sacrifice by the countries concerned will be in balance. The same is however not true for treaties involving capital exporting and capital importing countries. Here the capital importing countries give up more revenue. The UN model gives more taxing right to the source country and hence is more suitable in such situations. In its tax treaties India generally follows the UN model. These models of course keep on evolving and changing.

For reasons as yet unknown, India had entered into a tax treaty with Mauritius in the early eighties that was based on the OECD model, thereby giving more right of taxation to the country of residence. The most significant source of income where India has given up its right is capital gains. Per se, this would not have been a problem since it was hardly likely for Mauritius to be exporting capital to India. But then in the nineties, Mauritius declared its intention to become an offshore financial centre thereby encouraging foreign registered companies to set up post box companies in Mauritius, which could then invest in India and get the benefit of the India-Mauritius tax treaty. An investor from USA would have paid capital gains tax on its exit from its investment in India. But if the investment were just routed through

Mauritius, no such capital gains would be taxable because India would have no right to tax under the treaty and Mauritius would not tax such gains in view of its domestic tax law. No wonder, therefore, any investor from any country would like to set up a paper company in Mauritius and invest in India and consequently pay no capital gains tax on exit.[13]

Here again the tax administration's efforts to stem the hemorrhage of tax revenue have come unstuck- partly due to the administration's unwillingness to take on the menace head on and partly due to our Supreme Court's misplaced sympathy for the tax planners. When an officer in Mumbai challenged the availability of the treaty benefits in the case of some FIIs, stock market reacted adversely, the government panicked and forced CBDT to issue a circular no 789 which in effect prevented the tax officers from questioning the bonafide of such Mauritius based investors. On a public interest petition against the issue of such a circular, the Delhi High Court declared it to be ultra vires. However, the government itself appealed the said decision and the Supreme Court upheld the power of the CBDT to issue the impugned circular. While doing so, the Supreme Court also came out with a gem, which is now fairly well known in all tax literature relating to international taxation.[14]

> "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development. Deficit financing, for example, is one; treaty shopping, in our view, is another..."

Tax avoidance from an economic perspective

There are some principles of taxation, which are now universally accepted to be the hallmarks of a good tax system. These are equity, simplicity, neutrality and efficiency. These principles are derived from Adam Smith's work but are relevant

[13] Under the treaty, there are other benefits also of investing through Mauritius. These are not discussed here.

[14] Union of India Vs. Azadi Bachao Andolan [2003-TII-02-SC-INTL].

even to this day. Unchecked tax avoidance violates each of these basic canons of taxation.

The concept of equity has two components- horizontal equity and vertical equity. Horizontal equity implies that similarly situated taxpayers should pay similar taxes. However, avoidance activities are more prominent in some sectors than in others. Thus, a salaried person having the same income as that of a businessman or a professional has much less scope of avoiding taxes since all his income is subject to deduction of tax at source. Therefore, a salaried taxpayer feels discriminated against. Vertical equity implies that taxpayers in dissimilar economic situations should pay dissimilar taxes. That is the reason why we have the slab system of taxation. Tax avoidance activities also violate the concept of vertical equity since tax avoidance schemes being costly, these can mostly be availed of by the wealthy and affluent sections of the society. Similarly, tax avoidance activities also consume a great deal of time and energy on the part of the best of the lawyers, accountants and administrators. Therefore, the same is at the same time inefficient for the economy as a whole.

Even though in India, the response of the administration to avoidance activities is not that swift, many a times the particular loophole is plugged adding to the volume of the tax code and thus contributing to the complexity of the tax system. The response of other administrations, notably that of the UK is swifter. It is believed that there are 300 Targeted Anti avoidance measures (TAAR) in the UK that has resulted in the UK tax code being the longest one in the world.[15]

If tax avoidance activities turn out to be too profitable, these may even influence the choice of economic activities, thus violating the concept of neutrality which dictates that the tax system should not influence or prefer particular economic activities.

Finally and most importantly, since government's spending needs hardly contract, the revenue lost due to avoidance by

[15] Report dated 11, November, 2011 of Graham Aaronson, QC.

particular set of taxpayers has to be made up by others and this then is patently unfair to the compliant taxpayers who stick to the straight and narrow.

GAAR, the early attempts:

It is thus obvious that in the absence of a robust judicial anti-avoidance doctrine as also due to the lack of political will in quickly coming up with specific anti-avoidance rules (SAAR), the only way left for the tax administration is to have a statutory anti-avoidance rule [GAAR]. Most of the important economies already have such rules.[16]

The proposal for having a statutory general anti- avoidance rule was in fact, mooted for the first time in India by the expert committee that was set up by the government in 1996.[17] The committee that gave its report in 1997 observed as follows:

> "Taxation is now regarded as an important cost factor and so it is a common practice to undertake tax planning to ensure that while tax is reduced or totally avoided the transactions are structured within the legal framework of the law to minimize costs. While tax avoidance by taking advantage of law as distinguished from evasion is generally considered legitimate, the line between the two has tended to become thin. Hence, may tax systems in the world now contain provisions defining unacceptable tax planning. These provisions have come to be known as anti-avoidance provisions which cover cases other than those of sham transactions amounting to outright tax evasion."...

The group was of the opinion that section 33 of the Singapore Income-tax Act with a few changes will be best suited to our conditions. However, the government fell and nothing happened for next 13 years till 2009.

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[16] GAAR is in place in the following countries: Australia, Brazil, Canada, China, Germany, Hong Kong, Ireland, Japan, Netherlands, New Zealand, Poland, Singapore, South Africa, South Korea, and UK. In the USA, although there is no GAAR per se, economic substance doctrine has been codified.

[17] Mr. P. Chidambaram was the Finance Minister at that time.

DTC and GAAR

It was only in 2009 that the government unveiled a Direct Taxes Code for the first time to replace the old and amendment ridden Income Tax Act. Amongst the many controversial proposals was the proposal for introducing a GAAR in India. Explaining the rationale, the discussion draft released on the occasion mentioned[18]:

"24.1 Tax avoidance, like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner. Sectors that provide a greater opportunity for tax avoidance tend to cause distortions in the allocation of resources. Since the better-off sections are more endowed to resort to such practices, tax avoidance also leads to cross-subsidization of the rich. Therefore, there is a strong general presumption in the literature on tax policy that all tax avoidance, like tax evasion, is economically undesirable and inequitable. On considerations of economic efficiency and fiscal justice, a taxpayer should not be allowed to use legal constructions or Transactions to violate horizontal equity.

24.2 In the past, the response to tax avoidance has been the introduction of legislative amendments to deal with specific instances of tax avoidance. Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them.

24.3 In view of the above, it is necessary and desirable to introduce a general anti avoidance rule which will serve as a

[18] Discussion draft on Direct Taxes code, 2009.

deterrent against such practices. This is also consistent with the international trend."

The reaction of trade and business associations ever since has been of open hostility against GAAR on the avowed ground that the provisions confer unfettered discretion to the tax authorities who would now be empowered to ignore business transactions in certain circumstances. In the first draft that was released, the tax authorities in the following circumstances could invoke GAAR and ignore an 'impermissible avoidance agreement' with necessary consequences. An impermissible avoidance agreement was defined as:

"[A] step in, or a part or whole of, an arrangement, whose main purpose is to obtain a tax benefit and it,-

a. creates rights, or obligations, which would not normally be created between persons dealing at arm's length;

b. results, directly or indirectly, in the misuse, or abuse, of the provisions of this Code;

c. lacks commercial substance, in whole or in part; or

d. is entered into, or carried out, by means, or in a manner, which would not normally be employed for bonafide purposes."

The DTC Bill having undergone many changes was finally introduced in the Parliament in 2010 and was referred to the Standing Committee on August 30, 2010. The Standing Committee discussed the contentious issues threadbare with various stakeholders for over a year and gave its report incorporating its suggestions on March 9, 2012. DTC was supposed to come into operation in 2013. In the meantime, cornered over the allegation of inaction on the front of tackling black money, the then Finance Minister decided to fast track certain anti-abuse measures contained in the DTC including the GAAR. It is true that the provision as incorporated in the Finance Bill, 2012 differed in some aspects from the original DTC Bill as also from what was suggested by the Standing Committee. Responding to criticisms, however, assurances were given and certain changes were also made already diluting the original provision. It was also decided to defer the implementation of GAAR by one year to 2013 and to issue suitable guidelines by constituting a committee headed by the Director General of Income Tax (International Taxation).

Constitution of Shome Committee and deferment of GAAR

After the passage of the Finance Bill 2012, there followed a media blitzkrieg that painted a very bleak picture of the economy and predicted the impending withdrawal of all foreign investments from India. A hype was successfully created that the GAAR proposal was solely responsible for the dismal economic situation of the country.

Meanwhile there was a change in the Finance Ministry and for about a month, the PM also held the Finance Ministry portfolio. It has been widely reported that the PM was uncomfortable with the stance by the Finance Ministry in the budget and was of the view that foreign investments should not suffer at any cost. [19] The then FM having moved to the Presidential Palace, the first thing that the PM did was to appoint Dr Parthasarathy Shome to head a committee 'to undertake stakeholder consultation and finalise the guidelines for the draft GAAR guidelines'. Reading between the lines, it was obvious that the committee had to find suitable intellectual justification to dilute the GAAR provisions.

Dr Shome has obliged by proposing to defer the implementation of GAAR by three years. In order to sound reasonable, he proposed to immediately announce the implementation of his suitably diluted GAAR from the year 2016-17. "Pre announcement is a common practice internationally, in today's environment of freely flowing capital" says the report.

And what is the justification given for the deferment? This is supposed to be on 'administrative grounds'. "It needs to be realized that GAAR is an extremely advanced instrument of tax administration - one of deterrence, rather than for revenue generation - for which intensive training of tax officers, who would specialize in the finer aspects on international taxation, is needed."

[19]See for example story by Reuters in http://in.mobile.reuters.com/article/economicNews/idINDEE85R0GX20120628

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This is one of the lamest excuses that one could think of. The committee ignores the fact that GAAR is not restricted to international transactions. It is relevant in domestic transactions as well. Moreover, what is the purpose of deterrence if it does not lead to revenue augmentation? Mere existence of deterrence is often times sufficient for revenue augmentation.

It is true that officers need to be trained. But training is an on-going process, particularly for the officers of the tax department. Many new features come in the law at periodic intervals. Today, there is no CFC legislation in India. If and when it comes, again as a measure, of deterrence, should we again postpone its implementation on the ground that officers are not suitably trained? Taxation is a dynamic subject. Issues would arise at regular intervals. They have to be met by the administration as and when they arise through training and through other means of communication. Training should follow tax policy not the other way round.[20] The excuse of not introducing an anti-avoidance legislation on the pretext of inadequate training therefore seems hollow.

Leave Mauritius route open

There are quite a few proposals given by the Shome committee that, if accepted, will render the GAAR provisions virtually ineffective. But we highlight here the proposal of the committee to keep the Mauritius route wide open. This is ironic since one of the unstated objectives for the introduction of GAAR was indeed the closure of the Mauritius route. We may recall that not very long time back the government had placed before the Parliament a white paper on black money. [21]The white paper gives a table of the share of equity inflows of top investing countries as follows:

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[20] See article in EPW –'Taxes and Death are inevitable but GAAR is avoidable'– M. Govinda Rao and R. Kavita Rao.

[21] White Paper on Black Money- presented on 16th May, 2012.

(All figures in US $ million)

Rank	Country	2008-09	2009-10	2010-11	2000-01 to 2010-11	Percentage of cumulative inflows
1	Mauritius	11,229	10,376	6,987	54,227	41.80
2	Singapore	3,454	2,379	1,705	11,895	9.17
3	U.S.A	1,802	1,943	1,170	9,449	7.28
4	U.K	864	657	755	6,639	5.12
5	Netherlands	883	899	1,213	5,700	4.39
6	Japan	405	1,183	1,562	5,276	4.07
7	Cyprus	1,287	1,627	913	4,812	3.71
8	Germany	629	626	200	2,999	2.31
9	France	427	303	734	2,264	1.75
10	U.A.E	257	629	341	1,890	1.46
Total FDI Inflows		27,331	25,834	19,427	129,716	100

The white paper then mentions:"[T]he two topmost sources of the cumulative inflows from April 2000 to March 2011 are Mauritius (41.80 per cent) and Singapore (9.17 per cent). Mauritius and Singapore with their small economies cannot be the sources of such huge investments and it is apparent that the investments are routed through these jurisdictions for avoidance of taxes and/or for concealing the identities from the revenue authorities of the ultimate investors, many of whom could actually be Indian residents, who have invested in their own companies, through a process known as round tripping."

It was therefore expected that the proposed GAAR would tackle the problem. In this context, the White paper stated:

"5.2.62 India has consistently taken the stand against structuring of transactions through tax havens by creating a complex chain of subsidiaries for avoidance of taxes. Indian tax administration has always been of the view that foreign investors in India should pay taxes on their income either in India or the country of their residence, and does not endorse attempts to avoid taxes in both the countries by use of such opaque tax-avoidance structures. The legislative measures included in the Finance Bill 2012 and the introduction of GAAR can create necessary deterrence against such structuring and thereby plug this loophole for tax evasion." (Emphasis added)

However, the Shome committee did a perfect U-turn and observed as follows:

"Stakeholders also raised an issue regarding the status of Circular No 789 of 2000 issued by the Govt. The Circular provided that a Certificate of Residence (TRC) issued by the Govt. of Mauritius would constitute sufficient evidence for accepting the status of residence of a person as well as beneficial ownership for applying the tax treaty. Currently, the Revenue cannot look into the genuineness of residence of a company incorporated in Mauritius based on commercial substance, or other criteria, once a TRC is issued by the Mauritius authorities. Thus, the Circular would be in direct conflict with GAAR provisions. Hence, clarity was sought by stakeholders whether the Circular would be withdrawn after commencement of GAAR or, if not withdrawn, whether it would still be applicable to avail treaty benefit.

In view of the above, the Committee recommends that, where Circular No.e 789 of 2000 with respect to Mauritius is applicable, GAAR provisions shall not apply to examine the genuineness of the residency of an entity set up in Mauritius." (Emphasis added)

The logic adopted by the committee is curious to say the least. The committee first propounded a theory that wherever there is a special anti-avoidance provision in the Act or treaty, that should prevail and GAAR should not be applied in such cases. This is completely contrary to the practices adopted by the countries that have adopted GAAR so far.[22] The committee then

[22] For example, in the discussion document put up by HMRC, under the title 'Impact of GAAR on other anti-avoidance measures' in Para.2.5, it is mentioned: "The GAAR will be one strand in HMRC's approach to tackling avoidance. It will not affect HMRC's right or ability to challenge in the normal way arrangements which it considers ineffective in achieving a tax avoidance purpose. If arrangements do not fall within the GAAR; they may still be regarded as avoidance. HMRC will challenge and, where it can, counteract all forms of tax avoidance:

- using the GAAR, where it applies, as an additional tool alongside existing anti avoidance equated the circular 789 issued in the context of Mauritius treaty as discussed earlier as a kind of a SAAR and then adopting its own logic recommended that whenever investments are structured through such jurisdictions, the same should not be questioned by GAAR thereby negating the very purpose of bringing the provision into effect.

Conclusion:

GAAR [Chapter X-A] is technically a part of the Income Tax Act, 1961. But, its implementation has been deferred till 2017. It is therefore yet to be born and even before its birth, Dr Shome's prescriptions are there to ensure that either it is still born or has a stunted growth. It is not known which government will be in power in 2017. But going by our record, it is unlikely that in India we will have a very strong anti-avoidance legislation for any time to come. After all, the circular 789 was issued at the time of the NDA government in the year 2000. Thereafter, the UPA government has not only continued with it but also scuttled any move to get rid of the same. Indonesia has scrapped its tax treaty with Mauritius precisely because of such misuse. China has amended the article relating to capital gains in its treaty with Mauritius. It seems therefore that there is bipartisan support to continue with the present system with occasional noises about tax avoidance. The recommendation of the Shome committee thus nicely fits in with the view articulated by the Supreme Court which we mentioned at the beginning of this article that the agents of the state may err on the side of extreme caution even when there are strong signs of wrong doing. [23]

- tools; and
- using existing anti-avoidance tools where the GAAR does not apply".

After this article was submitted, the CBDT has, on the 23 rd September, 2013 notified the GAAR rules, 3 years in advance. In the final rules there is no reference to exemption for the Mauritius route as suggested by Dr. Shome but neither do the rules categorically say that such entities would be subject to GAAR. Circular 789 continues. The question of primacy of SAAR over GAAR is also left open. Moreover, it is specifically mentioned that investments by foreign investors by way of offshore derivative instruments or otherwise in FIIs would not be subject to GAAR. Thus participatory Note (PN) investments will clearly be out of the ambit of GAAR. (See CBDT Notification no 75/2013).

COAL BLOCK ALLOTMENTS-AUDIT REPORT ON "WINDFALL GAINS"

Ajit Patnaik*

The governance atmosphere for last few years is thick with technically accomplished reports of CAG on the economic sector igniting lively debate and ugly rebuttals regarding allocation of natural resources. The debate ranges from eloquent and learned analysis to below the belt and wild accusations against the CAG in person. Government Audit is a technical and matter of fact exercise where the practicing audit professionals diligently meet the professional requirements in making the Audit Reports far from the din and bustle of the 'madding crowd'. Economic sector audit dealing with allotment and development of natural resources which has seismic implications on economic growth of the country and living standards of the people, has expectedly generated the heat and dust. Leaving the areas of natural resources without appropriate regulations for possible maximisation of realisable value keeping public interest in view was an open invitation for carpet-bagging.

The Report No 7 of 2012 of the CAG on Allocation of Coal Blocks and Augmentation of Coal Production won wide acclaim for its incisive reporting and technical excellence from the public, civil society organisations and members of Parliament. It was not a routine report of the Government Auditor on deficiencies in maintaining accounts. The Report as a review of the performance of the Government in allocation of coal blocks was a pioneering audit endeavour in the energy sector in highlighting how the procedural delays and infirmities led to inefficiencies in policy

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formulation and implementation and windfall gain to private parties, of which a part could have been taped for public revenue.

Coal, because of abundant reserves in the country, has been recommended as the primary source of energy, by successive Committees on Fuel Policy; one of the early committees being Chakravarti Committee of 1975. India is the third largest producer and consumer of coal after China and US. As stated by the Sankar Committee (2005) in its report, coal shall remain India's most competitive fuel choice for power generation over the next 25-50 years. With, coal accounting for 50 percent of primary commercial energy during the Twelfth Plan period, the demand for coal is expected to reach 980 MT, the domestic production has to grow at an average rate of 8 percent, to partially meet the demand apart from imports. The position of coal being what it is in the energy security scenario of the country, it was germane that Audit should have taken up audit of coal block allotments.

Thrust of the Report

a) CIL falling short of Planning Commission targets

Coal India Limited (CIL) was within the close range of achieving internal targets fixed by it with the production ranging between 99.21 per cent in 2006-07 to 93.66 per cent in 2010-11. However, CIL achievement fell short of the targets set by the Planning Commission in 2010-11 by 51 million tonnes and it failed to supply 54.41 million tonnes of coal as per Fuel Supply Agreements (FSA) during the period 2008-09 to 2010-11.

There was no effective mechanism to monitor end-use of coal which defeated the purpose of distribution of coal to small and medium consumers as per the New Coal Distribution Policy 2007, involving diversion of coal to sale in black market.

As per recommendations of Energy Coordination Committee, since out of 289 coal blocks only 150 blocks were planned to be exploited by CIL by 2011-12,79 explored coal blocks were to be dereserved to enable other players to do mining in them. However, out of 48 blocks dereserved from CIL as of June 2011, 9 remained unallocated, 3 were deal located after allocation, 9 blocks had not commenced production though the normative date of production was over and in 27 blocks the normative date of production was between July 2011 to April 2014, thus defeating the purpose of de-reservation.

In the 32 projects under different subsidiaries of CIL, project execution was dealyed by 1 to 12 years which further accentuated the demand –supply gap.

b) Allocation of captive coal blocks-

The coal blocks were allotted to PSEs through Government dispensation route, while the allocation to captive users other than Ultra Mega Power Projects (UMPP) were made through Captive Dispensation on the recommendations of the Inter- Ministerial Screening Committee (Screening Committee)headed by Secretary, Coal. UMPPs were allocated coal blocks through tariff-based competitive bidding as per the guidelines of Ministry of Power.

The Screening Committee (SC) while scrutinising the applications did not record the comparative evaluation of the applicants to be procedurally transparent. In Fatehpur coal block, out of 69 applications, 36 applicants were called to make presentations and finally 2 were recommended. Similarly, in the case of Rampia and dip side of Rampia, out of 108 applicants only 2 were scheduled to make presentations. However, the SC made six recommendations. In both the cases, speaking reasons for the decisions were not on record.

c) competitive bidding of coal blocks-

With the increase in demand in the Tenth Five year Plan on energy availability, the applicants for coal blocks increased with the spurt in demand for coal. It was de rigueur that when there are large number of applicants, a fair and competitive system for selection of allottee and to realise the fair value should have been put in place. However, this was not done till as late as September 2010 and February 2012 when the Mines and Minerals (Development and Regulation) Act, 1957 and the rules for auction respectively were notified.

On 28 June 2004, the idea to allocate coal blocks through competitive bidding was made public at an interactive meeting held with the stake holders under the Chairmanship of Secretary (Coal). The then Secretary (Coal) on 16 July 2004 minuted "...since there is a substantial difference between the price of coal supplied by Coal India and coal produced through captive mining, there is a windfall gain to the person who is allotted a captive block.....the bidding system will only tap part of the windfall profit for the public purposes....." In September 2004, Secretary (Coal) mentioned regarding the pulls and pressures encountered by the Screening Committee. The Ministry of Coal and Prime Minister's Office (PMO) kept tossing the file till it was decided in the meeting in PMO in April 2006 that it would be appropriate to make the amendment in the MMDR Act 1957 for introducing the system of competitive bidding. In October 2008, a bill to amend the MMDR Act 1957 was introduced in Parliament by the Ministry of Mines.

Audit raised the issue that the process for competitive bidding aired by Government as early as June 2004 took an unconscionably long time to get concretised in 2008. It also observed that the system of competitive bidding could have been introduced as per the opinion of July 2006 of the Ministry of Law and that could have been brought about by administrative instructions which would have been governed by the Indian Contract Act 1872. The Ministry allocated 142 blocks through the Screening Committee procedure between July 2004 and September 2009.

d) financial advantage to private allottees-

Audit brought out that due to delay in introduction of the process of competitive bidding, the private players have gained due to the difference in the price of coal supplied by CIL and coal produced through captive mining. This had also been recorded in the files of Ministry of Coal in 2004. The auditors worked out the financial implications in case of 57 open cast / mixed mines out of total allotment of 75 private allotments. The underground mines were excluded from financial implications in the absence of reliable data. PSU allottees and joint ventures were also not taken into account as the likely gains would have passed on to exchequer in the shape of dividend / revenue. Allotments made to UMPPs through competitive tariff bidding were also excluded.

Extractable reserve (ER) was taken as 73 per cent, after deducting 10 per cent each from Gross Reserve (100 per cent) to arrive at net GR, from net GR to arrive at Mineable reserve (81 per cent) and from MR to arrive at ER. This was done on the basis of the report of the Sankaran Committee (2005).

In the case of open cast mines, where mining plan (MP) was available, ER was taken from the MP, and where MP was not available, ER was taken as 73 per cent, though open cast mines generally have extraction ratio of more than 90 per cent. In the case of mixed mines, where MP was not available, the extractable reserve of 37 per cent has been taken on the basis of average worked out of ER of mixed mines where MP was available.

CIL produces more than 80 per cent of total requirement of coal with pan –India presence. Average cost of production per tonne of all grades of coal produced in open cast (OC) mines of CIL and its subsidiaries (Rs 583.01) and average sale price of all grades of CIL open cast mines (Rs 1028.42) were taken into account for arriving at the financial implications, which was further reduced by financing cost of Rs 150. The total ER of 6,282.500 million tonnes over the lifetime of the blocks as per MP was multiplied by the net differential of Rs 295.41.These figures were taken from the Final Cost Sheet of Coal India for the year 2010-11. The potential financial gain to private allottees was pitched at Rs. 185,591.34 crore in respect of 57 open cast mines / Mixed mines.

Criticisms merited?

The CAG report on coal block allotments was like the proverbial bull in the China shop of allotments of the coal blocks which till then was a dark corner on which the searchlight of public scrutiny had not been focussed. Audit did a stellar job bringing to light the lack of transparency in allotments and ultimate failure to meet the ostensible objective of increasing coal production. It stirred the hornet's nest, stirring the Government and affected

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parties to heap on it charges of exceeding the mandate by treading into policy domain,cooking up grotesque figures to play to gallery, ignoring political reality of the day by questioning economic decisions aimed at improving living standards, leading to a decision-paralysis in Government et al.

The most important criticism levelled against the report is that it has indulged in the game of notional inflated numbers to attract public gaze and to show in poor light the government of the day. Some critics went to the extent of making the insupportable suggestion that CAG should refrain from making any loss calculations. Any Audit Report and assignment of a value to the audit objections is inseparable. It will only be empty verbosity, void inside like a bamboo pole. Numbers illustrate the severity of this point. However, while the numbers support the audit points numbers by themselves do not constitute an issue. The figures of gain given in the audit report are to be seen as buttressing the issues raised in the report. Was the gain to private parties overestimated? The report, on the other hand, was on the conservative side as it took only 57 OC and Mixed mines leaving out Underground mines and allotments to PSUs. Had the intention been to present the maximum justifiable number, the number would have been in the vicinity of Rs 10 lakh crore. The e-auction and import rates were not factored in. Enormity of the audit number is directly proportional to the enormity of omissions and commissions.

Could the figures have been discounted? The report took the 2010-11 cost and sale price; hence there was no need to project for the life of the mines and then discount. Current price was the most reasonable option as the international price of coal may move in either direction which can influence domestic prices also. The figures were arrived at after making certain assumptions. This is the opportunity cost of certain steps not having been taken in time.

The question that has been raised by certain quarters is why CAG did not take up audit from 1993 when the allotment of coal block to private parties started. Allocation of coal blocks through competitive bidding was first made public in June 2004. Hence, the year 2004, which seems logical. However, that does not justify the competitive procedure not being followed since 1993.

Another issue that was raised was that since the coal had not been mined, there was no loss. But the fact remains that it is an allotment of an asset, which can be part of a balance-sheet and can be used to commercial advantage. It was like money in a bank account whether drawn or not. It is also a licence to exploit remaining unused defeating the purpose of allotment and in the process delaying flow of revenue to exchequer, rather forcing the government to pay for import of coal. It was also stated that since coal was allotted for specific end-users like power there was no loss. The fact remains that due to difference in price of coal of CIL and cost of production of coal by end-users, the captive users made handsome profit.

Did the report tread into the domain of policy? There is no second opinion that CAG should not question the policy decisions. However, a distinction has to be made between legislative decisions and executive decisions. On the former, there is absolute no. In the present case, the decision to go for an administrative decision or an amendment to MMDR Act was an executive decision. Further, the process was unduly delayed. Audit can always look into deficiencies in formulation and implementation of policy, having implication on revenue as per Sec 16 of DPC Act 1971, which enjoins upon CAG to satisfy himself that in regard to revenue, rules are appropriately framed and enforced.

A path-breaking report......

It was a path-breaking report in many ways. Firstly, CAG has taken the bull of process of allocation of natural resources by the horns. The noble intentions of increasing production have to be backed by transparent procedures. Secondly, it is a major shift to opportunity cost audit from bare revenue and expenditure audit. Thirdly, it is an exhortation to buckle up the systemic deficiencies in implementation which has led to coal not being extracted adequately when needed, accentuating the demand gap in supply of coal and in a wider spectrum across all sectors; this is the major thrust of the report. Fourthly, the fact 'that such constitutional authorities are expressing themselves is a sign of maturation of our democracy'. Fifthly, CAG's reports are 'part of the great cleansing that is under way' in the body-politic of India.

Is Audit responsible for policy paralysis? Is Audit responsible for Current Account Deficit (CAD)? Audit cannot be accused of either. Audit is not inimical to responsible and efficient decision-making. CAD (import of coal only) is the result of meandering progress of decision-making in which Audit had no part. Audit cannot be blamed that a certain section of the media and society thought like Pythagoras that all things are numbers; audit numbers were the result of omissions and commissions worked out to support the audit objective of better governance. Audit reports encourage better and appropriate governance, thus making the decision-making process efficient and transparent. Perhaps the churning has begun as in the Coal sub-sector; Audit deserves kudos for being the catalyst.

References-

1. Report no7 of 2012 of CAG
2. Economic Survey 2012-13
3. 12th Five YearPlan document
4. Sankar Comittee Report (2005)
5. CAG's (DPC) Act 1971.

FODDER SCAM –REVISITING THE ROLE OF THE FINANCE DEPARTMENT IN BIHAR

P K Mukhopadhyay*

Foreword

Bihar went through great misfortunes in the 1990s due to incompetent governance and government sponsored high-level corruption manifested by myriad scams of which the Fodder Scam, was the most glaring example. As CAG unearthed the mechanism of the fraud, it came out that the government actively supported and sponsored a scheme of corruption in which millions of rupees of public funds were stolen through false bills from the state treasuries by a coterie of officials of Animal Husbandry Department (AHD) with direct connivance and support of the highest level of the political and administrative leaders (Chief Minister and Finance Minister, Finance Commissioner, Secretary AHD etc) of the government. The misdeeds of the prominent section the government and the Animal Husbandry mafia in the ill - famous Fodder scam of Bihar state were recalled when the Special CBI Court, Ranchi in case number RC 20A/1996 (supervised by a Bench of Jharkhand High Court) decided in October 2013 that the former Finance Minister and Chief Minister of Bihar (Lalu Prasad) and other leaders and senior bureaucrats were guilty and awarded the punishment of 5 years of rigorous imprisonment and a fine of Rs 25 lakh to the former Chief Minister (Lalu Prasad).

The scale and magnitude of the fraud and the loss to the state exchequer (Rs 713 crore) was unprecedented at that time. CAG's audit report bearing number 2 (Civil) 0f 31 March 1996, Government of Bihar (Report) provided an exposé on complicity

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and supportive role of the Finance Department and political executives in this fraud. This paper recalls the seminal findings of audit in regard to the Finance Department's role in this scam; other detailed findings on many other aspects of the fraud in CAG Report are outside the scope of this discussion.

The centrality of the role of the Finance Department, the keeper of the financial interests of the state, in large scale looting of public funds in Fodder Scam was a new phenomenon in history of public administration in this country. The Report provided conclusive evidence of how the Finance Department of Bihar Government misused its position, manipulated the annual budgets and subverted controls to facilitate the drawal of huge excess amounts over the budgeted funds and provided cover to the mafia against any inquiry of these frauds.

The Report demolished the attempts of the former Chief Minister of Bihar to deny any role of the Finance Department and the Finance Minister in this fraud and pass the buck to others. It showed how the fraud and its concealment was made possible by clever omissions and deliberate actions at the highest level of Finance Department in the Bihar Government. The emphatic findings of CAG questioned his moral authority as the chief political executive of the state.

On the face of it, the Fodder Scam appears to be merely a handiwork of a few officers in Animal Husbandry Department (AHD) that drew large number of false bills in a mafia-like operation to draw over Rupees 713 crore for fictitious supply of feed, fodder and medicines for the farm animals of Bihar government. But the Report established that the drawing of false bills by AHD mafia was only one part of the operation- the levers of the fraud were controlled by the Finance Department headed by Finance Commissioner with the Finance Minister at the helm in the government.

Budgetary control mechanism subverted

It is an established practice that Finance Department compiles the annual Budget proposals and the government seeks approval of the legislature for the Budget. The Finance Minister is required to personally present the proposals in the Budget that are identified as his responsibility. The Appropriation Act authorizes the government to spend the budgeted funds and requires that report on the spending by submission of the duly audited Annual Finance and Appropriation Accounts to the Legislature. Once the budget is passed, the Finance Department takes over the management of the state's finances by allotting funds to the Departments, all the while reviewing the progress of expenditure and regulating the cash flow with monthly inputs from the Reserve Bank of India (RBI).

The Accountant General (AG) compiles the monthly accounts based on the records of transactions obtained from the Treasuries and provides to the Finance Department on monthly basis an analysis of the spending against the budget provisions and alerts the government against too much spending in any department. This way the budgetary control and exchequer control are used simultaneously to mange the states finances. At the end of the year the Appropriation Accounts are finalized taking into account the comments of the government on the draft accounts. Additionally there are audit controls through the institution of CAG and oversight by the Public Accounts Committee (PAC) of the Legislature. In all these matters the Finance Department plays an over riding and coordinating role to ensure that the state's finances are managed effectively and it remains accountable to the Legislature for ensuring the security of the finances against loss by fraud and mismanagement.

The Report on the Fodder Scam analyzed in details how, by a series of omissions and commissions, the Finance Department of Bihar Government subverted these controls and breached the trust and responsibility imposed on them in this regard and ensured that the fraudulent excess drawal of large amount of funds by the AHD officials continued unhindered and remained concealed from the oversight authority like AG and the scrutiny by the Legislature. The Vigilance Department (working under the Chief Minister) and the Chairman Public Accounts Committee, the oversight wing of the Legislature together helped Finance Department to stonewall audit of AHD units and any request for investigation against the allegations of fraud.

Acts of deception by the Finance Department - fence eating the grass

Finance Department prepared the budget for AH Department in a way that provided enough budgetary space to draw excess funds by them. That the AHD mafia went far beyond even the inflated budget to suck out large funds through fraudulent bills is another issue.

From 1990-91, Finance department ensured that the budget of AH Department was unjustifiably over pitched and funds were provided in excess of requirement (AHD Budget for 1990-91 was Rs 55 crore and in 1995-96 it jumped by 50 per cent to Rs 82 crore). While the non-plan expenditure in that department was growing in leaps and bounds, there was no visible expansion of the AH Department's activities. This did not raise any eyebrows in the Finance Department.

Finance Department also allowed the AH Department the exceptional privilege of submission of budget estimates without revealing the actual expenditure of previous years. Thus there was no comparator to examine if the estimate was realistic. Finance Department was required to question this malpractice.

Finance Department made another bizarre exception for the AH Department while imposing cash flow restrictions on the department heads in the first four months of financial year during 1992-1995. During these years, Vote on Account was passed for first four months and regular budget would be passed in July. In these first four months, Finance would advise all Departments for strict control of expenditure. But AHD Officers in the three districts of Ranchi, Chaibasa and Dumka would have none of it and drew Rs 10.09 crore (more than 13 percent of the budget) in 1994 in these months alone. Finance Department would turn Nelson's eye to these transgressions.

Incidentally, different officers in Finance Department examined the AHD Budget proposals from year to year; so there was no continuity in these examinations- a factor that needs to be reckoned in the favoured treatment for AH Department budget proposals.

Method in the madness

Question is why the AHD budget was made this way. There was a method in this madness. Firstly, having got an inflated budget, Finance Department would not officially allot a part of the budget (in excess of 25 per cent in some years) to the AH Department. The unalloted funds would show up as unspent funds (savings) during expenditure review. The so-called savings now provided an opportunity to organize another charade – these funds were formally surrendered through elaborate legislative procedure!

The stage was thus set where the Legislature was assured that Finance Department was actively monitoring the expenditure and hence the unspent funds of AH Department were surrendered. This created a smoke screen and the allegations of irregular excess drawal of budgeted funds raised in the Legislature could be buffeted. In reality, AH department officers were fraudulently drawing hundreds of crores of rupees from South Bihar Treasuries through false bills while the Finance Department was orchestrating the surrender of unspent funds of the same department at the same time! This drama of the absurd could go on as the AHD's expenditure were not getting included in the monthly accounts prepared by the AG and no one could know the expenditure actually made by them and link the two seemingly contradictory actions.

The fraud dented the state's finances

Lalu Prasad assumed charge of Finance Minister in March 1990 and the excess drawal by the AH Department mafia had a quantum jump. Rising fortune of the star politician coincided with the rising loot. Consider this: during three years from 1987-88 to 1889-90, Rs 21.70 crore was drawn in excess and in 1990-91 alone Rs 29.29 crore was drawn. There was no looking back after this. In the following two years (1991-92 to 1992-93) Rs 158.40 crore and in the next three years (1993-94 to 1995-96), Rs 442 crore was taken out by the AHD mafia from the treasuries fraudulently.

The fraudulent excess drawals had disastrous impact on the state's finances. The Rs 603.62 crore of illegally drawn excess funds by the AHD mafia during 1991-1996 was equivalent of nearly 15 percent of the total revenue deficit of the state of Bihar in these years (Rs 3930.22 crore). In other words, had these funds not been looted, the revenue deficit and debt burden of Bihar government would have been that much less.

Finance Department actively concealed the fraud

To ensure that the fraud continues unabated, it had to be ensured that the brazen loot from the public treasuries should not come to light for as long as possible. To achieve this end, flow of records from the treasuries to AG was to be gagged. Finance Department did precisely that while they were responsible to ensure that monthly accounts are sent by the treasuries in time to AG. They looked the other way when the district treasuries in the South Bihar did not send the vouchers on monthly basis to AG. Thus till the end of the year, the accounts of the Government of Bihar would not include most of the fraudulent transactions of AH Department. It came to such a dire pass that in 1991-92 and 1992-93, less than 2 per cent of AH Department expenditure could be included in the preliminary accounts till end of March. No wonder that none would know what expenditure was incurred in the AH Department till very late in the day.

Finance Department used this ridiculous situation, made possible by their collusion, as an alibi to their advantage. In May 1994 AG compiled the accounts of the government expenditure upto December 1993 and noticed that AH Department expenditure upto that period reached Rs 82.66 crore as against a budget of Rs 74.11 crore. When AG wrote to the Finance Department for investigation of such huge excess expenditure, they replied that review of incomplete accounts would not be fruitful!

Even personal letters from CAG to the Chief Minister to pull up the arrears in sending accounts from the treasuries fell on deaf ears until this could not be kept hidden any more. In October 1994, when AG could finally compile several years' accounts, for the Government of Bihar, over Rs 500 crore loot by the AH

Department officers was identified. But Finance Department was unmoved. The loot continued unabated and another Rs 200 crore or so was looted during remaining months of 1994 through 1995-96!

You can take the horse to the water but you cannot make it drink

The now jailed former Chief Minister of Bihar made a case in the Assembly that AG did not warn the government in time about the excess drawal of funds. This was a blatant lie.

Even while the vouchers were not being timely sent by the Treasuries of South Bihar and compilation of accounts was delayed, AG was regularly sending the draft Appropriation Accounts to Finance Department. For each yerar these accounts were showing huge excess drawal of funds over budget by the AH Department as shown in the table below:

Year of Draft Appropriation Accounts of AHD	Date sent to Finance Department/AH Department	Excess expenditure over budget(Rs in crore)
1990-91	30 August 1993	29.29
1991-92	15 March 1994	70.72
1992-93	31 October 1994	87.77
1993-94	22May 1995	125.03
1994-95	25 September 1995	170.61

Had the Government acted on these Reports as they were expected to, they could have saved the loot that took place year after year. For example, if they had acted in August 1993 when the Draft Appropriation Accounts of 1990-91 were sent to them, they could have prevented loot of Rs 450 crore or so in the next four years. Even if they had acted in any subsequent year still they could save lot of funds. It appears that Finance Department clearly had no intention to safeguard the financial interest of the state.

Finance Department gave the figures of actual expenditure to the Finance Commission in May 1994

In May 1994, Finance Department's submission to Tenth Finance Commission showed the actual expenditure by the AH Department for 3 years upto 1992-93 as following:

- 1990-91-Rs 72.29 crore (budget Rs 54.92 crore)

- 1991-92-Rs 117.60 crore (budget Rs 59 crore)
- 1992-93- Rs 143.25 crore (budget 66.93 crore)

These figures were close to AG's figures in the Draft Appropriation Accounts that were sent to government in October 1994 (Rs 84.21crore, Rs 129.82 crore and Rs 154.70 crore respectively). It was evident that Finance department had access to the actual figures of expenditure by AHD but chose not to act on such information.

Had the Finance Department acted on its own figures to prevent such excess drawals by the AHD, it could have saved the moneys that were looted in the three years after May 1994 (nearly Rs 400 crore).

What happened at the District Treasuries

The story of Fodder Scam is incomplete without a note on how the Finance Department decided to turn a blind eye to the misdeeds of the Treasury Officers (TOs). The District Treasury is the nerve centre of the District Collector's office. All the Drawing and Disbursing officers (DDO) of the district present their bills (claims) with supporting documents to the Treasury Officer. After the bills are passed by the TO, the attached Bank issues the drafts to the suppliers in line with the amounts in the bills. The TOs send the monthly cash accounts to the AG for compilation of accounts. There was deliberate reluctance and enormous delay in sending of the accounts by the TOs. But they got way from this wanton failure.

The TOs are key players in the financial control and cash flow management of the Government as they check the correctness and appropriateness of the bills against allotment of funds. However, year after year the TOs passed enormous number of false bills of the DDOs of Animal Husbandry Department for astronomical amounts against fictitious allotments. On days it seems that they were passing bills of only the Animal Husbandry Department.

The Director of Treasuries who functions under the Finance Department, controls the TOs and so the reticence of the Finance

Department in passing of false bills by the TOs year after year and for not sending the monthly accounts to the AG is another evidence of Finance Department's complicity in the fraud. The District Collectors who exercises functional control on the treasuries, chose to remain silent over the years while the TOs in collusion with AHD officers of their districts were perpetrating the monstrous fraud.

Finance Department gets daily and monthly information on the amount passed by the TOs and the department to which such amounts pertain. While specific information of drawing of large amounts of fraudulent bills by AHD Mafia was brought to the notice of the Government in the Assembly through many complaints by the Legislators, through the media and also by AG through the Draft Appropriation Accounts, the Finance Department took no action to stop the TOs from their reckless act of passing fraudulent bills.

AG provided the most accurate exposé of the scam

AG office, Bihar provided precise, detailed, authenticated and convincingly evidenced analysis of how, when, where and by whom the loot was perpetrated in the AHD scam. Till the Report of CAG came out, there was no clear picture about the *modus operandi*, the nature of syndicated operation of the mafia and the active support and protection given by the Finance Department to the AH Department officers and Treasury Officers. Till date the Government of Bihar has not contested the Report.

The detailed findings of Audit Report released in October 1996 gave momentum to the criminal investigation by the CBI that started in March 1996 and culminated in the award of penalty in October 2013. The long march of time in dispensing justice notwithstanding, the validity of audit findings were substantiated by this case. CBI made a total of 54 cases against AHD mafia and 44 of these are decided so far (October 2013).

The AHD scam is the most sordid political- economic crime committed under the direct patronage of a discredited Chief Minister of a state. But the federal government elevated him as the Railway Minister of the country. This gave him much needed opportunity to drumbeat his success after he lost his credibility as CAG exposed his misrule.

Lessons for future

The AHD scam looks a distant story now and much water has flown down the Kosi basin since then. But it brings out that there is no substitute for ethical governance. Additionally, the possibility of equally serious, if not identical fraud persists if the guards are down. So, the needs of eternal vigilance and ethical governance remain supreme as ever.

Finance Department is the nerve centre of a state's financial administration. If unscrupulous political/bureaucratic leadership takes hold of it, it acts like a cancer that can ruin the state's fortune. Strong culture of accountability and transparency are the defense against the abuse of authority and moral depravity of the political leadership as was seen in the AHD scam. Institutional safeguard has to be bolstered to match the ethical imperative but the sentinels must have the required alertness and will to act promptly against any malfeasance to make the institutions function and deliver effectively.

The Finance commissioner served his master well and pro-actively participated in the fraud and betrayed the trust of the nation as a civil servant. But at the end of the day, he brought disgrace upon himself and the state. He is now in jail. Is there a lesson in this saga for the state's officers?

It was unimaginable that the Chairman PAC would be directly involved in wrong doing in the fraud and be sent to jail. The shenanigans of political managers to install unscrupulous people in crucial political posts may pay temporary dividends but it damages the credibility of venerable institutions. Are the politicians listening?

The oversight agencies need to be ever alert in their watch over the mismanagement of finance by the government and cry foul as sharply as necessary without being burdened by niceties.

AUDITOR'S NOTEBOOK

DharamVir*

Allocation of Coal Blocks: Two Reports and some governance issues; (ii) Audit Reports and Legislatures: Article 151 of the Constitution

(i) Allocation of Coal Blocks: Two Reports and some governance issues

It is heartening to note that some of the major observations in the widely discussed CAG's Audit report[1] on allocation of coal blocks for captive use for power, cement and iron and steel production have found resonance in the more recent report of the Standing Committee of Parliament (Coal and Steel)[2] on the same subject presented in April 2013. The Standing Committee had taken up the subject in January 2011, perhaps a little before the commencement of the audit exercise. The two reports also raise serious governance-related issues which do not appear to have received adequate attention in the din relating to the alleged scam, earning the sobriquet of "Coalgate" for the allocations.

According to the Audit report the concept of allocation of coal blocks through competitive bidding was made public for the first time in June 2004. The then Secretary Coal had strongly argued in favour of competitive bidding since the Screening Committee procedure lacked transparency and was vulnerable to different types of pulls and pressures. A decision had also been taken in October 2004 to switch over to competitive bidding system for allocation of coal blocks, and the Ministry of Law had

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[1] Report No.7 of 2012-13

[2] Thirty First report of the Standing Committee on Coal and Steel 2012-13 Fifteenth LokSabha

advised in July 2006 that this could be implemented through executive instructions within the existing laws. Nevertheless Government decided to wait for a formal amendment to the Mines and Minerals (Development and Regulation) Act, and in the mean time coal blocks continued to be allocated without inviting competitive bids resulting in assessed potential windfall gain of Rs.1.86 lakh crore to private companies, and a part of this could have been tapped by Government had the auction route been followed.(The amount of Rs. 1.86 lakh crore is in respect of open cast mines alone, and has been computed with reference to the 2010-11 sale price of coal of Coal India and its average cost price inclusive of financing charges; according to some analysts this has been somewhat conservatively computed). Without going into the legal aspect, the Standing Committee has also held that it was unfortunate that no auction was held, the allocations were done in most unauthorized manner and 'no one knows how much our country has suffered for that'.

The question whether natural resources can be alienated only by inviting competitive bids has been separately raised by Government before the Honourable Supreme Court through a Presidential reference under Article 143(1) of the Constitution in April 2012 in the wake of the Apex Court's judgment in what is known as the 2G case which not merely quashed 122 telecommunication licenses but also laid down the law that "while transferring or alienating natural resources the State was duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the auction"[3]. The Audit report had also referred to this judgment. The Apex Court's opinion on the Presidential reference is a comprehensive exposition on the issue of alienation of natural resources; however, the essence of the opinion is succinctly captured in the separate but concurring opinion recorded by Honourable Justice Jagdish Singh Khehar that when natural resources are made available by the State to private persons for commercial exploitation exclusively for their commercial gains the State's endeavour must be towards

[3] Centre for Public Interest Litigation and othersvs the Union of India and others. Writ Petition (Civil) No. 423of 2010

maximization of revenue returns and adoption of means other than those that are competitive and maximize revenue may face the wrath of Article 14 of the Constitution.

Interestingly, according to media reports, some of the allottees of coal blocks subsequently sold their entire stake to other companies at huge premium.

The Standing Committee is also critical of the long time taken by Government in notifying the Competitive Bidding of Coal Mines Rules even after the law was amended in 2010. The Ministry has set the target for holding the first tranche of auctions by the end of October 2013[4] i.e. nine years after the decision was taken to allot coal blocks through auctions, and three years after the law was amended. The long time taken, which has serious implications for availability of coal, could possibly have been compressed through a parallel or simultaneous rather than a sequential approach.

Although Government had prescribed (and refined from time to time) comprehensive set of guidelines for allocation of coal blocks, both the reports have critically commented on the manner in which these were followed by the Screening Committee which had been constituted for scrutinizing the applications for allocation of coal blocks. According to the Audit report there was nothing on record to indicate any comparative evaluation of applications and the process lacked transparency. In its more trenchant observations the Standing Committee has held that 'most non-transparent system' was adopted and that several coal blocks were allocated to a 'few fortunates' in 'total abuse of power by the Government'. According to the information available in the Standing Committee report some of the allottees did not have even an end-use plan/project for which coal mines were allotted while quite a few would appear to have secured allocation by giving incorrect information indicating absence of due diligence.

Both the reports are critical of the poor performance of the allocated mines and the inadequate follow up action by

[4] Results Framework Document Ministry of Coal

Government. It is one of the conditions of allocation of coal mines that no coal shall be sold, delivered, transferred or disposed except for the stated captive mining purpose without the approval of the Central Government. This required effective oversight, which is the responsibility of the Chief Coal Controller's Organization. According to the Audit report, though legally empowered to do so, the Chief Coal Controller's organization had not conducted any physical inspection to ascertain the actual progress/production vis-a-vis the progress reported by the allottees and the data furnished by the latter could not be verified. The two reports have commented on the inadequacy of the staff provided to the Chief Coal Controller; a proposal to suitably augment its staff strength had been pending since 2007.

Incidentally, the Ministry's Outcome Budget which is intended to establish a nexus between financial expenditure and physical outputs/outcomes achieved thereby does not even mention physical verification of production performance of captive coal blocks as one of the activities to be performed by the Chief Coal Controller's Organization.

The two reports are also critical of the performance of the Coal India for its failure to meet the requirements of power generation. From the Audit report it is seen that year after year production targets were fixed in the Ministry's Results Framework Document way below the targets recommended by the Planning Commission. Incidentally, following the recommendations of the Sixth Pay Commission for incentivizing performance, Government has prepared a draft Performance Related Incentive Scheme which relies heavily on the RFD. But the fixation of rather modest targets in the RFD puts a question mark on efficacy of the proposed scheme. Also the RFD does not sufficiently reflect the duties and responsibilities of the ministry's Secretary in his role as the Chief Accounting Authority of his Ministry as prescribed in the Government's General Financial Rules.

Both the reports have adversely commented on Government decision to de-reserve coal blocks originally with the Coal India in favour of the private sector. According to one estimate (the Economic Times June 13, 2013), based on data available with the

Chief Coal Controller's Organization, private companies have been allotted three to four times their requirement expected in 2016-17, while Coal India is unable to meet the requirements of non-captive power producers, making them dependent on costly imported coal. The modalities for disposal of surplus coal with the allottees also do not appear to have been decided so far. From media reports it also appears that the Ministry is investigating into the case of diversion of coal by the allottees of captive blocks for sale in the market where it commands a hefty premium.

The Audit report has also adversely commented upon shortfalls in drilling capacity, inadequate utilization of available equipment, tardy implementation of the coal washery projects as well as mismatch between excavation and transportation capacities leading to accumulation of coal at pithead with the Coal India.

In view of the likely windfall gains to the allottees of coal blocks, the Audit report had stressed the need for strict regulatory mechanism to ensure that the benefit of cheaper coal is passed on the consumers. The Standing Committee has expressed dismay that although coal blocks were allocated to the private sector producers without any monetary consideration, 'no specific condition was included in the allocation letters to ensure that the benefit of allocating coal free of cost is passed on to the consumers'. It is only in August 2013 that the Ministry issued instructions to the State Governments to incorporate an additional condition in the lease deeds with the allottees of coal blocks for power generation making it incumbent on the latter to sign power purchase agreements with the distribution companies through tariff-based competitive bidding. According to the information furnished to the Standing Committee, Government initiated necessary action only in March 2012, apparently after the CAG's organization had discussed audit observations with the Ministry in February and March 2012 but there are indications of buck passing between the Ministry of Coal and Ministry of Power.

Be that as it may, private power producers that have been allotted coal blocks are likely to have an edge over others. The basic anomaly in a policy framework that deregulates the pricing of the end-product (i.e. cement/power/iron and steel) while one of the important inputs (coal) remains regulated at least for a chosen few stated to have been selected in a non-transparent manner which allows them the benefit of cheaper input seems to have escaped notice. There are also issues of legality of stipulating additional conditions with retrospective effect besides apprehensions of cartelization with some of the cement companies already having been arraigned on this account.

The Standing Committee report is critical of some top officials of Government and Coal India taking up private sector employment after retirement with potential for conflict of interest.

In this connection the resignation, in the wake of CBI inquiry, of a former Coal Secretary from the Competitive Commission of India, to which he had been appointed on the recommendations of Supreme Court Judge chaired multi-member selection committee which inter alia includes two outside experts also points to the limitations of the admittedly more impartial, objective and transparent process of selection for appointment to statutory/regulatory bodies.

Coal continues to be 'hot' with the Apex Court being seized of the matter and the CBI already having registered as many as 14 FIRs. Ironically one of these FIRs names the former Coal Secretary who had been doggedly batting for changeover to competitive bidding system also referring to various pulls and pressures being experienced by the Screening Committee.

It has been truly said that every modern State is a magnificent façade but what matters is what goes on behind. The two reports hold a mirror to this magnificent façade and throw up some important governance-related questions including the remedy available to the Ministry's Secretary if his advice is not accepted[5], policy formulation, transparency in administration, delays in decision-making, adequacy of the existing control mechanisms including the Results Framework Document and the Outcome Budget, public accountability, etc. It is in this context that the follow up action on the two reports by way of PAC Report and the

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[5]DharamVir: "Beyond the Scams" Economic and Political Weekly March 9, 2013

Action Taken Report thereon and the Action Taken report on the Standing Committee report and the Minister's statement in this regard will be eagerly awaited.

(ii) Audit Reports and Legislatures: Article 151 of the Constitution

My article "Audit Reports and Legislatures" in an earlier issue of this Journal[6] had discussed the current practice of submission of Audit Reports to the President/Governor through the Ministry of Finance for being laid before the Parliament/State Legislature under article 151 of the Constitution. The article was in the backdrop of the delay of nearly one year by the Government of Maharashtra in the tabling of one of the Audit Reports. The issue had also featured in the Conference of Accountants General in 2008.

It had been pointed out that Article 151 of the Constitution dealt with two aspects: submission of the Audit Reports to the President/Governor and the presentation of the Reports before the appropriate legislature; in terms of the Allocation of Business Rules framed under Article 77(3) the Ministry of Finance is responsible only for the *laying of the Audit Report before the Parliament;* it has been assigned no role in the submission of the Audit Report to the President; and since adequate opportunity is provided to the executive to have its say before the Audit Report is finalized the executive has no role after the Report has been signed by the CAG. It was also pointed out that Article 151 of the Constitution carries an embedded exception to the rigours of Article 74 of the Constitution in terms of which the President is required to act in accordance with the aid and advice of the Council of Ministers. A similar exception has been engrafted on Article 74 under Article 103 of the Constitution in terms of which the President shall act in accordance with the opinion of the Election Commission while considering cases of disqualification of members of Parliament.

[6] DharamVir Audit Reports and Legislatures" Indian Journal of Public Audit and accountability July-December 2008

It was also pointed out that Article 151 needs to be read seamlessly with the other provisions of the Constitution and the DPC Act relating to the CAG that guarantee his independence. These provisions like fixed non-renewable tenure of office, protection of terms and conditions of service of the incumbent during his tenure, estoppel on eligibility for any further office under the Government, safeguards against arbitrary removal from office which can be done only after following the procedure prescribed for the removal of members of the higher judiciary, and the oath to perform his duties without fear or favour, affection or illwill etc; would be reduced to a nullity if the presentation of Audit Reports is made subservient to the convenience of the executive.

Similar views have been expressed in an order dated 30 March 2011 of the Central Administrative Tribunal Jodhpur Branch[7].

The issue before the Honourable Tribunal related to the transfer of cadre of Divisional Accountants from the control of the CAG to the State Government. The Honourable Tribunal examined the issue in the context of and after making a comprehensive examination of the status, powers and limitations of the CAG as per the provisions of the Constitution and the law.

Holding that the institutional mechanism of protection and independence granted to the CAG is one of the basic structures of the constitutional process the Honourable Tribunal observed:

"To ensure maintenance of the rule of law and political continuance of democratic institutions; institutional mechanisms have been generated by the constitutional process like the Election Commission of India, Union Public Service Commission as also the Office of the Comptroller and Auditor General of India. It is to be noted that the institutional independence are guaranteed to these agencies so that their duties are unsullied by interference of executive. They are accorded a level of protection against the interference in any way, either in their existence or in their

[7]Suresh Kumar and others vs. the Union of India and others

functioning. **This institutional mechanism of protection and independence granted to these agencies is one of the basic structures of the constitutional process."**

Holding that it is a natural right of every citizen to know the financial status of the nation directly and as expeditiously as possible inherent in him as a citizen and as participant in the democratic polity the Honourable Tribunal continued:

"Recognizing this as a cardinal feature the entire Chapter-V is dedicated to ensuring financial discipline and transparency in accounting."

Under Article 151 of the Constitution, "the audit report relating to the Union shall be submitted by the Comptroller and Auditor General of India to the President who shall place it before each house of Parliament. *It is to be noted in this connection that nowhere in it the executive comes into the picture. The report straight goes to the President who shall lay it before the representatives of the people*. It also says that relating to the State the report of the Comptroller and Auditor General of India shall be submitted to the Governor who shall cause them to be placed before the legislature of the State and then again without the intermediary of the executive machinery in the State. *Thus the accounting process bypasses the State executive machinery by deliberate constitutional choice."*(Emphasis added)

Holding that this is an essential feature and basic structure of the Constitution, the Honourable Tribunal continued:

"The right of the people to know the financial position of the nation directly and as expeditiously as possible without leaving it to the tender mercy of the executive to apprise them of a situation is a cardinal crux of the constitutional governance. This is recognized as early in the year 1950 which prompted in engagement and giving to ourselves Articles 148 and 151 of the Constitution of India provisions which engineered a situation of ensuring knowledge to the people of India relating to finances of the Union or State. Since this knowledge translates into effective control of the popular sovereign in the democratic process it is thus an essential feature and basic structure of the Constitution of India."

Anticipating situations where the executive might like to withhold an Audit Report, the Honourable Tribunal added:

"The independence in functioning, jurisdiction, existence of the entire audit machinery …is dealt with in Chapter V. The intention of the framers of the Constitution must be that there would be instances where the machinery of the State may want to suppress any information from the eyes of the people or may want to propagate a picture which is different from the actual state of affairs before the people and in order to prevent all these, functional independence is always in the Comptroller and Auditor General of India to be exercised by him as a duty imposed by the constitutional process. In the exercise of this he is not bound by the advice of either the Union or the States."

Examining the issue whether the submission of the Audit Reports is an executive function of the President the Honourable tribunal came to the conclusion that.

"In relation to the powers of the President through whom the executive power of the Union is to be exercised , under …Article 53 sub clause 3(a) it is specified that "Nothing in this article shall be deemed to transfer any functions conferred by any law on the Government of any State or other authority"…. *The whole purposes of Articles 148, 149,150 and 151of the Constitution coupled with entry 76 of List I of the Seventh Schedule of the Constitution would thus indicate a legislative intent of extreme transparency to be obtained in the matter of finance discipline and accounting processes and procedure by ensuring that the report of the CAG would go directly to the representatives of the people.*" (Emphasis added)

The pith and substance of the observations of the Honourable Tribunal in the present context is that it is the right of the people to know the financial position of the nation directly and as expeditiously as possible, that the same is one of the basic features of the Constitution, that the Constitution has prescribed the CAG as the authority to report on the financial position through his Audit Reports and according to the Constitution these Reports should reach the representatives of the people directly and as expeditiously as possible bypassing the executive machinery of the State. The CAG is duty bound to submit his Reports direct to the President and the executive is restrained from submitting the Audit Reports to the President.

These observations reinforce the arguments expressed in my article for disinter mediating the Government in the submission of the Audit Reports to the President. My article had also suggested the need for co-opting the civil society and the media for ensuring timely presentation of the Audit Reports to the legislature. In these days of right to information a press release by the CAG that an Audit Report has been submitted will alert the media and the civil society and generate pressures if there is any undue delay in its presentation to the legislature. Additionally when the Audit Report is tabled, a statement showing the date of signature of the Report by the CAG, the date of its receipt by Government, the date of its submission to the President, the date of its receipt from the President should also be simultaneously presented. This will not merely reassure the stakeholders that there has been no undue delay in the tabling of the Report but also act as a deterrent against any attempt to delay the presentation of Audit Reports.

ELUSIVE SEARCH AND IDENTIFICATION OF POOR

Dr. Subhash Chandra Pandey *

Introduction

Two recent developments have invited public attention, both serious and trivial, on the very important issue of who is poor, deserving unrequited support from government as a measure of social security. The first was the promulgation of the National Food Security Ordinance, 2013 (later passed as THE NATIONAL FOOD SECURITY ACT, 2013) seeking to provide heavily subsidised food grain to 67 percent of the country's population (75 percent of the rural population and 50 percent of the urban population) and the second was the publication of latest estimates of poverty in the country.

Planning Commission estimates of poverty

The Planning Commission is officially entrusted with the task of measuring extent of poverty in the country and it brings out periodically estimated poverty lines and poverty ratios. In December, 2005, Planning Commission constituted an Expert Group under the Chairmanship of Prof. Suresh D. Tendulkar to review the methodology for estimation of poverty. The Tendulkar Committee submitted its report in December 2009 and computed poverty lines and poverty ratios for 2004-05. For comparison they also computed poverty lines and poverty ratios for 1993-94 with identical methodology. These were accepted by the Planning Commission.

Following the Tendulkar Committee methodology, Planning Commission made estimates of poverty for 2009-10 which were

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released through a Press Note on 19th March 2012. Since several representations were made suggesting that the Tendulkar Poverty Line was too low, the Planning Commission, in June 2012, constituted an Expert Group under the Chairmanship of Dr. C. Rangarajan to once again review the methodology for the measurement of poverty. The Rangarajan Committee is deliberating on this issue and is expected to submit its report by middle of 2014.

The Planning Commission uses the data from Large Sample Surveys on Household Consumer Expenditure conducted by the National Sample Survey Office (NSSO) of the Ministry of Statistics and Programme Implementation. These surveys are normally conducted on quinquennial basis. The last quinquennial survey in this series was conducted in 2009-10 (NSS 66th round). However, since 2009-10 was not a normal year because of a severe drought, the NSSO repeated the large scale survey in 2011-12 (NSS 68th round). (There was criticism in some quarters about this unscheduled, repeat poverty survey, and release of Planning Commission estimates even as the report of the group headed by Dr. Rangarajan is awaited, attributing political motives to the exercise.)

The NSSO tabulates expenditure of about 1.20 lakh households. Since these households have different number of members, the NSSO for purpose of comparison divides the household expenditure by the number of members to arrive at per capita consumption expenditure per month. For 2011-12, for rural areas the national poverty line using the Tendulkar methodology is estimated at Rs. 816 per capita per month and Rs. 1,000 per capita per month in urban areas. Thus, for a family of five, the all India poverty line in terms of consumption expenditure would amount to about Rs. 4,080 per month in rural areas and Rs. 5,000 per month in urban areas. These poverty lines would vary from State to State because of inter-state price differentials.

The release of these estimates on 22 July 2013 drew sharp reaction from media. Many ridiculed the implied inference from the data that anyone who can have a meal in 12 rupees is not to be officially treated as poor, BELOW POVERTY LINE.

The Commission claimed, based on the latest, unscheduled NSSO survey: "During the 11-year period 1993-94 to 2004-05, the average decline in the poverty ratio was 0.74 percentage points per year. It accelerated to 2.18 percentage points per year during the 7-year period 2004-05 to 2011-12. Therefore, it can be concluded that the rate of decline in the poverty ratio during the most recent 7-year period 2004-05 to 2011-12 was about three times of that experienced in the 11-year period 1993-94 to 2004-05. The decline in poverty flows from the increase in real per capita consumption." The political undertone of this was not lost upon discerning readers, which further added fuel to the fire of controversy in an otherwise dry exercise. In essence, it was seen as an attempt by the government to highlight achievements of MGNREGA and other welfare programmes.

While one may crib about absolute numbers but it would be safe to conclude that the trend of declining poverty cannot be disputed. In this Paper, we try to recapitulate, rather than getting into ideological issues of poverty estimation methodology, some of the practical aspects of BPL tag in the implementation of various welfare and developmental schemes by the government and in particular the auditing concerns. Jammu & Kashmir is discussed in more detail basically to isolate broader issues that confront all governments.

Why is it important to identify the BPL?

The Central and State Governments have been running a number of welfare schemes for alleviation of poverty and some schemes are exclusively targeted for the benefit of persons 'Below Poverty Line' (BPL). Benefits in cash or kind are to be disbursed to them and proper records kept to ensure accountability for public funds. If an authentic, duly published list of BPL persons is not in place, it is not possible for government officials and auditors to certify whether the benefits have indeed been received only by intended beneficiaries and none else. An authentic list helps in minimizing the risk of benefits being drawn in favour of fake beneficiaries and misappropriated. This also helps in fiscal planning by way of assessing the funds required to meet such commitments and connected resource raising by way of taxation or borrowings for annual budget and 5 year Plans. The trends in the total number of BPL residing in a given area is also an important performance indicator for the outcome of development programmes in that area. Hence, its importance can hardly be over-emphasized.

Unfortunately, there is a continuing uncertainty as to who all are to be treated as BPL, how many BPL are there and whether number is increasing or decreasing, which needs to be resolved soon in the interest of public exchequer. No government has a single harmonised list. Many lists of BPL are leading to risks of malpractices inherent in arbitrary pick and choose of beneficiaries, denial of benefits to genuine beneficiaries and mis-utilization of public funds on ineligible beneficiaries.

Poverty estimation - Jammu & Kashmir perspective

In J&K, the Targeted Public Distribution System covers 19.72 lakhs APL/BPL/AAY households estimated to cover 108.8 lakhs persons based on estimated 5.52 persons per household. This means ~87 per cent of the State's population is covered by PDS. This scale of coverage was fixed by Central government on the basis of projected population in the year 2000, as has been done for all the States. Hence, 100 percent coverage is not there in any State although a uniform scale of food grain allocation is being made for certain fixed number of APL/BPL/AAY households @35 kg per household per month since 2002. The States are, therefore, required not only to work out inclusion criterion for identification of BPL households but also exclusion criterion for identifying APL households not to be provided with subsidized ration.

Concerns were publicly articulated that the Ordinance may result in cutting down the PDS quota to J&K. Some other States also have similar concerns and the Central government seems to have assured that the existing allocations would be protected.

The problem why some States seem to demand more food grain than what the Central government is willing to allocate is the sharp difference between the assessment of number of BPL households made by the two governments. The divergence is as high as 400 percent over the Central government assessment in J&K as detailed below.

As estimated by the Planning Commission of India based on Consumer Expenditure Surveys, the Ratio of BPL to population in Jammu & Kashmir in 2004-05 was 5.4 *per cent* for total population (:4.6 *per cent* of Rural Population and 7.9 per cent of Urban population), the LOWEST poverty ratio amongst all States. The absolute number of people Below Poverty was 5.9 lakh (3.7 lakh Rural and 2.2 lakh Urban). However, these estimates of the Planning Commission have not been accepted by the State Government. According to a BPL head count survey carried out by the State Government's Directorate of Economics and Statistics in 2007-08, the total BPL Estimated Population (Absolute Poverty) of J&K State was estimated to be 24.21 lakh persons (21.63 per cent of total population) with a dispersion of 26.14 per cent (22.00 lakh persons) from Rural areas and 7.96 per cent (2.21 lakh persons) living in Urban areas.

The Department of Food and Public Distribution, Government of India continues to allocate food grain to the State assuming the BPL population in the State being 26.5 lakhs (7.36 lakhs household). This level of poverty was assessed in the year 2000 and continues to remain the basis of allocation so far. In their latest assessment, the Planning Commission has assessed the BPL population in the State in 2011-12 to be 13.27 lakhs (10.73 lakhs rural and 2.53 urban) on the basis of per capita income criterion of Rs.891 per month in rural areas and Rs.988 per month in urban areas in Jammu & Kashmir. It is clear that the criteria and methodology used by the State Government to estimate the number of persons/households Below Poverty Line is different from that used by the Planning Commission. This has implications for scale of Central budgetary support for various welfare schemes. Situation is similar in other States as well.

Parliamentary Standing Committee deliberations on the issue of poverty estimation

Parliamentary Standing Committee [1] have questioned the Ministry of Planning on the issue of poverty assessment. The Planning Commission admitted before the Standing Committee that the number of BPL families identified on the basis of proxy parameters used for consumption expenditure are not strictly comparable to the poverty estimates because poverty line is not defined in terms of these parameters and no common cut-off is imposed. The Committee noted that though the criteria for determination of poverty is yet to be fixed by the Expert Group under Chairmanship of Dr. C. Rangarajan, Socio- Economic and Caste Census (SECC 2011) has already started. It would have been better if the exercise of SECC 2011 was undertaken after finalization of the criteria by the Expert Group so that Planning Commission is able to arrive at authentic picture of poverty instead of mere estimates. The Committee lamented that the Ministry is treading on the same path, which in the past produced results indicating glaring mismatch in poverty figures.

The Committee expressed serious concern over non-existence of a flawless and acceptable poverty estimation formula resulting in failure to achieve objectives envisaged in different Welfare Schemes despite allocation of huge amounts of anti-poverty funds for them. While acknowledging the fact that the impact of implementation of various Centrally Sponsored Schemes / programmes may not be upto the expectations, the Ministry have contended that these Schemes have brought a tangible impact in improving the standard of living of the people. The Committee, however, would like to emphasise that schemes must be well-designed and money allocated for them well-spent.

The Committee expressed their concern that constitution of one Expert Group after another may not resolve the problems. The Committee hope that in arriving at the estimates of poverty the ground realities are reflected. The Committee, therefore, desire that

[1] Standing Committee on Finance (2012-13), Fifteenth Lok Sabha, Seventy Second Report

the Expert Group utilizes the data collected from the SECC-2011 and accordingly formulate reliable criteria for identification of BPL population. The Committee had also expressed serious concern over wide variation in the estimates of poverty made by Expert Groups constituted by the Government based on different sets of criteria.

The Committee note that while the Planning Commission is the only nodal government agency entrusted with the responsibility of estimation of poverty, the Ministry of Rural Development and the Ministry of Housing & Urban Poverty Alleviation are the nodal agencies responsible for identification of BPL families in rural and urban areas respectively. The Committee have been informed that the estimation of poverty and identification of BPL families are two separate exercises which are complimentary to each other.

Ministry of Planning had informed the Committee in December 2012 that the current SECC-2011 is gathering the information on a host of socio-economic indicators through a door-to-door enumeration of all the households in rural and urban areas of the country for actual identification of BPL households. From amongst the rural households, the SECC 2011 is gathering the following information.

For likely use as inclusion criteria, the data are collected on: (a) households without shelter, (b) destitutes/living on alms, (c) manual scavengers, (d) Primitive Tribal Groups, and (e) legally released bonded labourers. The deprivation of the households is assessed from the following deprivation indicators. (a) Households with only one room with kucha walls and kucha roof; (b) Households with no adult member between age 16 to 59; (c) Female headed households with no adult male member between age 16 to 59; (d) Households with any disabled member and no able bodied adult member; (e) SC/ST households; (f) Households with no literate adult above 25 years; (g) Landless households deriving the major part of their income from manual casual labour.

The data on the following indicators are being gathered for use as possible exclusion criteria: (a) Households owning Motorized Two/Three/Four Wheelers/Fishing boats (which require registration); (b) Households owning mechanized Three/Four wheeler agricultural equipments such as tractors, harvesters etc; (c) Households having Kisan Credit Card with the credit limit of Rs.50,000 and above; (d) Households with any member as Government Employee: gazetted and non-gazetted employees of Centre government, State Government, Public Sector Undertakings, Government-aided autonomous bodies and local bodies. (This will exclude incentive and other honorarium based workers like ASHA, Anganwadi workers etc;) (e) Households with Enterprises registered with the Government for any purpose: any non agricultural enterprise registered with the Central or State Governments; (f) Households with any member in the family earning more than Rs. 10,000 p.m.; (g) Households paying income tax or professional tax; (h) Households with three or more rooms with pucca walls and pucca roof; (i) Households owning Refrigerator; (j) Households owning landline phones; (k) Households owning 2.5 acres or more irrigated land with at least one irrigation equipment such as diesel/ electric operated borewell/ tubewell; (l) 5 acres or more land irrigated for two or more crop seasons; (m) Households owning 7.5 acres or more land with at least one irrigation equipment such as diesel/ electric operated borewell / tubewell.

Similarly for urban areas, the information through SECC 2011 is being collected on a number of parameters which includes occupation, status of wage earnings, caste, educational status, disability, chronic illness, type of house/material used, ownership of house, size of the house, access to amenities such as drinking water, sanitation and source of lighting besides ownership of assets such as refrigerator, telephone/mobile phones, computer/laptop with or without internet, motorized wheelers, air conditioners, washing machines, etc.

The manner and method of utilizing this information for identification of beneficiaries for Government programmes have not been finalized.

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For identification of BPL families, the State Governments and local agencies have been involved in the exercise of SECC, 2011 which is being carried out under the guidelines of Ministry of Rural Development and Ministry of Housing & Urban Poverty Alleviation. The poverty ratio needs to be estimated objectively and realistically and the criteria therefore should stretch beyond the current norm which lays emphasis on calorific value and reflect faithfully the changing nutritional profile and living status of the masses.

The Committee, therefore, recommended that the operational methodology for identification of the poor should be based inter-alia on collectible information covering aspects relating to access to primary health including the number of illnesses of household members in a period of about a month which would give an indicative account on the extent of economic burden of households owing to poor health outcomes; level of indebtedness which often leads households into destitution and the reasons therefore; ownership and type of residence like kuccha, semipukka and pukka; proportion of total household members to the total members engaged in economically productive occupation or are self employed; schooling status of children along with number of working children in a household; and proportion of dependent children and the elderly, which would indicate the extent of economic strain on a household. Aspects relating to access to basic education, banking channels and micro credit should be suitably factored in operationalising the criteria for identification of the poor. The criteria may also provide for automatic exclusion of specified categories like those (a) possessing irrigated land double that of district average, (b) possessing two/four wheel mechanized transport vehicle, (c) income tax payees, (d) residence in a pucca house more than specified covered area, say 1,000 sq. ft (e) households with at least one person holding pensionable job etc.

Keeping in view such a broader approach, the Committee felt that there need not be any specific "automatic inclusion criteria . Hence it would thus be in order to have a more comprehensive and multidimensional approach to determine poverty, which will also take into account dynamic aspects like slipping back and forth across the poverty line as also issues relating to empowerment of masses.

Committee have also been informed that the problems in identification of BPL families are being addressed to in consultation with the experts, States and other stakeholders through the exercise of Socio-Economic and Caste Census (SECC) 2011. The census is a comprehensive exercise involving the Ministry of Rural Development, Ministry of Housing and Urban Poverty Alleviation, the Office of the Registrar General and Census Commissioner of India and the State Governments/Union Territory. The Committee noted that for the identification of BPL households, Socio-Economic and Caste Census (SECC) 2011 is gathering information from rural/urban areas on a variety of socio-economic parameters including occupation; income; education; type and ownership of house; income tax/professional tax payees; ownership of assets such as two/three/four wheeler (which require registration) / refrigerator / washing machine / air-conditioners / telephone / mobile phone / computer / laptop etc. The Committee are happy to note that most of the parameters recommended by it have been included. The Committee would like to be apprised of the present status of SECC – 2011 and the time frame by which the exercise is proposed to be completed. The Committee would also like to emphasize that the manner and method of utilizing information for identification of beneficiaries for Government programmes be finalized at the earliest.

State level implementation issues

In J&K, the Department of Consumer Affairs and Public Distribution has a BPL List. Besides, the Rural Development Department has their own List and Department of Social Welfare does not have any List but uses their own mechanisms to identify beneficiaries. Under "Rajiv Gandhi Grameen Vidyutikaran Yojna" (RGGVY) Scheme of Rural Electricity Infrastructure and Household Electrification, cumulative achievement of BPL household electrification under RGGVY as on 30.6.2013, is 57395 households. (BPL families are eligible for electricity connection free of cost). Power Development Department was required to furnish authentic list of BPL households to the Ministry of Power.

This is yet to be done. Basically, different Departments use their own way of beneficiary identification. Coordinated approach can produce an agreed common list of BPL beneficiaries to be used by all.

While eliminating discretion in determining the BPL status is not possible, it should be feasible to regulate the discretion and bring greater objectivity and transparency by prescribing objective tests/checklists/scoring systems and assigning certain marks for certain indicators of poverty. There should be clear-cut exclusion criterion to remove the 'creamy layer' of APL from the supply of subsidized food grain and benefits of other welfare programmes. Government can use the databases of tax assesses registered with the Income Tax Department or the Commercial Tax Department, Vehicle owners registered with the Transport Department, the database of employees and pensioners of State Government and the companies/corporations owned/controlled by the government and those of the autonomous bodies or statutory bodies. Other indicators of conspicuous consumption as are used by the Income Tax Department may also be used. The authorities competent to declare a family as BPL should be clearly defined so that there is proper accountability and record-keeping. Time bound resolution of differences between different government departments which may be using their own BPL lists and public notification of authentic BPL households/persons, preferably on a government website in convergence with e-governance initiatives would be helpful. Hopefully AADHAR/NPR exercise would resolve this problem to some extent but presently it is not tagging the BPL/non-BPL status precisely because operational norms are not in place.

JAWAHARLAL NEHRU NATIONAL URBAN RENEWAL MISSION (JNNURM): ISSUES OF IMPLEMENTATION

K. P. Sasidharan*

Introduction

As per 2001 census, India has a population of 1027 million with 285 million constituting 28 percent living in urban areas. Consequent to India's economic liberalization and accelerated urbanization, the urban population is expected to attain an enhanced rate with 40 percent of Indian population living in urban areas, contributing 65 percent of Gross Domestic Product (GDP) by 2021. The inevitable prerequisite for achieving this outcome is qualitative infrastructural facilities such as excellent roads, railways, airports, seaports, power, telecom, water supply and mass transportation facilities, accompanied by effective civic infrastructure including proper sanitation and solid waste management.

Realizing the significance of the urban sector as a critical component of Indian economy, the policy makers and planners have been emphasising fast track integrated urban development, focussing on efficient infrastructure, service delivery mechanism, community participation and accountability of Urban Local Bodies and Parastatal agencies. Consequent to the 74th Constitutional Amendment Act and model municipal law, a national level integrated development initiative was launched in the form of Jawaharlal Nehru National Urban Renewal Mission (JNNURM). The period of the Mission was planned initially for seven years from 2005-06 to 2012-13 and recently the period has been extended to March 2014.

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The objective of JNNURM is to harness full potential of reforms in urban infrastructure, engaging the key stakeholders, Central Government, State Governments and Urban Local Bodies to work together. The mission was launched on 3 December 2005 with the objective of fast track development of cities across the country, coupled with integrated urban infrastructural development and effective service delivery mechanism, by intensifying community participation along with accountabilities of the Urban Local Bodies and parastatal agencies.

As the investment has not resulted in envisaged outcomes, service level benchmarks for services like the urban water and sanitation sector have been formulated, prescribing a minimum set of standard performance parameters to be applied uniformly by stakeholders across the country. Along with encouraging community participation, ensuring accountabilities of the Urban Local Bodies and parastatal agencies, urban reforms for asset-creation and asset management for long-term project sustainability have been given adequate focus. The urban infrastructural development was estimated to require investment of Rs 1,20,536 crore for seven years form 2005-06 with an outlay of Rs. 17,219 crore.

Sub missions of Jawaharlal Nehru National Urban Renewal Mission (JNNURM)

JNNURM comprises two sub-missions: sub-mission 1 for Urban Infrastructure and Governance (UIG), administered by Ministry of Urban Development (MoUD). The Ministry of Housing and Urban Poverty Alleviation is the nodal ministry for providing Basic Services to the Urban Poor (BSUP) and Integrated Housing and Slum Development Programme (IHSDP), two integral components of the JNNURM. The main thrust of this sub-mission was on infrastructure projects relating to water supply and sanitation, sewerage, solid waste management, road network, urban transport and redevelopment of old city areas. Sub-mission II aims at catering to Basic Services for Urban Poor (BSUP). The main thrust of this sub-mission was integrated development of slums through projects for providing shelter, basic services and other related civic amenities. In line with the objective of the JNNURM, 65 mission cities were covered under UIG and BSUP. To cater to the remaining cities and towns, two components were included; first, Urban Infrastructure Development Scheme for Small & Medium Towns (UIDSSMT); and the second, integrated Housing and Slum Development Programme (IHSDP) with similar broad objectives as envisaged in UIG and BSUP.

Other than infrastructure and housing projects, the objective of JNNURM was to also provide an enabling environment of growth of cities by enhancing effective urban service delivery and civic infrastructure through improvements in urban management, land management, financial management and stakeholder participation in local governance. State Governments and Urban Local Bodies were thus, required to accept an agenda of reforms. For integrated development of slum areas and the provision of basic services to the urban poor, namely security of tenure at affordable prices, affordable housing, water supply, and sanitation and convergence with other already existing schemes for universal services such as education, health and social security are basic prerequisites. Further, enabling regulatory regime and urban reforms should be required for asset-creation and asset management for long-term project sustainability. JNNURM was designed therefore to provide an enabling environment for growth of cities by enhancing effective urban service delivery and civic infrastructure through improvements in urban management, land management, financial management and stakeholder participation in local governance.

The expected stated outcomes to be achieved by ULBs and parastatal agencies on completion of JNNURM were as follows:

1) Modern and transparent budgeting, accounting and financial management systems will be designed and adopted for all urban services and governance functions.

2) City-wide framework for planning and governance will be established and become operational.

3) All urban residents will be able to obtain access to a basic level of urban services.

4) Financially self-sustaining agencies for urban governance and service delivery will be established through reforms to major revenue instruments.

5) Local services and governance will be conducted in a manner that is transparent and accountable to citizens.

6) E-governance applications will be introduced in core functions of ULBs/Parastatal agencies resulting in reduced cost and time of service delivery processes.

Adequacy of funds and timely flow of funds were critical for planned development of identified mission cities and peri-urban areas, outgrowths and urban corridors leading to dispersed urbanization. Emphasis was on scaling-up delivery of civic amenities and provision of basic services to the urban poor. Security of tenure at affordable prices, improved housing, water supply and sanitation and delivery of basic services for education, health and social security are important components of JNNURM. The government is fully geared to develop sustainable Information Communication Technology (ICT) enabled Smart Cities. The lessons learnt from the first phase on planned development urban transport, water supply and sewage, among others should be used for effective implementation of the second phase.

Total number of cities identified in JNNURM are 65 with more than 1 million population with investment of Rs 1,20,536 crore over 7 years commencing from 2005-06 with an annual requirement of fund flow of Rs 17,219 crore. During the mission period from 2005 to 2012, Central Assistance ranging from 50 to 90 percent, depending upon status of the city, was provided as Additional Central Assistance (ACA) in four instalments under BSUP and in two instalments under IHSDP. Under the programmes, beneficiaries are required to contribute a minimum of 12 percent for housing except beneficiaries belonging to SC/ST/BC/OBC/PH and other weaker sections where the beneficiary contribution is limited to 10 percent only.

Out of the total investment of more than Rs. 1,00,000 crore envisaged during the mission period from 2005-06 to 2011-12, 50 percent share was to be borne by the Central Government and the remaining 50% by the State Governments and Urban Local Bodies. However, In 2009, the Central Government's contribution was revised to Rs.66084.65 crore. Though the mission period was contemplated till March 2012, the Planning Commission, in January 2012, agreed to make the budgetary provisions for two years beyond the mission period for completion of projects.

The Project Management Information System (PMIS) for JNNURM is the key e-Governance initiative being implemented in the Ministry of Urban Development besides other e-Initiatives like e-Awas in Directorate of Estates, e-Sewa in CPWD and e-Dharti in Land and Development office. The objective is to provide transparency, better information management, improved service delivery and overall improvement in urban governance. Implementation of PMIS aims at providing online and up-to-date management information for decision making, project management and monitoring of urban service delivery and civic infrastructure, land management, financial management and stakeholder participation in local governance.

The ministry is committed to its mandatory e-Governance reforms ensuring online birth and death registration, property tax, accounting, water supply and utilities, citizen's grievance redressal, personnel management system, building plan approval, procurement and monitoring of projects. Prior to JNNURM, only four out of 65 Mission cities had implemented e-Governance modules and now 37 mission cities have implemented e-Governance reform and the remaining 28 cities are at different stages of completion. Cities like Hyderabad, Bangalore, Chennai, Pimpri-Chinchwad have not only implemented all the committed 8 modules of e-Governance, but also have undertaken innovative approaches such as auto SMS to citizens on complaints, global positioning system device on vehicles and biometric attendance system for municipal employees.

The programme is tailored for providing higher level of resources and management attention to 65 select cities across the country including 35 cities with more than a million population, State capitals and cities of heritage and tourism importance. The other 30 towns are eligible for funding under the Urban

Infrastructure Development for Small and Medium Towns Scheme (UIDSSMT) and 551 projects at a total cost of Rs. 61,905 crore have been sanctioned. The Additional Central Assistance committed by the Central Government for the project cost is Rs. 28,590 crore. There are 807 projects sanctioned under UIDSSMT at a total cost of Rs. 14,021 crore for 672 small and medium towns. And by now, 166 projects under UIG and 269 projects under UIDSSMT have been completed providing improved service delivery to citizens.

Finance Commissions' Recommendations on JNNURM

The 73rd and 74th Constitutional Amendments in 1992 led to formation of local self governance structure for Panchayati Raj Institutions (PRI) and Urban Local Bodies (ULBs). Finance Commissions, constituted by the President in every five years, considered varied reforms for strengthening the local governance and improve finances of these bodies. After 10th Finance Commission (FC), there were specific references to the local bodies and 13th FC made implementation of some of the earlier FC recommendations conditional to access part of the funds it recommended to local bodies.

The 13th FC reviewed all the earlier recommendations and consulted the Ministry of Urban Development, Planning Commission, State Governments and Urban Local Governments and suggested major reforms for local governance. While conditions imposed by the previous commissions for release of grants are recommended by 13th FC it made mandatory to comply with these conditions by the local bodies before they can receive performance grants recommended by it. The conditions imposed by the 13th Finance Commission are as follows:-

1. Introduction of a supplement to budget documents on ULBs
2. Putting in place audit system in all local bodies
3. Establishment of an Independent Local Body Ombudsmen System
4. Electronic transfer of grants to ULBs in 5 days

5. Prescribing qualifications to SFC members through an Act
6. Empowering the ULBs to levy property tax without hindrance, Constitution of State Property Tax Board
7. Putting in place benchmarks for delivery of essential civic services
8. Putting in place fire-hazard Response and Mitigation Plan

The 13th Finance Commission also made several recommendations for improving urban governance. They include:

- The ULBs should exploit the scope that exists in property tax and profession tax;
- The ULBs should recover at least the operation and maintenance costs of the services they render. This is one of the mandatory reforms under JNNURM. But unfortunately, the states have not done enough to ensure that this mandatory requirement is complied with even in the Mission cities;
- Levy of user charges on roads if construction of any road in the city leads to tangible commercial benefit;
- ULBs should access market based financing of infrastructure and desired that Pooled Financing Model should be fully exploited;
- Urban Development Authorities should share a percentage of their income including income from sale or lease of land with ULBs;
- The ULBs should be enabled to levy and collect user charges from the central properties.
- State governments should share a portion of mining royalties with ULBs;
- The states should incentivize revenue collection efforts of ULBs through matching grants;

- Release of Grants recommended by the Commission in two installments in January and July subject to submission of utilization certificates without any other documentation;
- Speedy implementation of JNNURM reform relating to assigning or associating ULBs in planning and delivery functions;
- The city development plans must incorporate civilian portions of the Cantonments to facilitate integration in service delivery like water supply and other schemes and the civil community should benefit from the schemes being implemented under JNNURM or other projects;
- A portion of 13th FC grants to ULBs may be spent on revamping fire services and the ULBs may also extend financial support to the Fire Services Department;
- Formulation of guidelines for the constitution or up gradation of nagar panchayats;
- Developing and using comparable and audited data in all the ULB; and
- Strengthening Local Fund Audit Department through capacity building and personnel augmentation, etc.

The 13th Finance Commission initiated a multi-faceted reform process and access to a portion of the grants based on performance improvements. This made the paradigm shift in urban governance.

CAG's Performance Audit of JNNURM-2012-13

The CAG's latest performance report on JNNURM[1] finds out that out of 1,517 housing projects approved from 2005 to 2011 as on 31 March 2011, only 22 were completed and out of 1,258 approved urban infrastructure projects, only 231 projects were completed. The scheme envisages 23 urban reforms for good governance. However, many of the mandatory reforms are yet to be implemented. The audit findings include deficient appraisal of detailed projects, non-availability of land, escalation in costs, change in design and scope. In the housing projects, many dwelling units remained incomplete primarily for want of land; the beneficiaries were not identified in few cases; some of the completed dwelling units remain unoccupied and deficiencies in the process of selection leading to ineligible beneficiaries obtaining the benefits of the scheme. There were time overrun in Projects relating to water supply, sewerage, storm water drainage and roads and flyovers, due to non- availability of land and necessary clearances; deficiencies in awarding of work; a few cases of unauthorized and irregular expenditure and even instances of undue *favour* to contractors; machinery/equipment purchased for the project remaining unused.

As India needs about 500 cities in the next two decades at the current rate of urban migration, developing well governed sustainable smart cities that can offer quality life for its residents, requisite urban infrastructure and amenities, affordable quality HOUSING, schools and hospitals is the core challenge of the national urban mission in its second phase.

Structure for Project Implementation under JNNURM

While reforms were envisaged under the JNNURM, the basic thrust of the mission was project driven with the adoption of the

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[1]Report of the Comptroller and Auditor General of India on Performance Audit of Jawaharlal Nehru National Urban Renewal Mission, Union Government, Ministry of Urban Development, Ministry of Housing and Urban Poverty *Alleviation*; Report No:15 of 2012-13

following strategies:-

(i) Every city was expected to formulate a City Development Plan (CDP) integrating land use with services, urban transport and environment management. The CDP was to provide an urban perspective frame work for a period of 20-25 years indicating policies, programmes and strategies of meeting fund requirements to be prepared by every identified city.

(ii) Cities/Urban Agglomerations/Parastatals were required to prepare Detailed Project Reports (DPR) for undertaking projects under identified areas on the basis of CDP. In order to seek JNNURM assistance, projects need to be developed in such a manner so that optimization of the life-cycle costs over the planning horizon of the project can be ensured. A revolving fund was to be created to meet the Operation and Maintenance (O&M) requirements of assets created, over the planning horizon.

(iii) Private Sector Participation in development, management and financing of urban infrastructure was also envisaged.

The Central and State Government were required to release funds directly as grants-in-aid to the state level nodal agency (SLNA) designated by the State. The funds for identified projects across cities were to be disbursed to the Urban Local Bodies (ULB)/Parastatal agency through the designated SLNA as a soft loan or grant-cum-loan or grant. The SLNA/ULBs in turn could leverage additional resources from other sources like financial institutions/private sector/capital market.

Role of Central Government

JNNURM functions under the overall guidance and supervision of a National Steering Group (NSG) chaired by the Minister of Urban Development and co-chaired by the Minister of State for Housing and Urban Poverty Alleviation. Other members in the NSG are the two Secretaries of the respective ministries i.e. MoUD and MoHUPA, Secretary (Expenditure), Secretary (Planning Commission) and National Technical Advisor. The NSG, a coordinating arm of the Government of India, provides policy oversight and evolves policies to facilitate the achievements of JNNURM objectives. It sets policies for implementation, monitors and reviews progress, and suggests corrective actions where necessary. The NSG also reviews the implementation of reforms.

At the State Level, a State Level Steering Committee (SLSC) and a State Level Nodal Agency are to be set up. The role of the SLSC was to screen and prioritize the identified projects and recommend to the CSMC concerned for UIG and BSUP for sanction of the project. The SLSC was to monitor the implementation of projects and reforms and review the progress of urban reforms in the State.

The Central Sanctioning Committee (CSC) chaired by Secretary MoHUPA was to examine and approve the projects under IHSDP. The ULBs and implementing agencies were to submit DPRs to their respective SLNA's for appraisal. CSC was required to examine and approve the projects submitted by State Level Nodal Agencies on the recommendation of the State Level Co-Ordination Committee (SLCC).

The program also envisaged a Programme Management Unit (PMU) at the State Level as well as Project Implementation Unit (PIU) at ULB level.

Of the 1,517 housing and 1,258 urban infrastructure projects approved for completion from 2005 to 2011; as on 31 March 2011, only 22 housing projects and 231 urban infrastructure projects were completed. As regards strengthening the ULBs, in terms of their structure, composition, financial resources, functions and powers; the scheme required each State Government, ULB and the Central Government to enter into a Memorandum of Agreement indicating their commitment to implement the mandatory and optional reforms, in alignment with the 74th Constitutional Amendment towards increased transparency and better governance. However, in the selected States/UTs, the CAG in his performance report of 2012-13 on JNNURM observed that all the mandatory and optional reforms were not implemented. Therefore, reforms in the institutional, financial and governance structure of the ULBs to make them efficient, accountable and transparent could not be realized as envisaged.

The audit findings of the implementation of the scheme in the execution of 216 selected projects for the period from 2005-06 to 2010-11 indicated various deficiencies. Out of 216 selected projects only 11 were completed that too due to reasons including deficient preparation and appraisal of detailed projects, non-availability of land, escalation in costs, change in design and scope. As regards housing projects, many dwelling units remained incomplete primarily for want of land and there were deficiencies in the process of selection of beneficiaries leading to risks of ineligible beneficiaries getting the benefits. Inadequacies were noticed in those dwelling units occupied in respect of water supply, sewerage and storm water drainage facilities. The projects were delayed due to non-availability of land and deficiencies in awarding of work. There were cases of unauthorized and irregular expenditure and undue favour to contractors. Due to the delays in implementation of the projects, there were many cases of blockades of funds used for purchase of machinery/equipment not put to use.

The framework in the States envisaged setting up of SLNA and specialized bodies such as program management units (PMU) and project implementation units (PIU); SLNAs were appointed after considerable delay and there were shortage of staff. The PMUs and PIUs were intended to strengthen the capacity of the SLNA and the ULBs. However, in certain states these specialized units were not even set up and in the States/UTs where they were established, their role remained limited.

In regard to the Central Government allocation, there were substantial shortages in allocations and delays in releasing of funds to the states. Further, the guidelines did not contain any directions regarding timeframe for releases of funds. There was a rush of expenditure in the last quarter particularly in March. Though the scheme had envisaged that ULBs/parastatal agencies should share the expenditure in execution of projects, in most States/UTs, the ULB share was either not released or was less than the stipulated amount. The JNNURM guidelines were deficient in regard to instructions regarding parking of funds and utilization of interest thereof. There was no uniformity in utilizing interest earned on parked funds amongst the States/UTs. Many of them had not created the revolving fund and Utilization Certificates of substantial amounts were found lacking.

For monitoring and evaluation, adequate staff and technology were not in place. Though the ministry envisaged a web-enabled program for monitoring and evaluation to capture the physical and financial progress of JNNURM projects, the system was not found in operation. The Third Party inspection and monitoring mechanism as envisaged in the scheme was not also properly implemented in many of the states.

Toward Better Implementation of the Programme

The Government of India may consider providing suitable incentives to those States which are implementing the reforms as envisaged in the JNNURM guidelines. Augmentation of capacity building of personnel handling finance and human resources is urgently needed to help the states to operationalize the reforms envisaged at least within the extended period ending by 31 March 2014. Wide publicity is needed through print and electronic media to ensure that eligible beneficiaries get included in the projects. There should be review of all housing projects to ensure that allotments are given only to eligible beneficiaries. Government of India may strengthen the monitoring of execution of projects so that there are no diversions to ineligible beneficiaries/schemes. It is important to monitor delays and identify the reasons for resolving them on time. Ministry of Urban Development and Ministry of

Housing and Urban Poverty Alleviation should have a zero tolerance policy at all levels in respect of irregular expenditure and diversion of funds. The fund flow arrangements from the Centre to the implementing agencies via the SLNA/States/UTs may be rationalized to ensure minimum unspent/excess amount outside government accounts. The provisions of timely submission of utilization certificates must be insisted and deficiencies noticed in the monitoring of the scheme should be rectified at the earliest.

There should be both monitoring by Ministry and independent evaluation of all Centrally Sponsored Schemes on a regular basis. Such monitoring and concurrent evaluation reports should be placed on the respective Ministry's website and form the basis of any mid-course correction. Absence of such evaluation should be viewed adversely which will *affect* release of funds to the Ministry. Planning Commission is in the process of setting up of Independent Evaluation Office whose services may be utilized for such independent evaluation.

Accounting, Financial Reporting of Urban Local Bodies

The Institute of Chartered Accountants of India (ICAI) has published a Technical Guide on Accounting and Financial Reporting by Urban Local Bodies, which inter alia provides 'Guidelines on the Formats of balance sheets and income and expenditure account. Some of the important guidelines include that the financial statement of ULBs should be prepared on accrual basis; accounting policies should be consistently followed; provisions shall be made for all known liabilities and losses; the accounts must be prepared giving emphasis on substance rather than following merely legal format and based on the maternity principle, there shall be proper disclosure.

Auditing and Accountability Framework

Funds transfer from the central and state governments under various flagship schemes and socio economic development programmes directly to the Urban Local Bodies is going to increase significantly in the coming years. The objective is to strengthen the third tier of government and improve the livelihood conditions of the people by quality of governance. In the backdrop of increasing flow of funds and the large number of grant receiving bodies, it is indispensable to ensure proper accounting, auditing and thereby effective accountability framework. There is considerable risk of pilferage of resources and inadequate implementation of the schemes and non-realization of expected outcome. Maintenance of proper books of accounts, resource management, timely release of funds, effective execution of the projects, overseeing and ensuring proper utilization of funds for the purpose for which it is granted assume critical significance to realize the targeted output and outcome.

The Eleventh Finance Commission had sated; "Articles 243 J and 243 Z of the Constitution expect the States to make provisions by way of legislation for maintenance of accounts by the panchayats and the municipalities and for the audit of such accounts." Most of the states have made general provisions for this, but detailed rules, procedures, formats of accounts and guidelines have not been laid down by many of them.

The Eleventh Finance Commission was categorical in its recommendation that the accounts and audit of the third tier system of government – Urban Local Bodies- 'need to be set right under close supervision of the C&AG and supported by specific earmarking of funds from the grants recommended by it in respect of local bodies.' The report of the C&AG relating to audit of accounts of third tier government should be placed before a Committee of the State Legislature constituted on the same lines as the Public Accounts Committee. The C&AG has already developed auditing standards for PRIs and ULBs, guidelines for Certification audit of accounts, manual of audit of PRIs, audit training modules for ZPs, PSs and GPs, list of Codes for functions and activities of PRIs, Budget and Accounts formats for PRIs, New Accrual accounting system suggested by ULBs with detailed formats, Training module on PRI accounts and budget in two parts containing theory and practical.

REFERENCES:

1. Report of the Comptroller and Auditor General of India on Performance Audit of Jawaharlal Nehru National Urban Renewal Mission, Union Government, Ministry of Urban Development, Ministry of Housing and Urban Poverty *Alleviation*; Report No:15 of 2012-13
2. Report of the Committee on Restructuring of Centrally Sponsored Schemes (CSS); B.K. Chaturvedi, Member, Planning Commission of India, New Delhi, September, 2011
3. Report of the Working Group on Urban Strategic Planning; 12th Five Year Plan; Steering Committee on Urban Development & Management, October 4, 2011; Ministry of Urban Poverty Alleviation, Government of India
4. www.moud.gov.in/Ministry of Urban Development on JNURRM

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DOCUMENT

THE PENSION FUND REGULATORY AND DEVELOPMENT AUTHORITY ACT, 2013

NO. 23 OF 2013

[18*th September*, 2013.]

An Act to provide for the establishment of an Authority to promote old age income security by establishing, developing and regulating pension funds, to protect the interests of subscribers to schemes of pension funds and for matters connected therewith or incidental there to.BE it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commence ment

1.(1) This Act may be called the Pension Fund Regulatory and Development Authority Act, 2013.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Definitions

2.(1) In this Act, unless the context otherwise requires,—

(a) "Authority" means the Pension Fund Regulatory and Development Authority established under sub-section (*1*) of section 3;

(b) "central recordkeeping agency" means an agency registered under section 27 to perform the functions of recordkeeping, accounting, administration and customer service for subscribers to schemes;

(c) "Chairperson" means the Chairperson of the Authority;

(d) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, in printed or in electronic version, which is intended to be used, or which may be used, by the Interim Pension Fund Regulatory and Development Authority, or Authority or an intermediary or any other entity connected with the National Pension System, for the purpose of recording that matter;

(e) "individual pension account" means an account of a subscriber, executed by a contract setting out the terms and conditions under the National Pension System;

(f) "Interim Pension Fund Regulatory and Development Authority" means the Interim Pension Fund Regulatory and Development Authority set up by the Central Government through Resolutions No. F. No. 5/7/2003-ECB&PR, dated the 10th October, 2003 and F. No. 1(6)/2007-PR, dated the 14th November, 2008;

(g) "intermediary" includes pension fund, central recordkeeping agency, National Pension System Trust, pension fund adviser, retirement adviser, point of presence and such other person or entity connected with collection, management, recordkeeping and distribution of accumulations;

(h) "member" means a member of the Authority and includes its Chairperson;

(i) "National Pension System" means the contributory pension system referred to in section 20 whereby contributions from a subscriber are collected and accumulated in an individual pension account using a system of points of presence, a central recordkeeping agency and pension funds as may be specified by regulations;

(j) "National Pension System Trust" means the Board of Trustees who hold the assets of subscribers for their benefit;

(k) "notification" means a notification published in the Official Gazette;

(l) "pension fund" means an intermediary which has been granted a certificate of registration under sub-section (*3*) of section 27 by the Authority as a pension fund for receiving contributions, accumulating them and making payments to the subscriber in the manner as may be specified by regulations;

(m) "Pension Regulatory and Development Fund" means the fund constituted under sub-section (*1*) of section 40;

(n) "point of presence" means an intermediary registered with the Authority under sub-section (*3*) of section 27 as a point of presence and capable of electronic connectivity with the central recordkeeping agency for the purposes of receiving and transmitting funds and instructions and pay out of funds;

(o) "prescribed" means prescribed by rules made under this Act;

(p) "regulated assets" means the assets and properties, both tangible and intangible, owned, leased or developed by and other rights belonging to, the central recordkeeping agency;

(q) "regulations" means the regulations made by the Authority under this Act;

(r) "scheme" means a scheme of pension fund approved by the Authority under this Act;

10 of 1992 (s) "Securities Appellate Tribunal" means a Securities Appellate Tribunal established under sub-section (*1*) of section 15K of the Securities and Exchange Board of India Act, 1992;

(t) "subscriber" includes a person who subscribes to a scheme of a pension fund;

(u) "Subscriber Education and Protection Fund" means the fund constituted under sub-section (*1*) of section 41;

10 of 1949. (v) "Trustee Bank" means a banking company as defined in the Banking Regulation Act, 1949.

(2) Words and expressions used and not defined in this Act, but defined in—

4 of 1938 (i) the Insurance Act, 1938;

42 of 1956 (ii) the Companies Act, 1956;

1 of 1956 (iii) the Securities Contracts (Regulation) Act, 1956; and

15 of 1992 (iv) the Securities and Exchange Board of India Act, 1992,

shall have the meanings respectively assigned to them under those Acts.

CHAPTER II

PENSION FUND REGULATORY AND DEVELOPMENT AUTHORITY

Establishment and incorporation of Authority

3.(1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, an Authority to be called the Pension Fund Regulatory and Development Authority.

(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

2 of 1985

(3) The head office of the Authority shall be in the National Capital Region referred to in clause (*f*) of section 2 of the National Capital Region Planning Board Act, 1985.

(4) The Authority may establish offices at other places in India.

Composition of Authority

4. The Authority shall consist of the following Members, namely:—

(a) a Chairperson;

(b) three whole-time members; and

(c) three part-time members,

to be appointed by the Central Government from amongst persons of ability, integrity and standing and having knowledge and experience in economics or finance or law with at least one person from each discipline.

Term of office and conditions of service of Chairperson and members of

5.(1) The Chairperson and every whole-time member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided that no person shall hold office as a Chairperson after he has attained the age of sixty-

Authority

five years:

Provided further that no preson shall hold office as a whole-time member after he has attained the age of sixty-two years.

(2) A part-time member shall hold office as such for a term not exceeding five years from the date on which he enters upon his office.

(3) The salary and allowances payable to, and other terms and conditions of service of, the members other than part-time members shall be such as may be prescribed.

(4) The part-time members shall receive such allowances as may be prescribed.

(5) The salary, allowances and other conditions of service of a member shall not be varied to his disadvantage after his appointment.

(6) Notwithstanding anything contained in sub-section (*1*) or sub-section (*2*), a member may—

(a) relinquish his office, by giving in writing to the Central Government, a notice of not less than thirty days; or

(b) be removed from his office in accordance with the provisions of section 6.

Removal of members from office

6.(1) The Central Government may remove from office the Chairperson or any other member who—

(a) is, or at any time has been, adjudged as insolvent; or

(b) has become physically or mentally incapable of acting as a member; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a member; or

(e) has, in the opinion of the Central Government, so abused his position as to render his continuance in office detrimental to the public interest.

(2) No such Chairperson or other member shall be removed under clause (*d*) or clause (*e*) of sub-section (*1*) unless he has been given a reasonable opportunity of being heard in the matter.

Restriction on future employment of members

7.(1) The Chairperson and the whole-time members shall not, for a period of two years from the date on which they cease to hold office as such, except with the previous approval of the Central Government, accept—

(a) any employment either under the Central Government or under any State Government; or

(b) any appointment in any regulated entity in the pension sector.

(2) The Chairperson and the whole-time members of the Interim Pension Fund Regulatory and Development Authority holding the office as such before the commencement of this Act, shall not, on and after such commencement, accept any appointment in any regulated entity in the pension sector for a period of two years from the date on which they cease to hold office as such, except with the previous approval of the Central Government.

Administrative powers of Chairperson.

8. The Chairperson shall have the powers of general superintendence and direction in respect of all administrative matters of the Authority.

Meetings of Authority.

9.(1) The Authority shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be provided by regulations.

(2) The Chairperson or, if for any reason, he is unable to attend a meeting of the Authority, any other member chosen by the members present from amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) If any member, who is a director of a company and who as such director, has any direct or indirect pecuniary interest in any matter coming up for consideration at a meeting of the Authority, he shall, as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Authority, and the member shall not take part in any deliberation or decision of the Authority with respect to that matter.

Vacancies, etc., not to invalidate proceeding s of Authority.

10. No act or proceeding of the Authority shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person acting as a member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits ofthe case.

Officers and employees

11.(1) The Authority may appoint such officers and other employees as it considersnecessary for the efficient of Authority. discharge of its functions under this Act.

(2) The terms and other conditions of service of officers and other employees ofthe Authority appointed under sub-section (*1*) shall be such as may be determined byregulations.

CHAPTER III

EXTENT AND APPLICATION

Extent and application

12.(1) This Act shall apply to—

(*a*) the National Pension System;

(*b*) any other pension scheme not regulated by any other enactment.

(2) Every pension scheme referred to in clause (*b*) shall conform to the regulationsmade by the Authority within such time as may be specified in the regulations.

(3) Notwithstanding anything contained in sub-section (*1*), the provisions of this Actshall not apply to–

(*a*) the schemes or funds under–

46 of 1948 (i) the Coal Mines Provident Fund and Miscellaneous ProvisionsAct, 1948;

19 of 1952 (ii) the Employees' Provident Funds and Miscellaneous ProvisionsAct, 1952;

4 of 1966 (iii) the Seamen's Provident Fund Act, 1966;

Assam Act X of 1955 (iv) the Assam Tea Plantations Provident Fund and Pension Fund SchemeAct, 1955; and

Jammu & Kashmir ActXV of 1961 (v) the Jammu and Kashmir Employees' Provident Funds Act, 1961;

4 of 1938 (*b*) contracts referred to in sub-section (*11*) of section 2 of the InsuranceAct, 1938;

(*c*) any other pension scheme, which the Central Government may, by notification,exempt from the application of this Act;

61 of 1951 (*d*) persons appointed before the 1st day of January, 2004 to public services inconnection with the affairs of the Union, or to All-India Services constituted undersection 2A of the All-India Services Act, 1951;

(*e*) persons appointed to public services in connection with the affairs of anyState, or such Union territories as may be specified by notification by the CentralGovernment.

(*4*) Notwithstanding anything contained in sub-section (*3*), any State Government oradministrator of a Union territory may, by notification, extend the National Pension Systemto its employees.

(*5*) Notwithstanding anything contained in clause (*c*) of sub-section (*3*), the CentralGovernment may, by notification, extend the application of this Act to any other pensionscheme [including any other pension scheme exempted and notified under clause (*c*) of subsection(*3*)].

(*6*) Any person governed under any of the schemes or funds referred to in sub-section(*3*) may, at his option, also join the National Pension System.

CHAPTER IV

TRANSFER OF ASSETS, LIABILITIES, ETC., OF INTERIM PENSION FUND REGULATORY ANDDEVELOPMENT AUTHORITY

Transfer of assets liabilities etc., of Interim Pension Fund Regulatory and

13. On and from the date of establishment of the Pension Fund Regulatory andDevelopment Authority,—

(*a*) all the assets and liabilities of the Interim Pension Fund Regulatory andDevelopment Authority shall stand transferred to, and vested in, the Authority.

Development Authority

Explanation.—The assets of the Interim Pension Fund Regulatory andDevelopment Authority shall be deemed to include all rights and powers, all properties,whether movable or immovable, including, in particular, cash balances, deposits and all other interests and rights in, or arising out of, such properties as may be in thepossession of the Interim Pension Fund Regulatory and Development Authority andall books of account and other documents relating to the same; and liabilities shall bedeemed to include all debts, liabilities and obligations of whatever kind;

(*b*) without prejudice to the provisions of clause (*a*), all debts, obligations andliabilities incurred, all contracts entered into and all matters and things engaged to bedone by, with or for the Interim Pension Fund Regulatory and Development Authorityimmediately before that day, for or in connection with the purpose of the said RegulatoryAuthority, shall be deemed to have been incurred, entered into or engaged to be doneby, with or for, the Authority;

(*c*) all sums of money due to the Interim Pension Fund Regulatory andDevelopment Authority immediately before that day shall be deemed to be due to theAuthority; and

(*d*) all suits and other legal proceedings instituted or which could have beeninstituted by or against the Interim Pension Fund Regulatory and DevelopmentAuthority immediately before that day may be continued or may be instituted by oragainst the Authority.

CHAPTER V

DUTIES, POWERS AND FUNCTIONS OF AUTHORITY

Duties, powers and functions of Authority. 5 of 1908.

14.(1) Subject to the provisions of this Act and any other law for the time being inforce, the Authority shall have the duty, to regulate, promote and ensure orderly growth ofthe National Pension System and pension schemes to which this Act applies and to protectthe interests of subscribers of such System and schemes.

(2) Without prejudice to the generality of the provisions contained in sub-section *(1)*, the powers and functions of the Authority shall include–

(a) regulating the National Pension System and the pension schemes to whichthis Act applies;

(b) approving the schemes, the terms and conditions thereof and laying downnorms for the management of the corpus of the pension funds, including investmentguidelines under such schemes;

(c) registering and regulating intermediaries;

(d) issuing to an intermediary, on application, a certificate of registration andrenewing, modifying, withdrawing, suspending or cancelling such registration;

(e) protecting the interests of subscribers by—

(i) ensuring safety of the contribution of subscribers to various schemesof pension funds to which this Act applies;

(ii) ensuring that the intermediation and other operational costs under theNational Pension System are economical and reasonable;

(f) establishing mechanism for redressal of grievances of subscribers to bedetermined by regulations;

(g) promoting professional organisations connected with the pension system;

(h) adjudication of disputes between intermediaries and

between intermediariesand subscribers;

(*i*) collecting data and requiring the intermediaries to collect such data andundertaking and commissioning studies, research and projects;

(*j*) undertaking steps for educating subscribers and the general public on issuesrelating to pension, retirement savings and related issues and training of intermediaries;

(*k*) standardising dissemination of information about performance of pensionfunds and performance benchmarks;

(*l*) regulating the regulated assets;

(*m*) levying fees or other charges for carrying out the purposes of this Act;

(*n*) specifying by regulations the form and manner in which books of accountshall be maintained and statement of accounts shall be rendered by intermediaries;

(*o*) calling for information from, undertaking inspection of, conducting inquiriesand investigations including audit of, intermediaries and other entities or organisationsconnected with pension funds;

(*p*) exercising such other powers and functions as may be prescribed.

5 of 1908 (*3*) Notwithstanding anything contained in any other law for the time being in force,while exercising the powers under clause (*o*) of sub-section (*2*), the Authority shall have thesame powers as are vested in a civil court under the Code of Civil Procedure, 1908 whiletrying a suit, in respect of the following matters, namely:–

(*i*) the discovery and production of books of account and other documents, atsuch place and at such time as may be specified by the Authority;

(ii) summoning and enforcing the attendance of persons and examining them onoath;

(iii) inspection of any book, register and other document of any person orintermediary referred to in section 26, at any place;

(iv) issuing commissions for the examination of witnesses or documents;

(v) any other matter which may be prescribed.

(*4*) Without prejudice to the provisions contained in sub-sections (*1*), (*2*) and (*3*) andsection 16, the Authority may, by order, for reasons to be recorded in writing, in the interestof subscribers, take any of the following measures, pending investigation or inquiry, namely:—

(i) restrain persons from participating in any scheme;

(ii) restrain any office bearer of an intermediary from acting as such;

(iii) impound and retain the proceeds under the scheme in respect of any activitywhich is under investigation;

(iv) attach, after passing an order, on an application made for approval, by theJudicial Magistrate of first class having jurisdiction, for a period not exceeding onemonth, one or more bank account or accounts of any intermediary or any personassociated with the scheme in any manner involved in violation of any of the provisionsof this Act or the rules or the regulations made thereunder:

Provided that only the bank account or accounts or any transaction entered therein, relating to the proceeds actually involved in the violation of any of the provisionsof this Act or the rules or the regulations made thereunder shall be allowed to be attached;

(v) direct any intermediary or any person associated with the scheme in anymanner not to dispose of or alienate an asset forming part of any activity which isunder investigation:

Provided that the Authority shall, either before or after, passing such orders,under this section, give to such intermediaries or persons concerned an opportunityof being heard.

Power to issue directions

15 Save as otherwise provided in section 14, if after making, or causing to be made, aninquiry, the Authority is satisfied that it is necessary—

(i) in the interests of subscribers or orderly development of National PensionSystem or a pension scheme to which this Act applies; or

(ii) to prevent the affairs of any intermediary or other persons or entities referredto in section 27 being conducted in a manner detrimental to the interests of subscribers;or

(iii) to secure the proper management of any such intermediary or person orentity,

it may issue such directions to such intermediaries or entities or to any person or class ofpersons referred to in section 27, or associated with the pension fund, as it may deem fit:

Provided that the Authority shall, either before or after passing such orders, give anopportunity of being heard to such intermediaries, entities or persons concerned.

Power of investigation

16.(1) Where the Authority has a reasonable ground to believe that—

(a) the activities of the pension fund are being conducted in a manner detrimentalto the interest of

the subscriber; or

(*b*) any intermediary or any person associated with the schemes of the pensionfund has violated any of the provisions of this Act or the rules or the regulations madeor directions issued by the Authority thereunder,

it may, at any time, by order in writing, direct any person (hereafter in this section referred toas the Investigating Authority) specified in the order to investigate the affairs of suchintermediary or persons associated with the pension fund and to report thereon to theAuthority.

1 of 1956 (2) Without prejudice to the provisions contained in sections 235 to 241 of the CompaniesAct, 1956, it shall be the duty of every manager, managing director, officer and other employeeof the company, in case of a company and every intermediary or persons or entity referred toin section 27 or every person associated with the pension fund to preserve and to produceto the Investigating Authority or any person authorised by him in this behalf, all the books,registers, other documents and record of, or relating to, the company or, as the case may be,of or relating to, the intermediary or such person, which are in their custody or power.

(3) The Investigating Authority may require any intermediary or any person or entityassociated with the pension fund in any manner to furnish such information to, or producesuch books, or other documents, or record before him or any person authorised by him inthis behalf as he may consider necessary if the furnishing of such information or the productionof such books, or register, or other documents, or record is relevant or necessary for thepurposes of its investigation.

(4) The Investigating Authority may keep in its custody

any books, registers, otherdocuments and record produced under sub-section (*2*) or sub-section (*3*) for six months andthereafter shall return the same to any intermediary or any person associated or entity withthe pension fund by whom or on whose behalf the books, registers, other documents andrecord are produced:

Provided that the Investigating Authority may call for any book, register, otherdocuments and record if they are required again:

Provided further that if the person on whose behalf the books, registers, otherdocuments and record are produced requires certified copies of the books, registers,other documents or record produced before the Investigating Authority, it shall givecertified copies of such books, registers, other documents or, as the case may be, record tosuch person or on whose behalf the books, registers, other documents and record wereproduced.

(5) Any person, directed to make an investigation under sub-section (*1*), may examineon oath any intermediary or any person associated with the pension fund in any manner, inrelation to the affairs of his business and may administer an oath accordingly and for thatpurpose may require any of those persons to appear before him personally.

(6) Notes of any examination under sub-section (*5*) shall be taken down in writing andshall be read over to, or by, and signed by, the person examined, and may thereafter be usedin evidence against him.

(7) If any person fails without reasonable cause or refuses—

(a) to produce to an Investigating Authority or any person authorised by him in this behalf any book, register, other document or record which it is his duty under subsection(2) or sub-section (*3*) to furnish; or

(b) to furnish any information which it is his duty under sub-section (3) tofurnish; or

(c) to appear before the Investigating Authority personally when required to doso under sub-section (5) or to answer any question which is put to him by theInvestigating Authority in pursuance of that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (6),

he shall be punishable with imprisonment for a term which may extend to one year, or withfine, which may extend to twenty-five crore rupees, or with both, and also with a further finewhich may extend to ten lakh rupees for every day after the first day during which the failureor refusal continues.

Search and seizure

17.(1) Where the Authority, in consequence of information in its possession, hasreason to believe that–

(a) any person who has been required under sub-section (3) of section 16 toproduce, or cause to be produced, any books, accounts or other documents in hiscustody or power has omitted or failed to produce, or cause to be produced, suchbooks, accounts or other documents; or

(b) any person to whom a requisition to produce any books, accounts or otherdocuments as aforesaid has been or might be issued will not, or would not, produce orcause to be produced, any books, accounts or other documents which will be usefulfor, or relevant to, an investigation under sub-section (1) of section 16; or

(c) a contravention of any provision of this Act has been committed or is likelyto be committed by an intermediary; or

(d) any claim which is due to be settled by the intermediary, has been or is likelyto be rejected or settled at a figure higher than a reasonable amount; or

(e) any claim which is due to be settled by an intermediary, has been or is likelyto be rejected or settled at a figure lower than a reasonable amount; or

(f) any illegal fees and charges have been transacted or are likely to be transactedby an intermediary; or

(g) any books, accounts, papers, receipts, vouchers, survey reports or otherdocuments, belonging to an intermediary are likely to be tampered with, falsified ormanufactured,

it may authorise any officer of the Authority, not below the rank equivalent to that of aGazetted Officer of the Government (hereafter referred to as the authorised officer), to–

(i) enter and search any building or place where he has reason to suspect thatsuch books, accounts or other documents, or any books or papers relating to anyclaim, rebate or commission or any receipts, vouchers, reports or other documents arekept;

(ii) break open the lock of any box, locker, safe, almirah or other receptacle forexercising the powers conferred by clause (*i*) where the keys thereof are not available;

(iii) seize all or any such books, accounts or other documents, found as aresult of such-search;

(iv) place marks of identification on such books, accounts or other documentsor make or cause to be made extracts or copies therefrom.

(2) The authorised officer may requisition the services

of any police officer or ofany officer of the Central Government, or of both, to assist him for all or any of thepurposes specified in sub-section (*1*) and it shall be the duty of every such police officeror officer to comply with such requisition.

(3) The authorised officer may, where it is not practicable to seize any such book,account or other document, specified in sub-section serve an order on the person who isin immediate possession or control thereof that he shall not remove, part with or otherwisedeal with it except with the previous permission of such officer and such officer may takesuch steps as may be necessary for ensuring compliance with this sub-section.

(4) The authorised officer may, during the course of the search or seizure, examine onoath any person who is found to be in possession or control of any books, accounts or otherdocuments, and any statement made by such person during such examination may thereafterbe used in evidence in any proceeding under this Act.

(5) The books, accounts, papers, receipts, vouchers, reports, or other documentsseized under sub-section (*1*) shall not be retained by the authorised officer for a periodexceeding one hundred and eighty days from the date of the seizure unless the reasons forretaining the same are recorded by him in writing and the approval of the Authority for suchretention is obtained:

Provided that the Authority shall not authorise the retention of the books, accounts,papers, receipts, vouchers, reports, or other documents for a period exceeding thirty daysafter all the proceedings under this Act, for which the books, accounts, papers, receipts,vouchers, reports, or other documents are relevant, are completed.

(6) The person from whose custody the books, accounts, papers, receipts, vouchers,reports, or other documents are seized under sub-section (*1*) may make copies thereof, ortake extracts therefrom, in the presence of the authorised officer or any other personempowered by him in this behalf at such place and time as the authorised officer may appointin this behalf.

(7) If a person legally entitled to the books, accounts, papers, receipts, vouchers,reports or other documents seized under sub-section (*1*) objects for any reason to theapproval given by the Authority under sub-section (*5*), he may make an application to theCentral Government stating therein the reason for such objection and requesting for thereturn of the books, accounts, papers, receipts, vouchers, report or other documents.

(8) On receipt of the application under sub-section (*7*), the Central Government may,after giving the applicant an opportunity of being heard, pass such order as it thinks fit.

2 of 1974 (9) The provisions of the Code of Criminal Procedure, 1973 relating to searchesand seizures shall apply, so far as may be, to every search and seizure made undersub-section (*1*).

(10) The Central Government may, by notification, make rules in relation to anysearch or seizure under this section and in particular, and without prejudice to the generalityof the foregoing power, such rules may provide for the procedure to be followed by the authorised officer,–

(i) for obtaining ingress into such building or place to be searched where freeingress thereto is not available;

(ii) for ensuring safe custody of any books, accounts,

Power of Authority to ensure complianc e

Manageme nt by Administra tor

National Pension System

papers, receipts, vouchers,reports, or other documents seized under this section.

Power of Authority to ensure compliance

18 If the Authority finds, after causing an inquiry to be made, that any person hasviolated, or is likely to violate, any provisions of this Act, or any rule or regulation madethereunder, the Authority may pass an order requiring such person to cease and desist fromcommitting or causing such violation.

Management by Administrator

19.(1) If at any time the Authority has reason to believe that the central recordkeepingagency or pension fund is acting in a manner likely to be prejudicial to the interest ofsubscribers, it may, after giving the central recordkeeping agency or pension fund, as thecase may be, an opportunity of being heard, make a report thereon to the Central Government.

19.(2) If the Central Government, after considering the report made under sub-section (*1*)is of the opinion, that it is necessary or proper to do so, it may appoint an Administrator tomanage the affairs of the central recordkeeping agency or pension fund, as the case may be,under the direction and control of the Authority, in such manner as may be specified bynotification.

CHAPTER VI

NATIONAL PENSION SYSTEM

National Pension System

20.(1) The contributory pension system notified by the Government of India in theMinistry of Finance *vide* notification number F. No. 5/7/2003-ECB&PR, dated the 22nd December, 2003, shall be deemed to be the National Pension System with effect from the 1st day of January, 2004, and such National Pension System may be amended from time to timeby regulations.

(2) Notwithstanding anything contained in the said notification, the National PensionSystem shall, on

the commencement of this Act, have the following basic features, namely:–

(a) every subscriber shall have an individual pension account under the NationalPension System;

(b) withdrawals, not exceeding twenty-five per cent. of the contribution made bythe subscriber, may be permitted from the individual pension account subject to theconditions, such as purpose, frequency and limits, as may be specified by the regulations;

(c) the functions of recordkeeping, accounting and switching of options by thesubscriber shall be effected by the central recordkeeping agency;

(d) there shall be a choice of multiple pension funds and multiple schemes:Provided that—

(a) the subscriber shall have an option of investing up to hundred percent. of his funds in Government Securities; and

(b) the subscriber, seeking minimum assured returns, shall have an optionto invest his funds in such schemes providing minimum assured returns as maybe notified by the Authority;

(e) there shall be portability of individual pension accounts in case of change ofemployment;

(f) collection and transmission of contributions and instructions shall be throughpoints of presence to the central recordkeeping agency;

(g) there shall not be any implicit or explicit assurance of benefits except marketbasedguarantee mechanism to be purchased by the subscriber;

(h) a subscriber shall not exit from the National Pension System except as may bespecified by the regulations; and

(i) at exit, the subscriber shall purchase an annuity from a life insurance companyin accordance with the regulations.

(3) In addition to the individual pension account mentioned in clause (*a*) of subsection(*2*), a subscriber may also, at his option, have an additional account under theNational Pension System having the features mentioned in clauses (*c*) to (*g*) of sub-section(*2*) and also having the additional feature that the subscriber shall be free to withdraw part orall of his money at any time from the additional account.

Central Recordkeeping Agency

21.(1) The Authority shall, by granting a certificate of registration under sub-section(*3*) of section 27, appoint a central recordkeeping agency:

Provided that the Authority may, in public interest, appoint more than one centralrecordkeeping agency.

(2) The central recordkeeping agency shall be responsible for receiving instructionsfrom subscribers through the points of presence, transmitting such instructions to pensionfunds, effecting switching instructions received from subscribers and discharging suchother duties and functions, as may be assigned to it under the certificate of registration or asmay be determined by regulations.

(3) All the assets and properties owned, leased or developed by the central recordkeepingagency, shall constitute regulated assets and upon expiry of certificate of registrationor earlier revocation thereof, the Authority shall be entitled to appropriate and take over theregulated assets, either by itself or through an administrator or a person nominated by it inthis behalf:

Provided that the central recordkeeping agency shall be entitled to be compensatedthe fair value, to be ascertained by the Authority, of such regulated assets as may bedetermined by regulations:

Provided further that where the earlier revocation of the certificate of registration isbased on violation of the conditions in the certificate of registration or the provisions of thisAct or regulations, unless otherwise determined by the Authority, the central recordkeepingagency shall not be entitled to claim any compensation in respect of such regulated assets.

Point of presence

22.(1) The Authority may, by granting a certificate of registration under sub-section(*3*) of section 27, permit one or more persons to act as a point of presence for the purpose ofreceiving contributions and instructions, transmitting them to the Trustee Bank or the central recordkeeping agency, as the case may be, and paying out benefits to subscribers in accordance with the regulations made by the Authority from time to time in this regard.

(2) A point of presence shall function in accordance with the terms of its certificate ofregistration and the regulations made under this Act.

Pension funds

23.(1) The Authority may, by granting a certificate of registration under sub-section(*3*) of section 27, permit one or more persons to act as a pension fund for the purpose ofreceiving contributions, accumulating them and making payments to the subscriber in suchmanner as may be specified by regulations.

(2) The number of pension funds shall be determined by regulations and the Authoritymay, in public interest, vary the number of pension funds:

Provided that at least one of the pension funds shall be a Government company.

1 of 1956

Certain restrictions on foreign companies or individual or association of persons

4 of 1938

43 of 1961

Prohibition of investment of funds of subscribers outside India

Eligibility norms of the central recordkeeping agency etc.

1 of 1956 *Explanation.*—For the purposes of this sub-section, the expression "Governmentcompany" shall have the meaning assigned to it in section 617 of the Companies Act, 1956.

(3) The pension fund shall function in accordance with the terms of its certificate ofregistration and the regulations made under this Act.

(4) The pension fund shall manage the schemes in accordance with the regulations.

Certain restrictions on foreign companies or individual or association of persons

24 The aggregate holding of equity shares by a foreign company either by itself orthrough its subsidiary companies or its nominees or by an individual or by an association ofpersons whether registered or not under any law of a country outside India taken in aggregatein the pension fund shall not exceed twenty-six per cent. of the paid-up capital of such fundor such percentage as may be approved for an Indian insurance company under the provisionsof the Insurance Act, 1938, whichever is higher. (4 of 1938)

43 of 1961 *Explanation.*—For the purposes of this section, the expression "foreign company" shallhave the meaning assigned to it in clause (*23A*) of section 2 of the Income-tax Act, 1961.

Prohibition of investment of funds of subscribers outside India

25 No pension fund shall, directly or indirectly invest outside India, the funds ofsubscribers.

Eligibility norms of the central recordkeeping agency etc.

26 The central recordkeeping agency, points of presence and pension funds, shallsatisfy the eligibility norms as may be specified by the regulations, including minimumcapital requirement, past track-record including the ability to provide guaranteed returns,costs and fees, geographical reach, customer base, information technology capability, humanresources and such other matters.

CHAPTER VII

REGISTRATION OF INTERMEDIARIES

Registration of central recordkeeping agency pension fund point of presence etc.

27.(1) No intermediary, including a pension fund or a point of presence to the extentregulated under this Act, shall commence any activity relating to a pension fund exceptunder and in accordance with the conditions of a certificate of registration granted by theAuthority in accordance with the provisions of this Act and the regulations:

Provided that any intermediary, including any point of presence, who had beenassociated with a pension scheme and appointed to act as such by the Interim Pension FundRegulatory and Development Authority immediately before the establishment of the Authorityunder this Act for which no registration certificate was necessary prior to such establishment,and may continue to do so for a period of six months from such establishment or, if he hasmade an application for such registration within the said period of six months till the disposalof such application.

(2) Every application for grant of a certificate of registration under this Act shall be insuch form and manner and shall be accompanied by such fees as may be determined byregulations.

(3) The Authority may, after considering the application and subject to such terms andconditions as it may specify, grant a certificate of registration as a central recordkeepingagency, point of presence, pension fund or such other intermediary, as the case may be.

(4) The Authority may, by order, suspend or cancel a certificate of registration grantedunder sub-section (*3*) in such manner as may be determined by regulations:

Provided that no order under this sub-section shall be made unless the person concernedhas been given a reasonable opportunity of being heard.

CHAPTER VIII

PENALTIES AND ADJUDICATION

Penalty for failure by an intermediary or any other person to comply with provisions of this Act, rules, regulation and directions

28.(1) Any person, who is required under this Act or any rules or regulations madethereunder,—

(a) to obtain a certificate of registration from the Authority for carrying on any activity under this Act, carries on such activities without obtaining such certificate ofregistration, he shall be liable to a penalty of one lakh rupees for each day during which the failure continues or one crore rupees, whichever is less;

(b) to comply with the terms and conditions of a certificate of registration fails todo so, he shall be liable to a penalty of one lakh rupees for each day during which thefailure continues or one crore rupees, whichever is less;

(c) to furnish any information, document, books, returns or report to the Authority,fails to furnish the same within the time specified by the Authority, he shall be liable toa penalty which may extend to one crore rupees or five times the amount of profitsmade or losses avoided, whichever is higher;

(d) to maintain books of account or records, fails to maintain the same, he shall beliable to a penalty of one lakh rupees for each day during which the failure continues orfive times the amount of profits made or losses avoided, whichever is higher.

(2) If any person, who is required under this Act or any rules or regulations madeThereunder, to enter into an agreement with his client, fails to enter into such agreement, heshall be liable to a penalty of one lakh rupees for each day during which the failure continuesor five times the amount of profits made or losses avoided, whichever is higher.

(3) If any intermediary registered with the Authority, after having been called upon bythe Authority, in writing, to redress the grievances of subscribers, fails to redress suchgrievances within the time stipulated by the Authority, he shall be liable to a penalty of not more than one crore rupees or five times the amount of profits made or losses avoided, Whichever is higher.

(4) If any person, who is registered under this Act as an intermediary, fails to segregatemoneys of the client or clients or uses the moneys of a client or clients for self or for any otherclient, he shall be liable to a penalty not exceeding one crore rupees or five times the amountof profits made or losses avoided, whichever is higher.

(5) Whoever fails to comply with any provision of this Act, the rules or the regulationsmade or the directions issued by the Authority under the provisions of this Act for which noseparate penalty has been provided, he shall be liable to a penalty which may extend to one crore rupees or five times the amount of profits made or losses avoided, whichever is higher.

Crediting sums realised by way of penalties to Subscriber Education and protection Fund.

(29) All sums realised by way of penalties under this Act shall be credited to the Subscriber Education and Protection Fund established under sub-section (*1*) of section 41.

Power to adjudicate

30.(1) For the purposes of adjudging under section 28, the Authority shall appointany of its officers not below the rank specified by regulations to be an adjudicating officer forholding an inquiry as may be determined by regulations, after giving the person concerneda reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry, the adjudicating officer shall have the power to summonand enforce the attendance of any person acquainted with the facts and circumstances ofthe case to give evidence or to produce any document which, in the opinion of theadjudicating officer, may be useful for or relevant to the subject matter of the inquiry andif, on such inquiry, he is satisfied that the person has failed to comply with the provisionsof section 28, he may recommend such penalty as he thinks fit in accordance with theprovisions of that section, to the member in charge of investigation and surveillance.

(3) The penalty shall be imposed by a member other than the member in charge ofinvestigation and surveillance:

Provided that while adjudging the quantum of penalty under section 28, the membershall have due regard to the following factors, namely:—

(a) amount of disproportionate gain or unfair advantage, wherever quantifiable,made as a result of the default;

(b) amount of loss caused to a subscriber or group of subscribers; and

(c) the repetitive nature of the default.

Attachment of assets and supersession of management of intermediary

31.(1) Any person aggrieved may apply to the Authority for an interim measure ofprotection in respect of any of the following matters, namely:–

(a) the retention, preservation, interim custody or sale of any asset or propertywhich is regulated by the provisions of this Act;

(b) securing any pension fund, moneys and other assets and properties ownedby or under the control of the pension fund;

(c) interim injunction or appointment of an administrator; and

(d) such other interim measures as may appear to the Authority to be just andnecessary,

and the Authority shall have power to make such orders including an order for attachment ofassets of the pension fund as it deems fit in this regard.

(2) Where, on a complaint received by the Authority or *suomotu*, the Authority, after conducting an inquiry, comes to a conclusion that the governing board or board of directors,by whatever name called, or the persons in control of any intermediary to the extent regulatedunder this Act are indulging in any activity which is in contravention of the provisionsof this Act or regulations, it may supersede the governing board or board of directors ormanagement of the intermediary in accordance with the provisions of the regulations.

(3) In case the governing board or board of directors or management of an intermediaryis superseded under sub-section (*2*), the Authority may appoint an Administrator tomanage the affairs of the intermediary in accordance with the provisions contained in theregulations.

Offences

32.(1) Without prejudice to any award of penalty by the member under this Act, if anyperson contravenes or attempts to contravene or abets the contravention of the provisionsof this Act or of any rules or regulations made thereunder, he shall be punishable withimprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.

(2) If any person fails to pay the penalty imposed by the member or fails to comply withany of the directions or orders issued by the member, he shall

be punishable with imprisonmentfor a term which shall not be less than one month but which may extend to ten years, orwith fine, which may extend to twenty-five crore rupees, or with both.

Power to grant immunity

33.(1) The Central Government may, on the recommendation by the Authority, ifsatisfied, that any person, who is alleged to have violated any of the provisions of this Actor the rules or the regulations made thereunder, has made a full and true disclosure in respectof alleged violation, grant to such person, subject to such conditions as it may think fit toimpose, immunity from prosecution for any offence under this Act, or the rules or the regulationsmade thereunder and also from the imposition of any penalty under this Act withrespect to the alleged violation:

Provided that no such immunity shall be granted by the Central Government in caseswhere the proceedings for the prosecution for any such offence have been instituted beforethe date of receipt of application for grant of such immunity:

Provided further that the recommendation of the Authority under this sub-sectionshall not be binding upon the Central Government.

(2) An immunity granted to a person under sub-section (*1*) may, at any time, be withdrawnby the Central Government, if it is satisfied that such person had, in the course of theproceedings, not complied with the condition on which the immunity was granted or hadgiven false evidence, and thereupon such person may be tried for the offence with respect towhich the immunity was granted or for any other offence of which he appears to have beenguilty in connection with the contravention and shall also become liable to the imposition ofany penalty under this Act to which such person would have been

Exemption from tax on wealth income profits and gains.

liable, had no suchimmunity been granted.

34. Notwithstanding anything contained in–

(*i*) the Wealth-tax Act, 1957; 27 of 1975

(*ii*) the Income-tax Act, 1961; or 43 of 1961

(*iii*) any other enactment for the time being in force relating to tax on wealth,income, profits or gains,

the Authority shall not be liable to pay wealth-tax, income-tax or any other tax in respect of itswealth, income, profits or gains derived.

35.(1) No court shall take cognizance of any offence punishable under this Act or anyrules or regulations made thereunder, save on a complaint made by the Authority.

(2) No court inferior to that of a Court of Session shall try any offence punishableunder this Act.

Appeal to Securities Appellate Tribunal

36.(1) Any person aggrieved by an order made by the Authority or by an adjudicatingofficer under this Act may prefer an appeal before the Securities Appellate Tribunal whichshall have jurisdiction over the matter.

(2) Every appeal under sub-section (*1*) shall be filed within a period of forty-five daysfrom the date of receipt of the order appealed against and it shall be in such form and mannerand shall be accompanied by such fee as may be prescribed:

Provided that the Securities Appellate Tribunal may entertain an appeal after the expiryof the said period, if it is satisfied that there was sufficient cause for not preferring the appealwithin that period.

(3) On receipt of an appeal under sub-section (*1*), the Securities Appellate Tribunalmay, after giving the parties to the appeal, an opportunity of being heard,

(4)

(5)

15 of 1992 (6)

Civil Court not to have jurisdiction **37.**

Appeal to Supreme Court **38**

pass such ordersthereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Securities Appellate Tribunal shall send a copy of every order made by it to theAuthority, the parties to the appeal and to the adjudicating officers concerned.

(5) The appeal filed before the Securities Appellate Tribunal under sub-section (*1*)shall be dealt with by it as expeditiously as possible and endeavour shall be made by it todispose of the appeal finally within six months from the date on which the appeal is presentedto it.

15 of 1992 (6) Without prejudice to the provisions of sections 15T and 15U of the Securities andExchange Board of India Act, 1992, the Securities Appellate Tribunal shall deal with anappeal under this section in accordance with such procedure as may be prescribed.

Civil Court not to have jurisdiction

37. No civil court shall have jurisdiction to entertain any suit or proceeding in respectof any matter which an adjudicating officer appointed under this Act or a Securities AppellateTribunal is empowered by or under this Act to determine and no injunction shall be grantedby any court or other authority in respect of any action taken or to be taken in pursuance ofany power conferred by or under this Act.

Appeal to Supreme Court

38 Any person aggrieved by any decision or order of the Securities Appellate Tribunalunder this Act may file an appeal to the Supreme Court within sixty days from the date ofcommunication of the decision or order of the Securities Appellate Tribunal to him on anyquestion of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was preventedby sufficient cause from filing the appeal within the said period, allow it to be filed within afurther period not exceeding sixty days.

CHAPTER IX

FINANCE, ACCOUNT AND ADUIT

Grants by Central Government

39 The Central Government may, after due appropriation made by Parliament by law inthis behalf, make to the Authority grants of such sums of money as that Government maythink fit for being utilised for the purposes of this Act.

Constitution of Pension Regulatory and Development Fund

40.(1) There shall be constituted a fund to be called the Pension Regulatory andDevelopment Fund and there shall be credited thereto—

(*a*) all Government grants, fees and charges received by the Authority;

(*b*) all sums received by the Authority from such other source as may be decidedupon by the Central Government.

(2) The Fund shall be applied for meeting—

(*a*) the salaries, allowances and other remuneration of the Chairperson and othermembers and officers and other employees of the Authority;

(*b*) other expenses of the Authority in connection with the discharge of itsfunctions and for the purposes of this Act.

Constitution of Subscriber Education and Protection Fund

41.(1) The Authority shall establish a fund to be called the Subscriber Education andProtection Fund.

(2) There shall be credited to the Subscriber Education and Protection Fund thefollowing amounts, namely:—

(*a*) grants and donations given to the Subscriber Education and Protection Fundby the Central

Government, State Governments, companies or any other institutions forthe purposes of the Subscriber Education and Protection Fund;

(*b*) the interest or other income received out of the investments made from theSubscriber Education and Protection Fund;

(*c*) the sums realised by way of penalties by the Authority under section 28.

(3) The Subscriber Education and Protection Fund shall be administered and utilisedby the Authority for protection of the interests of subscribers in accordance with regulationsmade for the purpose.

Accounts and audit

42.(1) The Authority shall maintain proper accounts and other relevant records andprepare an annual statement of accounts in such form as may be prescribed by the CentralGovernment in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authority shall be audited by the Comptroller and AuditorGeneral of India at such intervals as may be specified by him and any expenditure incurred inconnection with such audit shall be payable by the Authority to the Comptroller andAuditorGeneral.

(3) The Comptroller and Auditor-General of India and any other person appointed byhim in connection with the audit of the accounts of the Authority shall have the same rights,privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connectedvouchers and other documents and papers and to inspect any of the offices of the Authority.

(4) The accounts of the Authority as certified by the Comptroller and Auditor-Generalof India or any other person appointed by him in this behalf, together with the audit-reportthereon, shall be forwarded annually to the Central Government and that Government shallcause the same to be laid before each House of Parliament.

CHAPTER X

MISCELLANEOUS

Power of Central Government to issue directions

43.(1) Without prejudice to the foregoing provisions of this Act, the Authority shall,in exercise of its powers or the performance of its functions under this Act, be bound by suchdirections on questions of policy, other than those relating to technical and administrativematters, as the Central Government may give, in writing to it, from time to time:

Provided that the Authority shall, as far as practicable, be given an opportunity toexpress its views before any direction is given under this sub-section.

(2) The decision of the Central Government, whether a question is one of policy or not,shall be final.

Power of Central Government to supersede Authority

44.(1) If at any time the Central Government is of the opinion that—

(a) on account of circumstances beyond the control of the Authority, it is unableto discharge the functions or perform the duties imposed on it by or under theprovisions of this Act; or

(b) the Authority has persistently defaulted in complying with any directionissued by the Central Government that the Central Government is entitled to issueunder this Act or in the discharge of the functions or performance of the dutiesimposed on it by or under the provisions of this Act and as a result of such default thefinancial position of the Authority or the administration of the Authority hasdeteriorated; or

(c) circumstances exist which render it necessary in the public interest so to do,the Central Government may, by notification and for reasons to be specified therein, supersedethe Authority for such period, not exceeding six months, as may be specified in thenotification:

Provided that before issuing any such notification, the Central Government shall givea reasonable opportunity to the Authority to make representations against the proposedsupersession and shall consider the representations, if any, of the Authority.

(2) Upon the publication of a notification under sub-section (*1*) superseding theAuthority,—

(a) the Chairperson and other members shall, as from the date of supersession,vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisionsof this Act, be exercised or discharged by or on behalf of the Authority shall, until theAuthority is reconstituted under sub-section (*3*), be exercised and discharged by theCentral Government; and

(*c*) all properties owned or controlled by the Authority shall, until the Authorityis reconstituted under sub-section (*3*), vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notificationissued under sub-section (*1*), the Central Government shall reconstitute the Authority.

(4) The Central Government shall, as soon as may be, cause a copy of the notificationissued under sub-

section (*1*) and a full report of any action taken by it, to be laid before eachHouse of Parliament.

Establishment of Pension Advisory Committee

45.(1) The Authority may, by notification, establish with effect from such date as itmay specify in the notification, a Committee to be known as the Pension AdvisoryCommittee.

(2) The Pension Advisory Committee shall consist of not more than twenty-fivemembers, excluding *ex officio* members, to represent the interests of employees'associations, subscribers, commerce and industry, intermediaries, and organisationsengaged in pension research.

(3) The Chairperson and the members of the Authority shall be the *ex officio* Chairpersonand *ex officio* members of the Pension Advisory Committee.

(4) The objects of the Pension Advisory Committee shall be to advise the Authority on matters relating to the making of the regulations under section 52.

(5) Without prejudice to the provisions of sub-section (*4*), the Pension AdvisoryCommittee may advise the Authority on such matters as may be referred to it by theAuthority and also on such matters as the Committee may deem fit.

Furnishing of returns etc. To Central Government

46.(1) The Authority shall furnish to the Central Government at such time and in suchform and manner as may be prescribed, or as the Central Government may direct to furnishsuch returns, statements and other particulars in regard to any proposed or existingprogramme for the promotion and development of the pension industry as the CentralGovernment may, from time to time, require.

(2) Without prejudice to the provisions of sub-section (*1*), the Authority shall, withinnine months after the close of each financial year, submit to the Central

Government a reportgiving a true and full account of its activities including the activities for promotion anddevelopment of schemes of pension funds regulated under this Act during the previousfinancial year.

(3) Copies of the reports received under sub-section (*2*) shall be laid, as soon as maybe, after they are received, before each House of Parliament.

Members officers and employees of Authority to be public servants

47 The Chairperson and other members and officers and other employees of theAuthority shall be deemed, when acting or purporting to act in pursuance of any of theprovisions of this Act, to be public servants within the meaning of section 21 of the IndianPenal Code.

45 of 1860

Protection of action taken in good faith

48 No suit, prosecution or other legal proceedings shall lie against the CentralGovernment or the Authority or any officer of Central Government or any member, officer orother employees of the Authority for anything which is in good faith done or intended to bedone under this Act or the rules or regulations made thereunder.

Delegation of powers

49.(1) The Authority may, by general or special order in writing, delegate to anymember, officer of the Authority or any other person subject to such conditions, if any, asmay be specified in the order, such of its powers and functions under this Act (except thepowers under section 52) as it may deem necessary.

(2) The Authority may, by a general or special order in writing, also form committees ofthe members and delegate to them the powers and functions of the Authority as may bespecified by the regulations.

Offences by companies

50.(1) Where an offence under this Act has been committed by a company, everyperson who at the time the offence was committed was in charge of, and was responsible to,the company for the conduct of the business of the company, as well as the company, shallbe deemed to be guilty of the offence and shall be liable to be proceeded against andpunished accordingly:

Provided that nothing contained in this sub-section shall render any such personliable to any punishment provided in this Act if he proves that the offence was committedwithout his knowledge or that he has exercised all due diligence to prevent the commissionof such offence.

(2) Notwithstanding anything contained in sub-section (*1*), where any offence underthis Act has been committed by a company and it is proved that the offence has beencommitted with the consent or connivance of, or is attributable to, any neglect on the part ofany director, manager, secretary or other officer of the company, such director, manager,secretary or other officer shall also be deemed to be guilty of the offence and shall be liableto be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means anybody corporate and includes a firm or other associationof individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

Power to make rules

51.(1) The Central Government may, by notification, make rules for carrying out theprovisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, suchrules may provide for all or any of the following matters, namely:—

(*a*) the salary and allowances payable to and the other conditions of service ofthe Chairperson and whole-time members under sub-section (*3*) of section 5;

(*b*) the allowances payable to part-time members under sub-section (*4*) ofsection 5;

(*c*) the additional functions which may be performed by the Authority underclause (*p*) of sub-section (*2*) of section 14;

(*d*) any other matter in respect of which the Authority may exercise the powers ofa civil court under clause (*v*) of sub-section (*3*) of section 14;

(*e*) the procedure to be followed by the authorised officer under sub-section(*10*) of section 17;

(*f*) the form and manner in which an appeal may be filed before the SecuritiesAppellate Tribunal and the fee which shall accompany such appeal, under sub-section(*2*) of section 36;

(*g*) the procedure to be followed by the Securities Appellate Tribunal in dealingwith an appeal, under sub-section (*6*) of section 36;

(*h*) the form in which annual statement of accounts shall be maintained by theAuthority under sub-section (*1*) of section 42;

(*i*) the time within which and the form and manner in which returns and reportsare to be made by the Authority to the Central Government under sub-section (*1*) ofsection 46;

(*j*) any other matter which is to be, or may be, prescribed, or in respect of whichprovision is to be made, by rules.

Power to make regulation

52.(1) The Authority may, by notification, make regulations consistent with this Actand the rules made thereunder for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, suchregulations may provide for all or any of the following matters, namely:—

(*a*) the time and places of meetings of the Authority and the procedure to befollowed at such meetings (including the quorum at such meetings) under sub-section(*1*) of section 9;

(*b*) the terms and other conditions of service of the officers and other employeesof the Authority under sub-section (*2*) of section 11;

(*c*) the regulations to be made by the Authority in respect of pension schemesreferred to in clause (*b*) of sub-section (*1*) of section 12 and the time within which suchschemes should conform to the regulations, made under sub-section (*2*) of that section;

(*d*) the establishing of mechanisms for redressing grievances of subscribersunder clause (*f*) of sub-section (*2*) of section 14;

(*e*) the form and manner in which books of account shall be maintained andstatement of accounts shall be rendered by intermediaries under clause (*n*) ofsub-section (*2*) of section 14;

(*f*) amendment to the National Pension System referred to in sub-section (*1*) ofsection 20;

(*g*) the conditions of its purpose, frequency and limits for withdrawals fromindividual pension account referred to in clause (*b*) of sub-section (*2*) of section 20;

(*h*) the conditions subject to which the subscriber shall exit from the NationalPension System referred to in clause (*h*) of sub-section (*2*) of section 20;

(*i*) the conditions subject to which the subscriber shall purchase an annuityreferred to in clause (*i*) of sub-section (*2*) of section 20;

(*j*) the duties and functions of central recordkeeping agency under sub-section(*2*) of section 21;

(*k*) the determination of compensation of fair value of the regulated assets payableto central recordkeeping agency under proviso to sub-section (*3*) of section 21;

(*l*) the manner of receiving contributions and instructions and transmitting themto the Trustee Bank or central recordkeeping agency, as the case may be, and payingout the benefits to the subscribers, under sub-section (*1*), and the regulations governingfunctioning of points of presence under sub-section (*2*) of section 22;

(*m*) the manner in which a pension fund may receive contributions, accumulatethem and make payments to the subscriber under sub-section (*1*), the number ofpension funds under sub-section (*2*), the functioning of the pension fund under subsection(*3*), and the manner of managing the schemes by the pension fund under subsection(*4*) of section 23;

(*n*) the form and manner in which an application for grant of certificate ofregistration shall be made and the fee which shall accompany such application undersub-section (*2*) of section 27;

(*o*) the conditions subject to which a certificate of registration may be granted toan intermediary under sub-section (*3*) of section 27;

(*p*) the procedure and manner of suspension or cancellation of certificate ofregistration of intermediaries under sub-section (*4*) of section 27;

(*q*) the procedure for holding inquiry by an adjudicating officer under subsection(*1*) of section 30;

(*r*) the supersession of the governing board or board of directors of theintermediary under sub-section (*2*) of section 31;

(*s*) the management of affairs of the intermediary by an Administrator under subsection(*3*) of section 31;

(*t*) the manner of administering and utilising the Subscriber Education andProtection Fund under sub-section (*3*) of section 41;

(*u*) the delegation of powers and functions of the Authority to committees undersub-section (*2*) of section 49;

(*v*) establishment, duties and functioning of the National Pension System Trust;

(*w*) any other matter which is required to be or may be specified by regulationsor in respect of which provision is to be or may be made by regulations.

Rules and regulation to be laid before Parliament

53 Every rule and every regulation made under this Act shall be laid, as soon asmay be after it is made, before each House of Parliament, while it is in session, for atotal period of thirty days which may be comprised in one session or in two or moresuccessive sessions, and if, before the expiry of the session immediately following thesession or the successive sessions aforesaid, both Houses agree in making anymodification in the rule or regulation or both Houses agree that the rule or regulationshould not be made, the rule or regulation shall thereafter have effect only in suchmodified form or be of no effect, as the case may be; so, however, that any suchmodification or annulment shall be without prejudice to the validity of anythingpreviously done under that rule or regulation.

Power to remove difficulties

54.(1) If any difficulty arises in giving effect to the provisions of this Act, the CentralGovernment may, by order, published in the Official Gazette, make such provisions notinconsistent with the provisions of this Act as may appear it to be necessary for removingthe difficulty:

Provided that no order shall be made under this section after the expiry of five yearsfrom the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made,before each House of Parliament.

Applicatio ns of other laws and barred

55 The provisions of this Act shall be in addition to and not in derogation of theprovisions of any other law for the time being in force.

Savings

56 Anything done or any action taken by the Interim Pension Fund Regulatory andDevelopment Authority and Central Government under the Resolutions of theGovernment of India in the Ministry of Finance number F. No. 5/7/2003-ECB&PR, dated the10th October, 2003 and F.No.1(6)2007-PR, dated the 14th November, 2008 and notificationnumber F. No. 5/7/2003-ECB & PR, dated the 22nd December, 2003, shall be deemed to havebeen done or taken under the corresponding provisions of this Act.

P.K. MALHOTRA,
Secy. to the Govt. of India

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