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90th Year

ज्ञानं परमं बलम्

A Monthly Journal of
The Chamber of
Tax Consultants

The Chamber's Journal

Your Monthly Companion on Tax & Allied Subjects

Vol . V | No. 8 | MAY - 2017

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The Chamber's Journal

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Editorial

This issue is dedicated to 90th year celebrations. The well-known American Editor of Essence Susan L. Taylor says that *"we are made up physically and spiritually of the billions who have passed before us. They gave us life, they gave us our culture, they gave us the world on which we have built our present world. Our values and traditions, our habits of thought are in large measure the wisdom of their experience passed down through the ages. Our breath, the very air we breathe, was once their breath."*

In the above spirit, we have requested senior and eminent professionals to contribute to this issue. They have obliged us by doing that. The Income-tax Review of August and September, 1996, was brought out as **"Vision 2000"**, to commemorate completion of 70 years of The Chamber. The Editorial for that issue was titled **"Why even 1% of our population is not paying income tax?"** Please recall Hon'ble Finance Minister's speech while introducing the Finance Bill, 2017, in which he had brought out a very small number of taxpayers. Even after passage of 20 years, the tax base has not expanded as desired. The tax administration is facing many challenges. The uncertainty created by constant flow of case laws from various High Courts and the Apex Court adds to the woes of the taxpayers. The role of professionals becomes very crucial in such a situation. The Chamber of Tax Consultants through the Chamber's Journal always tries to disseminate knowledge and help professionals to have in-depth knowledge of the tax laws as well as allied laws.

The articles in this issue are quite thought provoking and this issue is definitely to be preserved. Chinese Philosopher Hong Zicheng says that *"what are the blessings left to us by our ancestors? They are the lives we now enjoy, but we should bear in mind that they are the sum of difficulties when they were amassed. What are the blessings we leave our descendants? They are what our lives leave behind, but we should bear in mind how long they can be waylaid and uppended."*

With this, I express my gratitude to all the contributors of this issue.

Thanking you

K. GOPAL
Editor

From the President

Dear Members,

When I started depicting my thoughts for President Message, **I realised that ten months have passed with blink of eyes** since I took the charge as President of Chamber and this will be my second last communication with you all.

This year we all are witnessing major changes like implementation of GST, IND AS (IFRS) for 2 tier companies, ICDS, etc. **Legal Challenge and regulatory compliance will prove to be one of the biggest challenges for India Inc. in the year 2017.**

In addition to this, recently, Hon'ble Prime Minister Shri Narendra Modi pitched for **shifting the fiscal year from the current April to March period to January to December period** so as to link it with crucial monsoon period. If indeed this change happens, **this will be a major break from a 150-year old colonial practice implemented by English rulers** in India way back in 1867. This will be a progressive, convenient transition for the Indian economy as it gets increasingly integrated to the global economy and with more companies from across border engaging in business activities.

Business entities are not fully geared up to deal with such changes which involves huge cost in terms of infrastructure and cost of manpower. Compliance costs of business entities will increase manifold and in the times when margins are dropping it will be a big challenge for some of the Business Houses.

However the moot question is, whether the Government is geared up for such drastic changes .....? Already, **there is lot of confusion** amongst the business entities with the change in the tax system when the GST will be implemented. These changes are for the good and will bring financial discipline. At the same time we need to see the ground reality whether we can absorb all these changes simultaneously.

It was reported in newspaper that **India spends less than 1% of its GDP on research and development (R&D).** The comparable figures for South Korea and Singapore are 4.3% and 2.2% respectively. In India 60% of R&D spend is by Government, 4% by universities, and the remaining by business including R&D by MNC captives in India. Govt. should create a conducive environment for conducting more in-house research and **make India a global hub for research activities. Some unique thought process like "Make in India" is required to prompt states, corporates and others to invest more on in-house research activities. The**

research spending must increase considerably in India if it wants to become developed economy and global power. Even spending on research activities by universities must go up sharply. And the **person/organisation should be suitably rewarded those who create new knowledge.** It's a proven fact that Indians play a crucial role in Research carried out outside India also.

The differences between the promoters and management of the Indian Corporates resurfaced once again in news. This underscore the need for a rigorous evaluation of the board including the chairperson and independent directors. Domain knowledge and expertise of a board member alone will not suffice. What counts is whether one can think independently, and challenge the management. Checks must be in place to allow independent directors to perform their roles effectively, as Indian companies take on the turbulence of global uncertainty. **Globally, many entities rope in external experts to the evaluation process. Bringing in independence makes sense for Indian companies too.**

SEBI wants an overhaul in the way boards of listed companies discharge their duties that include the appointment and removal of directors. SEBI's guidance note should have the force of law to protect the interest of shareholders and corporate governance should move beyond a check-the-box exercise.

The month of April 2017 was very eventful for the Chamber. The Allied Laws Committee of the Chamber had organised **first Dr. Y. P. Trivedi Moot Court** wherein many Law colleges from Mumbai participated and also Team Chamber. This was a unique feature the Chamber had added to its feather. The event was spread over two days. **Semi Final Round was judged by the Hon'ble Members of ITAT Mumbai in ITAT court rooms while Final Round was judged by the full bench comprising of by Hon'ble Justice Mr. Karnik of Bombay High Court and Hon'ble Senior members of ITAT Mr. Pannu and Mr. Saktajit Dey.** Students of Government Law College won the First Prize. However students from all colleges had performed very well. It is not important who is winning or losing but the **whole aim is to provide a platform to the young law students to present themselves, put forth their views, make them aware of the court procedures and its functioning and to learn the art of advocacy.** It was new initiative undertaken by the Chamber and was a mammoth task. I thank all the judges, Govt. Law College, professionals, students, ITAT, ITAT Bar Association and finally Dr. Y. P. Trivedi for lending their support.

The Indirect Tax Committee had organised four **days Orientation Course on GST Law Bill** at Jai Hind College. **Due to overwhelming response with 370 participants it had to shift the programme to bigger venue at Jai Hind Auditorium. Brains' Trust session** dealing with various case studies and views of experts at this stage where law has not yet been implemented was **a unique feature** of this workshop.

The Chamber as a mark of gratitude and respect felicitated CA Nilesh Vikamsey on 29-4-2017 at Jai Hind Auditorium on his being elected as President of the ICAI. Nileshbhai was part of our Managing Council and has played an important role in past for building up activities of Corporate Members Committee.

The Student and IT Connect Committee along with WIRC organised article student training programme at RVG Hostel and around 300 students participated. International Taxation Committee of Chamber had also organised four days' workshop on Basic Course on FEMA and issues jointly with Malad Chamber of Commerce at Saraf College, Malad. This programme too was well received by the participants and many non-members participated in the programme.

In the month of May 2017 Chamber has organised series of Webinars in the field of Direct Taxes and International Taxes apart from its routine programmes. The Chamber has successfully conducted series of Webinars and now Chamber can serve even one single member situated outside Mumbai.

I also would like to inform members that work of **reconstruction of primary school at Chopda in Rudra Prayag District in Uttarakhand – an initiative the Chamber** has undertaken this year, is in full progress and substantial work will be completed by end of May 2017.

In the month of June 2017 the Chamber has planned **training module (workshop) for Article students pursuing Chartered Accountancy Profession, Programme on advance learning on Excel, full day programme on ICDS, its much awaited International Tax RRC at Taj, Nashik.** The 90th Year Celebration Committee has organised a **musical entertainment** event for members and their families **on 26th June, 2017.** I request all members to attend the programme. This will also help members and their families to come closer to each other and make a stronger Team Chamber. The details will soon be available on the website and through Newsletter.

The Chamber's calendar for next two months is packed with series of programmes, webinars and publications. Chamber's new mobile responsive website is under development and is expected to get over by end of June 2017.

It's time **to renew our ties with the Chamber;** yes I am referring to renewing membership of the Chamber and *request members who have not renewed their membership to do so at the earliest.*

This being 90th year, the Chamber, in continuation of doing unique and knowledge spreading activities, has come out with unique and special issue this month on **'VISION 2025'** containing various different topics on Taxation and Administration of Law. Seniors from the profession have contributed to these articles. I thank Chairman Mr. Kishor Vanjara, Co-Chairman Mr. Sujal Shah the entire team and specially Ms. Neha Gada, who was a co-ordinator for this special Issue of the Journal. I hope this will immensely benefit members.

I would like to end with the quote of our Hon'ble Prime Minister Shri Narendra Modi,

"The Wealth that increases by giving, that wealth is Knowledge and is supreme of all possessions."

HITESH R. SHAH
President

Chairman's Communication

Dear Readers,

Month of April witnessed BSE Sensitivity Index (Sensex) crossing 30,000 mark for the first time in its history! Is the stock market the barometer of the health of the economy of the Country? This continues to be a debatable issue, but the reason for buoyancy in the Stock Market appears to be based on overall positivity in the air due to various measures taken by the current Government. Some global economic surveys do indicate that India is going to be one of the top economies in terms of GDP growth and will go ahead of China in a few years. The Government seems to be geared up to introduce various reforms to give impetus to the economy of the country. Bankruptcy Code, Recent amendment in the Banking Regulation Act are some of the indicators. Bright future of India is vouched by none other than the Investment Guru Warren Buffet, in his very recent interview. CHEERS!

While there is general optimism in the country, The Chamber of Tax Consultants ("The Chamber") established in 1926 is celebrating ninety years of its existence. An organisation which is not for profit and involved in serving professionals and society at large, is going from strength to strength year after year. This has been possible due to solid foundation and vision of the founding fathers of the Chamber. After its foundation the Chamber has never looked back thanks to eminent professionals who have selflessly nurtured this organisation all these years by giving their precious time and providing the right direction and vision and making it a prominent professional organisation that it is today. Salute to all the eminent, selfless professionals for their immense contribution over the last ninety years in building The Chamber.

Completion of ninety years is a major milestone and matter of pride for any organisation and therefore it does call for a celebration. During the year various programmes have been organised to celebrate NINETY years which began in July 2016. To commemorate the 90th year celebration, The 90th Celebration Committee has conceptualised this issue titled "Vision 2025 – Tax Laws and Administration". The profession is at cross roads and is facing many challenges at the same time there are many emerging opportunities too. With this backdrop, the issue has been designed and who's who of the profession have authored very insightful articles which would go a long way in guiding the professionals.

No words would be adequate to thank the illustrious Past Presidents of the Chamber, illustrious Past Presidents of the ICAI and other luminaries who have spared their valuable time and shared their wealth of knowledge and experience in writing the articles.

I compliment and thank the members of "90th year Celebration Committee" for conceptualising this issue and also the Chairman of the Committee Shri Kishore Vanjara and Neha Gada for their efforts in overall co-ordination of this issue.

Let us continue to CHEER !

VIPUL K. CHOKSI
Chairman – Journal Committee

The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Y. P. Trivedi, *Senior Advocate*

Ideal Tax System for 21st Century

1. Cicero had said that taxes are sinews of the State and the Great Judge Justice Oliver Homes had said that I love to pay my taxes because that is the price which I pay for my civilization. Taxes are with us from ancient times and even Kautilya has mentioned in his Arthshastra about the progressive method of taxation. The Great Economist John Keynes had said that there are only two things certain in life 'taxes' and 'death'.

2. Taxes are all around us and if we want our civilized Society to prosper, then taxes are inevitable part of life. But, in order to make taxes palatable one must again go to Kautilya to advise that the king should collect the taxes like the sun collecting water from the ocean again to give back in the form of rains. Again Kautilya said that taxes should be collected like a bee collecting honey from the flower.

3. The minimum requirement of decent system of taxation should satisfy three criteria:

a. It must be simple.

b. It must have element of certainty.

c. It must take into consideration the peoples' capacity and willingness to pay.

We have to judge our Income-tax Act by applying the above criteria.

4. Firstly, nobody will say that the Act is couched in a simple language which anybody who wants to make some efforts to understand can follow. Over the years the present 1961, Act has become so complicated that nobody even with the computer mind can claim that he knows law with certainty at any particular time. More than approximately 5,000 amendments have been introduced in the present Act from its introduction in 1961. The present Act was introduced in order to make the 1922 Act simple. But, over the years it is a great maze of words. There are sections with several sub-sections. There are explanations and provisos overlapping with each other. At several stages there are sections which start by saying "notwithstanding anything contained in any other provisions of this Act". When you find similar provisions couched elsewhere, one would not know how to interpret these conflicting provisions.

5. Sections have been added by using English Syllabus (a), (b), (c) etc. and when the syllabus are exhausted they are sought to be replicated by (za) and furtheron. For giving any interpretation, it is difficult to find out which provisions are applicable in that particular year. To add to this confusion, amendments are made with retrospective effect even when Hon'ble Supreme Court has stated time and again that the legislature should desist from doing so. There is an urgent need for a Direct Tax Code which is so assidulously prepared to be introduced in Parliament as early as possible. This measure

will be as momentous as the Goods and Services Act.

6. Next requirement is certainty. Even on this aspect there is considerable confusion because various High Courts give diverse interpretations to the provisions of law. There are 76 Benches of Income Tax Appellate Tribunal which interpret law in their own way. In these conflicting legal interpretations when even lawyers fumble, how can a layman or a businessman understand law even if the saying is "ignorance of law is no excuse". The need of the hour is (i) to avoid retrospective amendment as far as possible. (ii) on important issues matter should be referred directly to Hon'ble Supreme Court to give its final interpretation. This will impart stability and certainty to rudderless ship.

7. The third requirement is to take into consideration the people's ability and willingness to pay. The Finance Minister has laid a target of raising ` 5, 38, 744/- Crores through Corporate tax and Income tax of ` 4, 41, 255 Crores is to be raised from direct taxes as a result of which now direct taxes will be the largest source of tax revenue leaving indirect taxes and service tax far behind. One can well appreciate the finance Minister's desire to mop up the maximum revenue by direct taxes which in effect is a progressive taxation; in that Direct taxes pinch rich more than the poor. But beyond a point increase in the rates of taxes only induces the tax evaders to prosper. In USA when taxes were reduced by President Franklin Roosevelt while introducing new deal the tax revenues had gone up. Even now Mr. Donald Trump is planning to reduce the taxes to the level of 15% knowing very well that with the reduction in rates the revenue collection will increase and will not suffer. In our country we have to make a bold attempt to reduce the rates of taxes to bring in line with other countries in Asia in order to induce people to pay their taxes with a smile.

8. We must realise that we have a great scourge of black money. Demonetisation destroyed a fraction of that money but it is not over. It is very likely that with the system of governance that we have and the bad habits planted by previous Governments, the bureaucratic system has become fairly corrupt generating and devouring on uncounted money. It is a fact that huge stock of money running into crores of rupees are still lying deposited with foreign banks in tax saving countries, in the farthest corners of the world. More and more such venues are opening in some remote islands in Pacific Ocean where these monies are deposited. The Government will have to devise a scheme and a definite strategy to unearth and bring back this money in the country. It is unfortunate that some of these deposits may remain unclaimed and will go in the pockets of these banks only. Something drastic either in the form of carrot or stick is necessary to bring this vast treasure at home. Very bold steps may be necessary including nationalisation of these accounts but probably such drastic steps might have to wait till the second term of our dynamic Prime Minister Shri Narendra Modi, when he can take more risky steps.

9. Politicians and people in public life should set an example. After the First World War, when Britain public debt had increased many fold, Lord Baldwain invested 80% of his wealth in Government Treasury Bonds which he later destroyed publicly so that Government's debt liability to that extent is reduced. While our Prime Minister and some other Chief Ministers stay like ascetic the other politicians should emulate the example of Lord Baldwain. How many of us are prepared for this?

Whenever we attain a higher vision, the lower vision disappears of itself.

— Swami Vivekananda

Sohrab Erach Dastur, *Sr. Advocate*

Corruption

Hardly a day passes without the newspapers reporting an act of corruption by a businessman, a politician, a professional person and, now even sports bodies (the wag may say it's not cricket!) and, sometimes, (fortunately, very rarely) even by a judge of a High Court or the Supreme Court. As per a recent dismaying report, apparently even the armed forces are not immune from the cancer of corruption. Periodically reports appear of scandals and scams. About 60 years ago we had the "Jeep scandal" involving Mr. V. K. Krishna Menon (then the Indian High Commissioner to the U.K. which was said to involve ` 80 lakh. It is sad that each succeeding misdemeanour makes the earlier one look as "chicken feed: and which, therefore, gets consigned to history!

One hundred and twenty-five years ago it was proclaimed "... we meet in the midst of a nation brought to the verge of moral, political and material ruin. Corruption dominates the ballot box, the legislatures, the Congress and touches even the ermine of the Bench." This is a good illustration of the popular belief that the world and its inhabitants do not change nor is the present necessarily an improvement on the past.

Apart from the monetary and economic consequences of corrupt practices, what is reprehensible is that it lowers the moral fibre of the country's citizens. In 2016 India ranked 79th out of 176 countries in the Corruption Perceptions Index researched by Transparency International. A large percentage of persons interviewed confessed that they had first hand experience of paying or, as they put it, being forced to pay, a bribe.

Corruption is often classified as being of two types. The first is what one may term as "dishonest corruption," that is, corruption motivated by a desire to gain a dishonest or unfair advantage. There is also the "other" type of corruption, which people, to soothe their conscience, label as "honest" corruption – really a contradiction in terms! It is corruption indulged in to procure or to obtain what is your right but which is being unreasonably and manipulatively withheld or denied. A citizen finds it frustrating, if, for obtaining what he is undoubtedly entitled to, say, a refund he has to grease someone's palm. The seasoned veteran will, of course, advise that it is better to part with some money today and consequently save the time otherwise wasted rather than to have one's matter kept hanging for an indefinitely long time and thereafter to receive the same sum

in, by then, devalued currency! Though such an approach is morally insupportable it is often difficult, even for an honest person, to resist this temptation.

Edward Gibbon in "The Decline and Fall of the Roman Empire" viewed corruption as, "the most unfailing symptom of Constitutional liberty" whilst Edmund Burke in April 1777 warned, "Among a people generally corrupt, liberty cannot long exist." Corruption is sometimes sought to be justified as being a necessary evil to attain a high and laudable objective. Even the most respected may succumb to this temptation. The story goes that Republican President Abraham Lincoln, a President uniformly and universally admired and who rid America of slavery, (the great emancipator as he is called) realised that though in the 1864 general election the Republicans had secured a sizable majority in the House of Representatives (which would have enabled Mr. Lincoln to get the required 13th Constitution Amendment Bill, passed) the "new" House of Representatives with the required Republican majority was not to be convened until March 1865. A lame duck session of the members comprised in the outgoing House of Representatives was held from December 1864 to March 1865. Perhaps on account of a premonition, Lincoln wanted the Constitution Amendment Bill to be passed by this (old) House of Representatives even though the Democrats had a majority therein. Realising the difficulty, he tersely directed some trusted lieutenants "these votes must be procured." Apparently not the most laudable means were used by them to satisfy the President's desire. This issue raises the eternal debate of "means and ends." The reason why I said that Lincoln had a "premonition" is because, as it happened, he was shot on 14th April, 1865 by John Wilkes Booth as he sat in the Ford's Theatre in Washington. If he had waited for the March 1865 session of the House (with the requisite Republication majority) to be convened, one does not know whether slavery would have been abolished in his lifetime!

If linking of Lincoln with corruption raises a few eyebrows it is worth recalling that Lord Chancellor Francis Bacon, from whose writings we so often quote, was found guilty of being corrupt and fined 40,000 Pounds and, in addition, imprisoned in the Tower of London. His somewhat lame defence was that he was following "the custom of the age" which is what many of us also plead when confronted with our having contributed to the spread of corruption.

A newspaper article published some 15 years ago very aptly summed up the situation by stating "protection breeds corruption and corruption finds protection." One often reads of civil servants going out of their way to shield an erring politician. They say that it is the small fish who get caught in the net: the net is not wide or deep enough to catch the big fish or at least to prevent their escaping therefrom.

It is worth recalling what Justice R. C. Lahoti (later Chief Justice of India) said whilst inaugurating the National Tax Conference organised by the All India Federation of Tax Practitioners (Central Zone) at Indore in September 2002. He perceptively observed, "I am amazed at the patience of the Indian people who endure injustice and unfairness with serenity and resignation. We bear the torture of the laws and brutality of corruption and endure ourselves in such circumstances which would lead to bloody revolution in any other polity .... Corruption is a cancer eating into the roots of the society. It is difficult to fight against corruption because the chances of success are bleak but this is no reason for despondency. Nobody is born corrupt: it is the vitiated atmosphere in the society and the system of governance which converts the clean into the corrupt. An honest person resists corruption but

allurements and temptations at times prevail upon him and once corrupt, even an honest person prefers and finds it convenient to stay corrupt. The seeds of corruption are sown in the mind of the man and the cure, if any, lies in eradicating the seeds of corruption from his mind. An honest revenue official says 'The honest are hounded; they are humiliated; they are ignored; they are manipulated; they are used, they are punished; they become the laughing stock in society and in their families; even their very honesty is suspected. In spite of that, there are many, many honest officers in the department who remain honest against all adversities. They are a special species; they have to be preserved and protected.'"

If there are still some doubting Thomases who shut their eyes to the stark reality they should inquire from a trucker about his experiences at check points and entry points from and into different states/cities. One estimate says that truckers annually pay unimaginable amounts to avoid unnecessary wastage of their time at check points. In 2009 *The Times of India* had reported that a survey had shown that Indian bureaucracy ranked the worst in Asia. It is alleged that one of the sources of corruption is the vesting of discretionary powers in Government officials. Though this is true to some extent I am sure that most tax practitioners must have at some time experienced that the absence of discretionary powers means that an assessee, from whose income tax has been deducted at source, is not in a position to obtain appropriate credit therefor because of some magical Form AS-26 which is required to be filed by the tax deductors and which allegedly robs the officer of discretionary power to take an independent and just decision, whatever information Form 26-AS may/may not contain. There are reasons too numerous to set out here why there may be a mismatch between what appears/does not appear in this Form AS-26 and what sum an assessee claims as being tax which has been deducted at source from his income. Taking shelter under alleged non-conferment of discretionary powers to ignore Form 26-AS the Tax Authorities brazenly defy the clear mandate of section 205 of the Income-tax Act.

What is ironic is that though the amount claimed by the assessee to have been deducted at source is not regarded by the officer as TDS for which the assessee must be granted credit, still the same sum is included by the Officer as a part of the assessee's professional/business income! Could there be a more glaring illustration of an Officer's Tax Code: "Heads I win, tails you lose". Whilst taking such a contradictory stand the Officers ignore even binding decisions of the High Courts.

Corruption does not adversely affect only the rich and powerful. Government collects taxes and levies and has introduced specific aid programmes for the farmers, the poor, the illiterate, the student and the weaker sections for whose benefit the collected levy/tax is to be applied. Transparency International in a recent report records that only 40% of the grain handed out for the poor reaches the intended beneficiaries. It is reported that huge amounts set aside by the Government under the Mahatma Gandhi National Rural Employment Guarantee Scheme were pocketed by intermediaries and corrupt officials in the name of fake rural employees. Another report says that it is not unusual to pay 2½ times the official fee for obtaining a driver's licence. Prof. Dibek Debroy and Mr. Laveesh Bhandari in their book "Corruption in India: The DNA and RNA" estimate that public officials may be cornering 1.26% of the GDP. To hide black money Indian businessmen and politicians go international: whether to Switzerland or Panama or wherever. India's geography is not and has never been a restraining factor.

The Government appears to be fully conscious of the rampant growth of corruption and

repeatedly proclaims that it is anxious to control the same. As a first step one must attempt to remove the belief in the minds of the ordinary citizen that Government is out to shield politicians and political parties. For example, Complete (and I mean with a capital C) transparency must exist in respect of donations and donors to political parties. Removal of the secrecy provided by donating electoral bonds is desirable. In this connection it may be noted that it is ironic that though the Whistle Blower's Protection Act was passed in 2011 and received the Presidential assent in 2014, in so far as I can ascertain, it has not yet been notified. Unless a person who complains about corrupt officials, politicians etc., is assured of some basic protection against vindictive action it may be difficult to track down/obtain evidence concerning corruption and corrupt practices.

In the Jharkhand Mukti Morcha bribery case *(Narasimha Rao vs. The State AIR 1998 S.C. 2120)* the Supreme Court held that on account of Article 105 of the Constitution, action cannot be taken against a bribe-taking member of Parliament. Though several Constitutional Amendment Bills have been passed since then this abuse of a Constitutional privilege still remains unattended to.

Mr. C. K. Prahalad in an article in *"The Financial Express"* has estimated that if the level of corruption in India was reduced to that which exists, say, in the United Kingdom, the growth rate in the GDP would greatly increase. He estimated that on account of corruption the growth in investment and jobs is less by over US$ 50 billion.

What then are the causes for this state of affairs? In so far as income taxation is concerned, presently, the maximum rates are undoubtedly reasonable, though perhaps the initial slabs could be broadened and the maximum rate reached at a level higher than as at present. It is also for consideration whether the general rate of 20% for tax on long term capital gains requires a reduction. Unfortunately and inexplicably there was a time when the income-tax rate in respect of incomes over ` 2 lakh went up to 97.5%. At that time in addition to the income-tax a citizen was also subjected to expenditure-tax, wealth-tax, gift-tax and surtax (for companies). Such rates fostered the belief that it was not dishonourable to avoid payment of income-tax when the laws were such that the direct tax payable by a citizen may exceed his total income. This led people to believe (quite wrongly) that it was not wrong or dishonourable to evade the payment of an unconscionable rate of income-tax. After all, human beings are not saints! It is true that these rates were in force for a limited period of time and that this was the position more than 40 years ago. However, the horrendous rates of tax created tax evasion habits and, unfortunately, bad habits die hard and are easily transmitted from generation to generation. People openly flaunted their "achievements" in this behalf – which egged on others to follow suit. The few years when the rates had zoomed, created a psychology which "justified," if not encouraged, tax evasion by corrupt means and this has permeated down the years to successive generations.

A reason often put forward to justify transactions which generate black money is that coloured money is required to satisfy the ever increasing and insatiable appetite of those from whom permissions and licences are to be obtained. Thus, excessive licensing procedures and Government controls played and play no mean role in the generation of unaccounted money. The freer the economy the lesser would be the incidence of corruption. Tacitus said, "The more corrupt the State, the more the laws." One could perhaps equally perceptively say, "The more the laws the more corrupt the State." What is the vote?

Another cause for the non-eradication of corruption is that even after a corrupt deal is detected, justice is not meted out for decades. Thus, the fear of early punishment and retribution is absent. Where facts so justify the process of filing of a chargesheet must be expedited without in any way sacrificing a full and complete investigation and correct framing of the charge. This means that the Investigation wing has to be suitably and properly staffed so as to be able to tackle the situation. It is the fundamental duty of the State to provide, and it is a citizen's inalienable right to receive, "free" justice – unfortunately even though exorbitant Court fees are charged by the State, reasonably prompt justice is not provided.

Almost a decade ago the hot topic of discussion among assessees and taxpayers was an incident in Kolkata wherein a member of the Income-tax Appellate Tribunal and a professional person were allegedly involved. In so far as I am aware, the matter has not yet reached a conclusion even at the first level.

In March, 2000, Mr. Bangaru Laxman was trapped and a video recording his acceptance of illegal monetary gratification made headlines. Twelve years passed before he was convicted by a Special CBI Court and sentenced. His appeal to the High Court was admitted and he was set free on bail. He passed away before the final verdict could be pronounced.

The Government must spruce up the judicial machinery by appointing adequate judicial officers and judges so that within a reasonable period punishment follows the crime and/or the person is exonerated and his reputation restored. It is for consideration whether once a charge is framed by a Court in a matter involving corruption or the commission of a serious economic offence the concerned person should be debarred from contesting a public election. This may act as an incentive for him to seek an early disposal and not to derail the hearing with a view to postponing the day of judgment.

As noted above corruption has sometimes touched even the higher judiciary. We have the cases of Bhattacharjee, Ramaswami, K. N. Singh, Veeraswami, Soumitra Sen and Dinakaran to name but a few who apparently strayed from the straight and narrow path and violated their oath of office. Allegations were also made against the conduct of Chief Justice Sabharwal of the Supreme Court. Referring to this case Paul Cohen and Arthur Marriott in their very interesting book entitled "International Corruption" (Chapter 7 – The current state of anti- corruption laws in India) observe, "In this case instead of taking an affirmative action in ordering an inquiry, the Court sentenced the four journalists, who brought the news to light to four months' imprisonment for contempt of court..."

More cases of judicial corruption may undoubtedly be exposed if draconian powers are not vested in the Courts to issue notices for contempt. It was reported some 18 years ago that the Attorney-General for India had stated "Chances for detection and exposure of corruption in the judiciary are slim unless the law of contempt is amended ...". The Judicial Standards and Accountability Bill, 2012 introduced in 2010 and passed in 2012 by the Lok Sabha still does not appear to have become law.

At the same time one has to remember that some regulatory measures have to be fashioned to prevent loose and unsubstantiated allegations being levelled against persons honourably occupying high judicial posts, particularly as everyday a judge is likely to decide matters in which one party is adversely affected, and who, rightly or wrongly, had and has great faith in the strength of his case and attributes his failure to something more than a correct judicial determination. It is also to be remembered that unlike politicians, judges cannot resort to

the public forum for explaining their position. This is a matter which requires public debate and one must evolve a method to protect the honest judge from unjustified public criticism and an over-sensitive judiciary clamping down on even justified criticism.

One has to evolve an acceptable methodology for dealing with judicial corruption as it raises delicate issues. In so far as the Income-tax Appellate Tribunal is concerned, up till now where allegations of substance had been levelled against a member the procedure followed by the President, on being reasonably satisfied that a prima facie case had been made out, was to transfer the member concerned to another jurisdiction or not to allocate judicial work to him. It is for consideration whether transferring a member reasonably suspected of corruptive in essence means transferring corruption. One option is to constitute a disciplinary committee consisting of, *inter alias,* the President, the Law Secretary of the Government of India, a senior professional and perhaps two others. The Committee should have the power to take appropriate disciplinary action including recommending dismissal of the member. Non-allocation of work to the member under suspicion is a poor alternative. It is on record that two judges of a High Court against whom serious allegations were made were not allotted judicial work by the Chief Justice of the High Court and drew their salary without work till their retirement day! Appeals from orders of the Committee should be limited and speedily disposed of on a priority basis.

In so far as the higher judiciary is concerned, the appointment of an Ombudsman is very desirable. The judiciary in India rightly commands the highest respect. However, the errant action of a few tarnishes the reputation of judges generally. If faith in the judiciary is lost there is very little else which one can look to in the Indian context.

The slow pace at which the enactment of anti-corruption legislation proceeds in india is highlighted very tellingly by Mr. Fali. S. Nariman in his most interesting and informative book "The State of the Nation". He notes that the first Lokpal and Lokayuktas Bill, 1968, was introduced in the 4th Lok Sabha and thereafter in several succeeding Lok Sabhas (at least eight in number) and on each occasion the Bill lapsed on account of the dissolution of the Lok Sabha. It was only in 2013 during the course of the twelfth Lok Sabha (almost 50 years after its first introduction) that the Bill with the very laudable objective of constituting an Authority to look into the conduct of the highly placed was passed and that too partly, if not mainly, because of Mr. Anna Hazare's threat of direct action. This shows the "priority" successive Governments bestowed on this most desirable legislation. According to Thomas Jefferson the time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold than to trust to drawing his teeth and talons after he shall have entered!

In conclusion, (I can hear sighs of relief!) I leave you with this thought: "Would there be a corruptee in the absence of a corruptor?" Once it is known that a person is "flexible" enough to succumb to corruption he is bound to be exploited. If a person is known to turn a blind eye or a deaf ear, to requests for corruption he is likely to be ignored as one of the unreal and strange persons in the world. Is it not worthwhile to create such a reputation?

P.C. Joshi, *Advocate*

Future of Litigation – Indirect Taxes

We the Indians are too well known for having different opinions on any aspect of the life, so much so that if there are two Indians, there would be three opinions. The basic question however for consideration in the present article is the future of litigation in regard to the levy of indirect taxes especially when the much trumpeted Goods and Services Tax is on the Indian horizon.

Background

2. Indian citizen by and large are law abiding and would like to arrange their affairs in full compliance of the law in force on the date of the taxable event. Each of the indirect levies have presently different taxable event on happening of which, the tax is payable. Presently the tax on sale of goods as well as supply, transfer or delivery of six categories of non-sale transactions; are being levied under unamended Entry 54 of List II of the Seventh Schedule appended to the Constitution of India; by all individual States under their own VAT Act; while the transactions in the nature of inter-State sale are being taxed by the Parliament under the provisions of Central Sales Tax Act, 1956. Such a scenario led to virtual rate war and unhealthy competitions between neighbouring States, with the result the assessees used to shift to the place where the burden of tax is less/ or minimum. Places like Daman or Parwanoo which offer complete exemption to a new industrial unit, are more suitable and preferred by new entrepreneours.

Present Status

3. A manufacturer presently pay central excise duty on his production, in addition to the levy of sales tax on the sale of manufactured goods. In case, the raw material happens to be from another State, he pays entry tax. If the concerned assesssee is only service provider he pays service tax. No Input Tax Credit is available to such transactions leading to heavy burden on the cost of finished products.

4. All such levies being of indirect nature, are normally passed on as part of sale price, to the real consumer, by which time, the product concerned suffer multiple cascading effect of each levy. The separate enactment of VAT by each State, was felt to be an impediment to create one national market in the international trade. This scenario is now proposed to be corrected through the Constitution 101st Amendment Act, 2016. The amendments thereunder now enable both the Centre and the State to levy a uniform tax throughout the nation under the name and style of tax on Supply of goods and services, popularly known as 'GST'. Several taxes both by Centre and States will be subsumed with GST.

Mera Bharat Mahaan

5. One more instance of multiple opinions; unlike the GST in other countries with one rate all throughout; we have our own dual GST system found more suitable for the federal nature of the country. We will have Central GST, State GST, Integrated GST and Union Territories GST. In order to avoid the cascading effect during intervening stages in the chain of transactions from the manufacturer / importer to the ultimate consumer, it has been provided that the tax paid as recipient of supply of Goods / services would be available as ITC for setting it off from the output tax payable on supply of goods or services.

Whither simplicity ?

6. Whenever a new law is drafted, one of the avowed object which is observed to be constant on all occasions, especially while amending an existing Act, is attainment of simplicity and certainty, easy to be understood by common man. Unfortunately such an avowed object have not been achieved through multiple enactments legislated continuously by each legislative action. The drafting of the new law of GST is not an exception to the above position. It was very much felt that to achieve the ultimate object of having one nation one tax, one uniform rate of tax on all supplies of goods or services (as is prevailing in various other countries) was required to be adopted. However we would be adopting several rates right from zero to 40%. This multiplicity itself will be the cause for future litigation in regard to proper classifications and nature of each transaction. To begin with the GST regime; all the supplies of taxable goods or services will be classified under one of the varied rates @ 5%, 12%, 18% or 28%.

High Seas – Supplies

7. Transactions on high seas whether in or outside the territorial waters will also cause multiple disputes and litigations. The offshore transactions or works contract at the gas drilling platforms, including supply of food, drinks etc., there at by a canteen contractor who also undertakes the housekeeping services by employing his personnel, will also create problems for serious consideration. In the cases in relation to offshore platforms which are admittedly situated beyond territorial waters, the situs of supply would naturally be beyond the territory of India. Such supplies of goods and services whether liable or not will also be in a grey area. The transactions within territorial waters however would now be legally taxable by the nearby coastal States. The import from other country will be treated as one in the course of inter-State supply liable to integrated GST, but what will be status of supplies in the course of import, would be a big question to be resolved.

Unregistered small suppliers

8. Small dealers and service providers having turnover below twenty lakhs will also be adversely affected; unless they obtain voluntary registration under the GST regime. In the cases of unregistered persons, their customers if registered will have to bear the tax liability on reverse charge basis with the result majority of registered persons will be reluctant to deal with an unregistered person. Such a scenario will create upheaval amongst the small dealers and similar service sector.

Litigations all around

9. When one thinks of litigation, a normal person, a common man, would mean a proceeding in accordance with law; it is not synonymous to judicial proceedings. In other words, the redressal of a legal grievance or proceedings against the violation of a legal right. With that meaning, we can definitely conclude that the proceedings of assessment and the proceedings before higher appellate authorities including the Tribunal would be considered as a part of litigation.

10. As mentioned hereinabove, the drafting of all the GST Laws are faulty to a great extent and only future would tell us as to whether the law is made simpler or more complex.

Constitution impact

11. Our Constitution is the fountain source of all enactments. Any legislation which is held to be contrary to or in conflicts or in violation of any of the provisions of the Constitution would be ultra vires and bad *ab-initio.*

12. Article 265 expressly provides that no tax can be levied or collected without the authority of law. It is well known fact that a good beneficial law can be felt to be a bad law and a bad law can be made to be a good law by the manner in which the concerned law is implemented or administered. Therefore the role of the tax administrators is very vital and important. Each proceeding has to be handled in an independent and unbiased manner but in practice it is the other way round.

Transparency & certainty – Much desired

13. Since the beginning of indirect taxes, the administrators have their own dictionary meaning of simplicity and the principles of interpretation, as to how the goods and services covered by the relevant enactment or schedule, are to be interpreted. They behave as if all the taxpayers are tax dodgers and treat them in that fashion. This mindset of the revenue officers coupled with the tax saving mentality of the assessees have so far led to multiple disputes. The non-adversial system adopted in the grievance redressal mechanism, again, force the assesse to approach the Appellate Authority appointed under the provisions of the Act. Unfortunately the Appellate Authorities working under the indirect tax provisions also believe that they have to decide the appeals ordinarily in favour of the revenue. Such an attitude or mindset unless radically changed, the disputes would continue to travel from one table to another; ultimately adding to the backlog of the cases pending with the Tribunal and / or High Court.

14. Though the law is purported to have been drafted by the Law and Judiciary Dept., in reality the amendments are carried out in the suggested manner, by the lower strata of the concerned department. Such proposers hardly realise the pros and cons of their suggestions. Sometimes the retrospective amendments are carried out simply for getting over the law settled by the court of law. Such a climate does not encourage or be helpful for the conduct of the business. The past experience is that the benefit available in accordance with law in force on the date of transaction, is suddenly denied by such amendments. In my opinion, for a democratic country like India, (which is still not a developed nation but trying to play a major role in the International market) must have certainty and simplicity in the tax laws relevant to the foreign businessman as well as their representatives. Once the law is settled by a High Court or Supreme Court, that position have to be honoured by one and all without any reservation about its correctness. If warranted, remedial amendments may be carried out but with prospective effect. Article 141 provide for a healthy practice of observing the judicial discipline while dealing with similar later case, by observing and complying the law of precedent.

15. Though above-mentioned scenario is a welcome feature required to be maintained by all concerned, the ground reality is not commensurate with the Rule of law.

Rule of Law – At a far distance

16. The present environment in all the indirect tax depts., does not speak well in the direction of rendering the real, full and quick justice. The additions to the number of dockets containing various aspects of the enactment arises because of improper drafting of the law and erroneous interpretation thereof by the tax administrators.

"Jungle of Laws : In-numerable laws are enacted and amended without understanding its ill-effects with drafting errors. All should see that unnecessary laws and delays are avoided. "Justice delayed is justice denied". It needs introspective for all concerned. Non-enforcement or delayed enforcement would be disastrous to democracy. With globalisation, liberalisation, increase of crime, jungle of laws and money power have prospered and are flourishing. We must learn that mere enactment of a law would not correct the people unless and until social awareness is ushered in and enforcement is expeditious and flawless".

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Helpless Courts of Law

17. Though the need for speedy justice is well recognised by all concerned, there are several factors which result in making additions to the number of dockets containing various aspect controversies and complex problems. Crowded courts are witnessed in India, because of large number of pending appeals and revisions, before the courts as well as the authorities constituted to give due relief or justice in accordance with law, to the aggrieved assessee or the department of indirect taxes.

18. An impression is being gathered amongst the litigants, though unwarranted, that in a court of law, only two things are certain, one next date and the other Advocate's fees for the day's appearance. Such impression is required to be removed by pro-active measures by we professionals in accordance with the rules contained in the applicable code of conduct. Remember, that the litigation many a times is forced upon by the anti-business attitude as well as the mind set of the taxpayers who have formed the habit of avoiding or paying the minimum tax then what is payable in accordance with law. The expression "in accordance with law" takes different colour from person to person.

Achhe Din – When ???

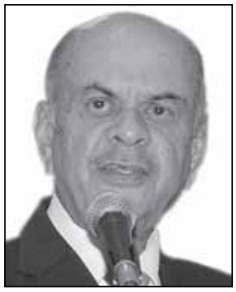
19. Under the leadership of our Prime Minister Shri Narendra Modi, the scenario may in future change, especially consequent to demonetisation and consistence actions against black money, corruption and lazy work culture. I am confident that all the measures so taken up will yield a positive "achhe din" in the days to come.

20. The ultimate goal of one nation one tax, is not achievable so soon because of various reasons which cannot be removed overnight. Each political party have their own manifesto with apparent one common idea to serve the citizens and make them happy, but their focus every time vary to suit their immediate requirement of getting votes in their favour.

Role of professionals

21. Assuming that a new era is ushered in, resulting in, no litigation of any nature; yet the backlog of dockets at every stage, are so large in number, that it will take several years to wipe it out fully and therefore I can conclude that the future of litigation is very bright, needing several young professionals, Advocates and Chartered Accountants to lend their professional skill, towards successfully and quickly reach the destination.

22. I request all my young brothers and sisters to seize the present opportunity and rise to the top in the profession by mastering the new GST Law. Remember a diver has to reach bottom of the sea to get the shining pearls so do not sit at the shore but jump in the profession for your bright future. This is the right moment for you to join the profession.



Dinesh Vyas, *Sr. Advocate*

Tax Evasion and Tax Avoidance – Tax Planning and Morality

The theme of this prestigious publication of the Chamber of Tax Consultants is "Vision 2025 – Tax Laws and Administration". In the times in which we are living, there could not have been a better theme than this one. The field of taxation, the tax administration, tax legislation and everything else connected with taxation is witnessing a wind of change which was never seen before. The Government of India, led by the Hon'ble Prime Minister Mr. Narendra Modi has rightly waged a war on corruption and black money with intensity and force of a ruthless warrior. The sincerity and the genuineness of the cause goes to the foundation of the country and therefore should evoke a very positive and constructive response and reaction. If the mission has a solid support of the tax administrators, tax professionals and other stakeholders, the nation can very well be placed on a road of progress and development and change the face of the nation. Going by the political developments currently happening, especially in the recent elections, it appears most probable that the present Government may in the General Elections of 2019 come back in power again and lead the nation up to 2024. How appropriate therefore is the decision of the Chamber to settle on the theme of "Vision 2025" being the most appropriate year to assess and ascertain the outcome and the result in the period in between, from now to then.

So long as taxation continues to be a part of national governance, the debate of tax evasion vs. tax avoidance and the connected aspect of morality will continue with the ups and downs and with bureaucratic and taxpayer fervour and zeal. The question whether a tax payer can arrange his affairs in a manner that attracts least tax will continue to be raised for all times. Without doubt, the first authoritative pronouncement on the subject was in the case decided by the House of Lords in the year 1935 in the case of *Duke of Westminster vs. IR (19 TC 409).* It clearly held that a citizen has the legal right to undertake transactions in a manner which attracts upon himself the least amount of tax. This position thereafter was reiterated by the Privy Council in *Bank of Chettinad Limited vs. CIT (8 ITR 522)* and by the Supreme Court in *CIT vs. Keshavlal (55 ITR 637)* and subsequently in a long line of cases. The fundamental proposition was well laid down during the earlier period by the Supreme Court decision in the case of *CIT vs. Raman & Co. (66 ITR 11)* wherein it was observed as follows: Avoidance of tax liability by so

arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented.

In the recent times, however, the above foundation seems to have been shaken temporarily by the decision of the Supreme Court in the case of *McDowell vs. CTO (154 ITR 148).* A huge controversy was created, not by the main judgment delivered on behalf of the Full Bench by Justice Ranganath Misra but by an additional judgment delivered by Justice Chinnappa Reddy. On the basis of observations of Justice Chinnappa Reddy, the Revenue spread a stormy proposition that the above legal position regarding tax avoidance should be taken as altered and that no more is it possible for a taxpayer to resort to tax planning even though it may be an attempt of legitimate tax avoidance.

After the case of McDowell and its aftermath, the attempt of the Revenue to hit out at every action of tax planning was extremely aggressive but totally fallacious. The Revenue missed out the fact that the judgment delivered by Justice Ranganath Misra on behalf of the Full Court with which Justice Chinnappa Reddy agreed, had as a matter of fact reiterated the earlier balanced approach by observing that "tax planning may be legitimate provided it is within the framework of law and that the Court disapproved only "colourable devices", "dubious methods" and "subterfuges" under the guise of tax planning".

It is required to be noted that the judgment of Justice Chinnappa Reddy was greatly influenced by three decisions of the House of Lords in *Ramsay vs. IR (54 TC 101); IR vs. Burma Oil (54 TC 200) and Furniss vs. Dawson (55 TC 224).* But, subsequent to McDowell, the House of Lords itself removed the misunderstanding created in the application of the above three House of Lords rulings and eliminated the scope of misinterpreting the said three judgments, when it delivered the judgment in *Macniven vs. Westmoreland Investment Limited (255 ITR 612).* While judgment of Chinnappa Reddy in the case of McDowell was completely founded on the House of Lords decision in Ramsay, the later House of Lords decision in Macniven had a completely different perception of Ramsay ruling. The position was summed up by me in Kanga, Palkhivala & Vyas, 9th Edition, in the following manner:

(i) In Ramsay, the House of Lords did not enunciate any new legal principle. What the House of Lords did was only to highlight the Court's duty to determine the legal nature of the transaction and relate it to the tax legislation.

(ii) The Ramsay ruling is not an overriding legal principle superimposed upon the whole of the revenue law without regard to the language or purpose of any particular provision. The Courts have no constitutional authority to impose such an overlay upon the tax legislation, and the House of Lords had not attempted to do so.

(iii) In Ramsay, both Lord Wilberforce and Lord Fraser, who gave the other principal speech, were careful to stress that the House was not departing from the principle in Duke of Westminster.

(iv) Ramsay was widely regarded as some form of judicial legislation and as the proclamation of a revolutionary

> credo. In the first flush of victory after Ramsay, and Burmah Oil and Furniss that followed, there was a tendency on the part of the Inland Revenue to treat these decisions 'as if they were a broad spectrum antibiotic which killed off all tax avoidance schemes'. But Ramsay was no such super-legislation.

The House of Lords concluded in Macniven that steps which had no commercial purpose and had been artificially inserted for tax purposes into a composite transaction, should be disregarded; but that a transaction which came within the statutory language could not be disregarded merely because it was entered into solely for tax purposes.

The royal ride of Duke of Westminster which commenced in the year 1935 had to continue even thereafter. The decision of Macniven had its Indian sequel in India when the Supreme Court delivered two further important judgments viz. *UOI vs. Azadi Bachao (263 ITR 706) andVodafone vs. UOI (341 ITR 1).*

In the Azadi Bachao case, the Supreme Court reiterated the importance and the relevance of Justice Misra's judgment delivered on behalf of the Full Court in McDowell case. More importantly, the Supreme Court emphasised the relevance of its earlier judgment in the case of Raman & Co. which is quoted hereinabove. The Supreme Court reiterated that the principle in the case of Duke of Westminster is very much alive and is required to be followed by Indian Courts. A very interesting and practical analysis of McDowell judgment was made by the Gujarat High Court in *Banyan and Berry vs. CIT (222 ITR 831).* The Supreme Court went out of the way to fully endorse this analysis by quoting in its judgment the following useful observations in Banyan and Berry: The Court nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the act; an inference which unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell's case [1958] 154 ITR 148 (SC). The ratio of any decision has to be understood in the context it has been made. The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity.

Again, the Supreme Court in the case of Vodafone reiterated the above position and very clearly reiterated the law for the future. Further, it placed a very heavy burden on the Revenue with regard to burden of proof while dealing with the avoidance cases. Chief Justice S. H. Kapadia laid down such directives for the Revenue in these words: In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the transaction in question is a sham or tax avoidant. Similar observations were made by Justice K. S. Radhakrishnan thus: The burden is entirely on the Revenue to show that the incorporation, consolidation, restructuring, etc., has been effected to achieve a fraudulent, dishonest purpose, so

as to defeat the law. The Revenue cannot tax a subject without a statute to support and every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and he is not bound to choose that pattern which will replenish the treasury.

The above law, now well-settled, has to be applied by the Courts to varying facts and circumstances in a very careful manner. The approach of the Court while dealing with issues of tax planning, tax evasion and tax avoidance has to be very just and fair and judicious and practical. The Calcutta High Court has done well to lay down such practical approach in *Hela Holdings vs. CIT (263 ITR 129)* wherein it laid down the following fundamental principles for the Court to adhere to while dealing with cases of tax avoidance: (1) The distinction between tax evasion and tax avoidance is still prevalent. (2) Generally speaking tax evasion is the result of such things as illegality, suppression, misrepresentation and fraud. (3) Tax avoidance is the result of actions taken by the assessee, none of which is illegal or forbidden by the law in itself and no combination of which is similarly forbidden or prohibited. (4) The permissibility of a tax avoidance, will fail to be decided, when and only when, on the basis of the facts and transactions truly and correctly disclosed by the assessee, a point of law arises, whether on a certain reasonable construction of one part of the taxing statute, as applied to the assessee's case, tax which would otherwise be payable by the assessee, becomes not payable in the case in hand. (5) When the Court is faced with a task of construction in the above manner, the Court is not bound to make the construction in favour of the assessee merely on proof by the assessee, that it has entered into no illegality and made no prohibited transaction. (6) The Court would have to assess, in the facts and circumstances of each case, upon general principles of conscience and justice, whether the arrangement of affairs by the assessee, so as to cause the possibility of a reduction of tax incidence, can fairly be permitted to the assessee, as a genuine and legal means of tax reduction, employed by it in a commercial fair sense, or whether allowing the assessee to earn the reduction, in the facts and circumstances of the particular case, is opposed to the public policy of not encouraging citizens to engage themselves in dealings and transactions designed primarily for the purpose of non-payment of tax only.

The aforesaid academic debate has to have a practical conclusion. The conclusions can be compartmentalised as follows:

(i) Tax planning

Tax planning is permissible so long as it is within legal framework of law. All tax planning cannot be treated as illegal or impermissible or illegitimate.

(ii) Tax evasion

Tax evasion has zero tolerance. Tax evasion necessarily means to try illegally to avoid paying tax. It encompasses illegal actions prohibited by law and includes frauds, forgeries, dubious methods, colourable devices, bogus transactions and similar condemnable stuff. Such cases need to be dealt with harshly and with penal consequences.

(iii) Impermissible tax avoidance

Transactions which have no commercial purpose and have been artificially inserted for tax purposes into the composite transaction have to be

disregarded. Artificial and colourable devices whose sole purpose is to reduce tax cannot have judicial sanction.

(iv) Permissible tax avoidance

Legitimate tax planning which is in accordance with law and within legal framework has to be accepted even if it results in reduction of tax liability. The test to be satisfied to be a legitimate tax avoidance is to ensure that it does not contain any of the negatives referred to above.

Tax and morality

Interplay between tax and morality has two dimensions. First, the moral conduct of the taxpayer mainly with regard to the earning of income and secondly, the moral conduct of the tax professional while providing legal professional services, are the two independent issues.

The manner in which a person earns his income is a matter within his personal domain but it is totally irrelevant for tax purposes. The income earned in an immoral way is nonetheless taxable. In that sense, tax has nothing to do with the morality of the taxpayer, or for that, matter with the morality of the method in which the income is earned. Similarly, the question of morality is irrelevant in the administration of tax; an immoral earning does not attract high rate of taxation nor does it invite more rigorous penal implications. In this sense, tax and morality have their own separate tracts to run on and an independent course where the twain shall never meet.

The morality to be adhered to by the tax professional while rendering legal professional services to his clients is a very vital and serious matter. The wind of change in the national governance with regard to tax administration referred to in the beginning should also bring about a change in the professional approach to the legal practice. To follow high standards of code of good moral conduct is the duty of a professional person. Practicing with high moral and ethical principles can be a great source of personal satisfaction. More importantly it is the duty of every professional to conduct himself with adherence to high values and high standards and morality. The tax professional is not a slave or a servant of his client and therefore client's interest of saving taxes in any manner is not what is expected of him, nor should this be his religion. Breaching and violating noble principles of morality and good conduct in the course of legal professional practice is a disservice to the nation. The tax professional should bear in mind the demarcation line between tax evasion and impermissible tax avoidance on the one hand and legitimate tax planning and permissible tax avoidance on the other hand. He should never assist, abate and encourage his clients to indulge in tax evasion and impermissible tax avoidance. Moreover, it is his duty to advise his clients and desist them from such anti-national actions. An honest tax professional should keep in mind that taxes saved in an illegal manner for his client is a burden on other honest citizens. This is detrimental to national interests. What is morally not acceptable is professionally not doable and therefore whether it is legally acceptable or not is not a question which requires any debate or discussion. A tax professional needs to look at the year 2025 with a hope that it is a year of just, fair and ethical and moral tax compliance and tax administration.

Saurabh N. Soparkar, *Senior Advocate*

Tax Terrorism in India

Justice Oliver Wendell Holmes said ***"I like paying taxes. With them I buy civilisation."*** It is also said by ***Veda Vyasa said in the Mahabharata that a king should collect taxes like a bee collects nectar from flowers, painlessly.***

However, *Sabyasachi Mukherji in CWT vs. Arvind Narottam 173 ITR 479* has observed as under:

".....true that tax avoidance in an under-developed developing economy should not be encouraged on practical as well as ideological grounds. One would wish, as noted by Reddy, J. that one could get the enthusiasm of Justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilisation. But the question which many ordinary taxpayers very often in a country of shortages with ostentious consumption and deprivation for the large masses ask, is does he with taxes buy civilisation or does he facilitate the wastes and ostentiousness of the few. Unless wastes and ostentiousness in the Government's spendings are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance.."

Nobody "likes" to pay tax and perhaps tax administration may have to take stern action against the defaulting or erring taxpayers. But the short question is: can the State, as a Tax collector adopt strong arm tactics in the matter of tax administration? Answer, obviously would be in negative. The experience, regretfully, is otherwise. This is so in spite of the Courts, time and again, warning the tax administration to follow the rules of natural justice and good conscience while implementing tax laws.

Despite concerns shown by various High Courts and Highest Court of land on the undesirable attitude and discriminating treatment shown by the tax administration to the taxpayers of the country, the situation has yet not significantly improved. This is visible from a number of judgments delivered by the Courts in recent times in which, the irk is shown towards such attitude of the Officers of the Income-tax Department and the Courts have even fined the erring Officers.

The issue of tax terrorism in India may be classified in following different aspects.

1. Retrospective legislation
2. Judicial Indiscipline
3. Not following binding law
4. Mindless Appeals, Revisions and Reopening of cases
5. Coercive action during Search and Survey

6. Defiance of law in favour of the Assessee

- Refunds
- Recovery of Taxes
- Adjustment of refunds
- Creating artificial demands to meet the "targets"

1. Retrospective legislation

1.1 It is often said that it is necessary for the taxpayers to understand and comply with laws and also to plan their business /financial affairs, there should be stability in tax laws. While one cannot deny that in consonance with the social necessities of our country, amendments in tax laws might be unavoidable. However any retrospective amendments in tax laws leads to distrust and shakes the confidence of the tax paying community in the tax laws and results in adverse effect on the desire to invest and growth of Industrialisation . Retrospective legislation also leads to a great amount of litigation and results into no real benefit in the matter of timely tax recoveries.

1.2 It is a good sign that the present Government is not keen to make retrospective amendment in tax laws . As we find from the Speech of Hon'ble Finance Minister while presenting Union Budget for. 2014-15 , he has said that

> *"The sovereign right of the Government to undertake retrospective legislation is unquestionable. However, this power has to be exercised with extreme caution and judiciousness keeping in mind the impact of each such measure on the economy and the overall investment climate.* ***This Government will not ordinarily bring about any change retrospectively which creates a fresh liability. Hon'ble Members are aware that consequent upon certain retrospective amendments to the Income-tax Act, 1961 undertaken through the Finance Act, 2012, a few cases have come up in various courts and other legal fora. These cases are at*** *different stages of pendency and will* ***naturally reach their logical conclusion.*** *At this juncture I would like to convey to this august House and also the investors community at large that we* ***are committed to provide a stable and*** *predictable taxation regime that would be investor friendly and spur growth."*

1.3 While it is true that the legislature as well as President and the Government in the exercise of their legislative powers can promulgate laws which are retrospective or retroactive in effect and pending assessment or other proceedings must be disposed of in conformity with the statutes made applicable retrospectively, the issue of vested right assumes significance when by making the retrospective amendment, the right of deductions granted to the taxpayers is taken away. Reference is invited to the judgment of the Gujarat High Court in the case of *Niko Resources Ltd. vs. Union of India (2015) 374 ITR 369 (Guj.)* where the High Court held in favour of the assessee and held that the amendment made was clearly unconstitutional, violative of Article 14 of the Constitution of India and is liable to be struck down.

1.4 The problem with the retrospective amendments is that it leaves a bad taste and is extremely unfair to the assessee. How can one expect to have a fair game where the player also acts as the umpire!!!

2. Judicial indiscipline

2.1 At times, we come across cases where the doctrine of judicial discipline is flagrantly flouted by not following the binding precedents. It has been observed by the Supreme Court in the case of *Union of India vs. Kamalakshi Finance Corporation Ltd. AIR 1992 SC 711* that judicial discipline requires that decision of higher authority should to be

followed in the case of quasi-judicial authority and, therefore, a lower officer is bound to follow the decision of the higher authority e.g. Assessing Officer is bound to follow the decision of the Tribunal particularly so in the case of the same assessee. This principle requires that decisions of higher authorities such as Tribunal should be followed by lower officers, viz., CIT(A) and Assessing Officer. Even decision of the Tribunal though may not be of a jurisdictional Tribunal, is required to be followed by the lower authority. It is not uncommon to find cases in which an argument is raised by the Revenue, even by the CIT(A) who is performing a judicial function, a binding judgment/order is not followed because the Department has "not accepted" the said decision and an appeal has been preferred. However, the Courts have repeatedly held that phraseology of not accepting the decision is wholly unjustified and unless, in the further appeal against the decided case, a stay is granted, it operates as a valid binding decision to the lower authority not only in the case of the same assessee but also in other cases where the same legal issue is similar. If the statute is an All India Statute, decisions of benches of the Tribunal at various places are considered as binding on the law point decided on the principle of judicial discipline.

2.2 It is unfortunate that some times judicial precedent is not followed even by a body like the Income Tax Appellate Tribunal (ITAT) by wrongly drawing distinction. This was so found by Bombay High Court in the case of *HDFC Bank Ltd. vs. DCIT (2016) 383 ITR 529 (Bom.)* where the ITAT did not follow the judgment of Bombay High Court in assessee's own case on the issue of disallowance u/s. 14A on the ground that in the said judgment, the Court relied upon the its decision in Reliance Utilities & Power Ltd.. but the decision in Reliance Utilities & Power Ltd. was rendered in the context of Section 36(1)(iii) of the Act and its parameters are different from that of Section 14A of the Act. The High Court observed that it is not the office of Tribunal to disregard a binding decision of the court. The High Court made following concluding observations :

> *"..... Once there is a binding decision of this Court, the same continues to be binding on all authorities within the State till such time as it stayed and / or set aside by the Apex Court or this very Court takes a different view on an identical factual matrix or larger bench of this Court takes a view different from the one already taken.*
>
> *..... We are also conscious of the fact that we are not final and our orders are subject to appeals to the Supreme Court. However, for the purposes of certainty, fairness and uniformity of law, all authorities within the State are bound to follow the orders passed by us in all like matters, which by itself implies that if there are some distinguishing features in the matter before the Tribunal and, therefore, unlike, then the Tribunal is free to decide on the basis of the facts put before it. However till such time as the decision of this court stands it is not open to the Tribunal or any other Authority in the State of Maharashtra to disregard it while considering alike issue. In case we are wrong, the aggrieved party can certainly take it up to the Supreme Court and have it set aside and / or corrected or where the same issue arises in a subsequent case the issue may be reurged before the Court to impress upon it that the decision rendered earlier, requires reconsideration.* ***It is not open to the Tribunal to sit in appeal from the orders of this Court and not follow it. In case the doctrine of precedent is not strictly followed there would be complete confusion and uncertainty.*** *The victim of such arbitrary action would be the Rule of law of which we as the Indian State are so justifiably proud.*

3. Mindless Appeals, Revision and Reopening of cases

3.1 This again contributes heavily to the tax terrorism and increases the load of pending cases before the Courts. While positive step in this direction is taken by the Government as the CBDT has increased the financial limit of tax effect for not filing appeals before ITAT and Courts, frivolous appeals are still being filed and Court fumes the Departmental Officers for their approach of preferring appeals without application of mind to the merits of issues involved. It is interesting to note that in almost every circular fixing the monetary limits for not preferring appeal, the CBDT prescribes that *"an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case"* and yet, we know that in every matter where the financial stakes are high, howsoever frivolous the case of the Revenue might be, the Department invariably files appeal. Nobody wants to bell the cat by acknowledging on the file that the case of the Revenue is worthless and there should not be waste of time, money and energy. This results into two serious problems. Firstly the assessees undoubtedly suffer tremendously. But secondly, and equally importantly, the attention of the Revenue also gets deflated and serious matters do not get as much attention as they deserve.

3.2 The Courts have come heavily on such sort of tax terrorism when frivolous appeals are preferred. In the case of *CIT vs. Sairang Developers and Promoters Pvt. Ltd. Income Tax Appeal No. 2603 of 2011,* the Bombay High Court awarded cost of ` 50,000/- to be personally paid and observed as under:

> *"We do not find how Officers lower down in the hierarchy can take decisions to file Appeals and that too against the decision of the Tribunal.* ***The tendency not to accept any adverse verdict on facts results in frivolous Appeals being filed in this Court. That causes huge loss to the public exchequer and results in wastage of precious judicial time of this Court. All this ought to have been discouraged long time back.*** *The High Court has not adopted a strict approach and that has possibly encouraged the Revenue in filing Appeals to challenge essentially findings of fact and with regard to matters which should stand concluded at the level of the authorities. The officials should realise that the authorities like Commissioner of Income Tax (Appeals) and the ITAT are envisaged as appellate and possibly final fact finding authorities and at least the Tribunal is last in that hierarchy. The fact finding therefore if demonstrably perverse or palpably erroneous and as would amount to unsettling the settled position in law alone should be questioned by filing Appeals to this Court. However, a routine exercise and by people who do not wish to take any responsibility, results in number of Appeals being filed and pending. This benefits no one and rather defeats larger public interest. The Revenue collection and equally the participation of the assessee in the exercise undertaken by the authorities to assess their income, therefore is affected adversely. None takes a position or decision because of pendency of matters and for a long time.* ***In these circumstances, while dismissing this Appeal, we impose costs quantified at ` 50,000/. The costs be paid to the assessee within four weeks from today. We at least now expect the authorities to take cognizance and initiate proceedings for recovery of this amount personally from such of the Officers who do not take decisions or postpone them endlessly."***

3.3 The Bombay High Court again in the case of *CIT vs. Proctor & Gamble Home Products Ltd. Income Tax Appeal No. 37 of 2013* dealt with the issue of frivolous appeals by Department. The Court observed as under:

*"These **appeals are filed by the Revenue in a very casual manner** without indicating the basis of the challenge i.e. some distinction in facts from the order of the High Court or that the order of the jurisdictional High Court is a subject matter of challenge before the Apex Court. In the absence of the above explanation, it follows that there are times when even though the decision of the jurisdictional High Court has been accepted by the Revenue and yet the Revenue chooses to file an appeal on the same issue before this Court. Rule of law implies certainty of law and the State filing appeals on settled issues arbitrarily and/ or without any application of mind. **This filing of appeal without due application of mind leads to attempting to unsettle settled position without reasons. This casual manner of filing appeals subjects an assessee to unnecessary expenditure and at times anxiety. Even the Revenue incurs substantial expenses in pursuing unwarranted cases, which are a sheer waste of public money.** The least that the Revenue should do is to examine whether or not the decision of the jurisdictional High Court being relied upon by the Tribunal, is subject matter of challenge before the Apex Court or is otherwise distinguishable and the same must be indicated in the appeal memo. **In the above view, we were contemplating to impose costs on the Revenue. However, we noticed that on earlier occasion when costs were imposed on the revenue, it seemed to matter little to the Officers, for after all the amount came out of the general pool of tax paid by the taxpayers. In the circumstances, we are now putting the Officers of the Revenue to notice, that in all cases including where appeals are filed, the Offices instructing the Counsel would review whether the appeal should at all be pressed in view of the Revenue having accepted the jurisdictional High Court's order on an identical issue and take necessary instructions from the Commissioner of Income Tax to withdraw and/or not press the appeal."***

3.4 And yet we find no improvement in the situation. One more example of tax terrorism is in filing frivolous appeals where there is no implication on tax revenue, like dispute as to the year of allowability of a deduction/expenditure or taxability of income, the issue otherwise being tax neutral. The Supreme Court, in the case of *CIT vs. Excel Industries Ltd. (358 ITR 295)* had to observe as under.

> ***32.** Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."*

3.5 Almost 75 years back Bombay High Court in the case of *CIT vs. Edulji F.E Dinshaw (1943) 11 ITR 340, 347* – observed as under:

> *"I have been hearing income-tax references in this Presidency for the last thirteen years and I would say that in at least ninety per cent of the cases which have come before this Court the Assistant Commissioner has agreed with the Income-tax Officer and the Commissioner has agreed with the Assistant Commissioner, however complicated and difficult the questions may*

have been. But although , that may have been the result in practice of giving a right of appeal to superior Income-tax Officers, I apprehend that that was not what was in the contemplation of the Legislature when they gave the right of appeal. I have no doubt they contemplated that superior officers would exercise their powers in judicial spirit, and consider on merits the cases which came before them."

3.6 And yet we find the practice to be continuing with no signs of improvement!!!!

4. Coercive action during Search and Survey

4.1 Search & survey action are necessary to unearth the black money as also to bring to tax income which has not been disclosed. As per the section 132, a search and seizure action can be undertaken against any person who is or is likely to be in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing which represent either wholly or partly income or property which has not been disclosed or would not be disclosed for the purpose of this Act (i.e. to unearth undisclosed income or property). The search and seizure action can also be taken when the assessees fail to produce books of account, documents etc. in response to summons issued or notice issued under section 143(2).

4.2 At the same time it is pertinent to note that at the same time search and seizure is an invasion into the privacy of the individual. A house, hut, home or castle of a person is his / her personal property and no one has a right to enter and disturb the peace without prior permission of the person in occupation. While the proceedings of search and survey might be for good reasons, there are certain ground rules which need to be strictly followed by the search and survey team. Quite often, it is seen that those rules are not adhered to in the enthusiasm to show that the proceedings was a grand success.

4.3 At times, it is seen that the taxpayers are forced to declare the income even if there is no evidence found during search and survey. The CBDT had to come out with instruction *vide* F No. 286/2/2003 dated 10-3-2003 stating as under:

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely."

4.4 It is not uncommon to find that when additions are based on confessional statements recorded during the course of search which are later retracted, the argument from the side of Revenue is that in the statement recorded, the assessee has put his signature by writing that there was no force or coercion while recording statement. In this regard, the decision of the Bombay ITAT in the case of *Deepchnad & Co vs. ACIT 51 TTJ 421* may be noted in which the ITAT has held that :

"The stereotyped mention at the end of the statement that whatever was stated was true and to the best of the knowledge and belief

and the statement given was voluntary without any threat, force or undue influence, would not mean that the partners agreed for making additions. Putting certain expression at the end of the statement cannot be taken as true in view of the retraction....."

It would not be out of context to mention here that the statements recorded by the search party during the search of more than two days and two nights cannot be considered to be free, fearless and voluntary. There is a considerable substance in the assessee's contention that the statements were recorded under pressure and force."

4.5 The judgment of Gujarat High Court in the case of *Kailashben Manharlal Chokshi vs. CIT 328 ITR 411 (Guj.)* the High Court disapproved the attitude of Department and observed that :

"So far as case on hand is concerned, the glaring fact required to be noted is that the statement of the assessee was recorded under section 132(4) of the Act at mid night. In normal circumstances, it is too much to give any credit to the statement recorded at such odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours....."

It is however strange that despite the above position of law clarified by the Courts and also as instructed by Board, the recent provision in section 271AAB provides for levy of penalty at varying percentage based on admission or non admission of undisclosed income during search in statement recorded u/s. 132(4).

5. Defiance of law in favour of assessee

(A) Creating artificial demands to meet the "Targets"

5.1 As back as in the year 1942 *vide* Circular No. 3 of 1942 dated 16-1-1942 it was instructed as under:

"Except that he should give precedence to cases which are likely to yield more revenue, ***the ITO should not be obsessed by the budget figures.*** *He has certain number of assessments to complete in a year and his merits will be judged by the way in which he completes those cases and not by the extent to which he has collected his budget estimates....."*

5.2 Again in the year 1973, *vide* Instruction No: 574 dated 27-7-1973, it was instructed as under:

"The assessment have to be made in a reasonable and fair manner after considering all the relevant circumstances of the case. Even where an assessment has to be made ex parte, the information available should be reasonably weighed and a proper estimate made in the exercise of best judgment in the circumstances. There should be no tendency to frame assessments even in such cases mechanically on past basis, if there is evidence to the contrary e.g. the business of the concern has become defunct or is in clear adverse circumstances. ***If unjustified over assessments are avoided, this will inter alia, curtail the feature of exaggerated demands which unnecessarily inflate arrears figures."***

5.3 Once again instructions were issued *vide* Instruction No. 767 dated 4-10-1974 as follows:

"Overpitched assessments have been target of adverse criticism by inter alia Parliamentary Committees. They throw up a host of problems like inflation of demands and generation of unnecessary and unproductive work. ***The necessity of curbing the tendency on the part of Income-tax Officers to make high-pitched assessments and raise heavy uncollectable demands has been emphasised by the Board from time to time. Despite these instructions, the tendency has not been checkmated.*** *The*

> *Board, therefore desire that you should once again impress upon the Income-tax Officers in your charge to avoid making such type of assessments. You and your inspecting Assistant Commissioners should periodically review the statistics regarding the number of ex parte assessment made and demand raised therein as also, statistics of application under section 146 lying disposal of-"*

44 years have rolled by but there is no improvement. Despite above instructions issued on the assessing authorities, in actual practice, we come across several cases in which demands are artificially raised which ultimately get deleted in further appeals. A mere look at the figures of number of appeals decided against Revenue will reveal that in many such cases assessments were only high pitched far from being just and fair.

5.4 Many a times, the defence of the Officers making assessment is that their duty is to collect more revenue and in so doing, they need to adopt alternative methods whereby more amount of taxes can be imposed. However, this approach has not stood the test of judiciary. The Supreme Court in the case of *CIT vs. Simon Carves Ltd. 105 ITR 212 (SC)* has observed as under:

> *"....Although it is part of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee.* ***We are wholly unable to subscribe to the view that unless those authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed not to have exercised it in a proper and judicious manner..."***

5.6 It is thus evident that there is tendency on the part of few officers to raise huge demand by making high pitched assessment even in a case of best judgment assessment. Unless therefore requirement of accountability on the erring officers is introduced in the statute, this tendency may continue to remain uncurbed. High pitched assessments not only results in unproductive work but it seriously affects the business of the taxpayers and the same is reflected in the business results in which the Department is also a sharer.

(B) Non-granting of refunds

6.1 This is another area which creates distrust in the minds of the taxpayers. While payment of legitimately due taxes has to be made in time, it is equally a duty of the Department to refund the excess tax paid without any delay. Unfortunately the Revenue adopts two diametrically opposite standards in the matter of collection and refund of taxes. Quite often we come across cases where refund amount is very sizable, the same is held up on the ground of budget. In many cases it is sheer lethargy on the part of the Revenue in issuing the refund orders. It is important that there should be prompt issue of refunds due to the taxpayers either of advance tax or amount due to him in consequence of appellate orders. Interest paid on refund is at a lower rate than the rate charged when there is default in tax payment. There seems to be no justification for the same.

6.2 With the system of giving direct credit of refund to the account of the taxpayers, there is some improvement in realising refund but this procedure must be followed and monitored strictly and any laches on the part of the defiant officers must be seriously viewed. In any case the said system does not work satisfactorily so as to give a prompt refund on the favourable appellate order.

(C) Recovery of taxes

7.1 An assessee suffers huge additions. And to add to his woes, he does not get even stay against recovery pending his appeal. There cannot be any two views about the fact that

the demands created due to high pitched assessments must be stayed till the decision of the higher forum. Various circulars are issued from time-to-time regarding guidelines to be followed in case of recovery of demands and stay of recovery.

7.2 The latest instruction bearing No. 404/72/93-ITCC, dated 29-2-2016 requires AO to grant stay till disposal of appeal by FAA on payment of 15% of demand or lower than that subject to conditions mentioned therein. However the experience is that even this instruction is not being followed in a few cases requiring the assessees to approach the High Court.

7.3 In a great number of cases however, it may not be possible for a small businessman or taxpayer to pay even 15% of demand raised under a high pitched assessment. Although the instructions permit assessee to approach Pr. CIT / CIT in case he is not satisfied with decision of the AO, in actual practice, it remains to be seen how expeditiously, his grievance on this account stands resolved.

(D) Adjustment of refunds

8.1 Law is clear that under section 245 that the authorities have to intimate the proposed action of adjusting refund due to the taxpayer against demands raised. In actual practice however, the Revenue rarely puts the assessee to notice of the proposed action. An order is passed, straight away, adjusting the refund against demand, quite often created unjustifiably, and thereby deny the assessee the fruits of the litigation for years. Power to set off refund is not an unguided power and intimating the proposal to set off refund against tax demand is not merely a matter of formality.

8.2 Cases have come before the High Courts challenging the adjustment of refunds. In the case of *Kerala State Beverages Corporation vs. JCIT 388 ITR 600(Ker.)* it was held that where for earlier assessment years, additions made towards surcharge on sales tax and turnover tax were deleted and, consequently, certain amount became refundable to assessee, such refund could not be adjusted against demand of tax due for relevant assessment year wherein total income was determined by making similar additions. In the case of *Oriental Insurance Co Ltd. vs. DCIT 229 Taxman 521 (Delhi),* the order of adjusting refund was quashed as intimation under section 245 was issued and adjustment was made simultaneously on same date and no opportunity of hearing was given to assessee before adjustment was made. In the case of *Baljeetsingh Bakshi vs. ACIT 51 taxmann.com. 278 (All)* it was held that in terms of provisions of section 245, dues of firm in which assessee is a partner cannot be recovered/set off against refund due to him in his personal capacity.

Conclusion

It is unfortunate that taxpayers, who contribute to the development of nation, are looked down as if they are enemies of the State. Instead of treating them with respect and dignity, quite often, they are subjected to harassment and harsh treatment. Tax terrorism must stop. But that would not till the Authority is made accountable for the action taken by him. Presently the Authority gets away, even after most inhumane treatment meted out to the assessees because there is no method to check abuse of power and authority. One hopes that some day very soon a method of "checks and balances" would be devised so that this harassment would stop. Otherwise, as is well said, "the power corrupts, and absolute power corrupts absolutely".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GAAR – Testimony of Trust Deficiency

The twenty-first century has seen a global shift towards a trust-based relationship of tax authorities with the taxpayers. Voluntary compliances are the norm today, and authorities are increasingly enhancing their capabilities to administer tax using technology and information sharing. There is no doubt that it is the obligation of every citizen to pay a part of his earnings to the State for the benefit of the people, but no one likes to part with his earning as taxes. Hence the need arises to codify a law to recover taxes. In the conflict of honesty to pay taxes versus legal obligation to comply with a law, arose the concept of 'tax avoidance'. Tax avoidance involves deliberate actions which are not illegal or forbidden by law, and such actions result in reducing tax burden, or avoiding it altogether. The idea contrasts with 'tax evasion', which involves illegality, suppression, and violations of law. For the State, tax avoidance too undermines the objective of collecting revenues in an effective manner and is thus considered to be undesirable and inequitable.

The cardinal principle of taxation laid down in *Westminster's*[1] case is that every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. This principle has been qualified by the House of Lords in *Ramsay's*[2] case which laid that the principle must not be overstated or overextended to permit evasion of tax in the garb of avoidance. However, in the absence of a statutory de-recognition, Courts across the world have been reluctant to look through legally permissible tax planning measures. This resulted in the State amending the taxing statute to prohibit the measures generally adopted to legally avoid tax.

Such amendments till lately had been in the form of introducing specific provisions to counter mischief and cover loopholes in the law. However, the introduction of the general anti-avoidance rule (GAAR), which has become effective from 1st April 2017, tries to counter evasion with a blanket approach, by empowering tax authorities in that regard. This article traces the history of the GAAR, and analyses the legal provisions laid down, besides understanding its impact on the trust levels between the taxpayer and the tax authorities.

Special Anti-Avoidance Rules (SAAR)

The response of the legislature to avoid tax avoidance has been to enact Specific Anti-

1. IRC vs. Duke of Westminster [1936] AC 1
2. W.T. Ramsay Ltd. vs. IRC [1982] AC 300 (HL),

Avoidance Rules (SAAR) from time-to-time in the form of several sections and provisions. Section 94 of the Income-tax Act, 1961 ('the Act'), dealing with dividend stripping, bonds stripping, etc., is an easy example of a SAAR. Section 2(22)(e) of the Act is a measure to prohibit shareholders of closely held companies from enjoying the profits of the company without payment of dividend tax.

However, as the name suggests, SAAR is tailor-made to deal with specific situations or instances. Taxpayers tend to find newer avenues to reduce their liability and the legislature takes long time to realise them and plug the loopholes. Of late, countries are changing their approach to tax avoidance and codifying the 'substance over form' doctrine in the form of the General Anti-Avoidance Rule (GAAR). These rules are general in nature, legislatively prohibiting any action resulting in lesser tax liability.

Analysis of the Indian GAAR

A. History and inspiration

Clear legislative intent to introduce GAAR in India goes back several years, when the Direct Taxes Code 2009 was introduced for public discussion. GAAR was finally introduced in the IT Act as Chapter X-A by the Finance Act 2012. The same was however never brought into force. Finance Act 2013 modified the provisions substantially; the Indian GAAR, as it stands now, would be effective from April 1, 2017.

Indian GAAR is broadly modelled on the South African legislation which in turn is modelled on the Australian, New Zealand and Canadian legislations. If one wants to look for jurisprudence on the subject, South African and Australian laws could be a good starting point. However, Indian Courts are quite reserved in attributing to foreign case law anything more than mere persuasive value.

GAAR is based on a principle that transactions have to be real and are not to be looked at in isolation. Merely because the transactions are not illegal does not mean that they will be acceptable with reference to the meaning in the fiscal statute. Therefore, where there is no business purpose, except to obtain a tax benefit, GAAR will be attracted.

B. Overriding effect of GAAR and its effect

The Indian GAAR has an overriding effect on other provisions of the tax law. Section 95 of the Act provides that GAAR would be applicable, irrespective of other provisions of the Act not permitting tax avoidance. For example, if the tax liability of the tax-payer under other provisions is calculated at ` 100 and the transaction is declared to be impermissible, and on application of Chapter X-A the liability is ` 150, then, the tax liability of the tax-payer would be determined at ` 150 irrespective of the fact that the other provisions of the act clearly provide only for taxation of ` 100.

Further, the statute provides that GAAR will apply to any step in or part of an arrangement as they are applicable to the whole arrangement. It appears to have been drafted to ensure there is no loophole in the provisions. It is not necessary to impugn every step in the arrangement as impermissible. Even if one step is found to be impermissible, GAAR will apply to the entire arrangement. Therefore, when impermissible arrangement has been referred to, it covers any impermissible step or part of the arrangement.

Section 100 is closely related to section 95, which states that Chapter X-A will apply 'in addition to, or in lieu of' any other basis of determination of tax liability. Therefore, for the purposes of determining tax liability, first an attempt should be made to harmoniously interpret Chapter X-A and other provisions of the Act, and in cases of an irreconcilable conflict, provisions of Chapter X-A will prevail. The question of conflict between special versus

general normally presumes that special prevails over general, but section 100 explicitly provides to the contrary. However, the Government seems to be of the view that when SAAR applies, GAAR will not be invoked. This understanding however does not flow from the provisions of the Act.

C. Impermissible avoidance arrangements

The GAAR is applicable to 'impermissible avoidance arrangements', that is, an arrangement in which the 'main purpose' is to obtain a tax benefit. The main purpose has to be derived from the circumstances, making this determination a highly subjective one. Thus, the first step towards applying GAAR in any tax audit would be to conclude that an arrangement is impermissible.

To be declared as impermissible, the arrangement has to fall in at least one of the clauses listed in section 96 of the Act. This appears to be an exhaustive list, and includes the following. Firstly, the arrangement should create rights or obligations not ordinarily created between persons dealing at arm's length. So, while the transfer pricing provisions already deal with individual transactions not conducted at arm's length, GAAR deals with the arrangement which results in such transactions.

Secondly, the arrangement should result in a misuse or abuse of the provisions of the Act, or is carried out in a manner which is not *bona fide*. This requires the tax authority to decipher the intent of the taxpayer, and is rather a subjective condition.

Thirdly, the arrangement should lack commercial substance. Thus, if the very existence of a business arrangement is imprudent (e.g., shell companies incorporated in tax havens), it'll be considered as lacking commercial substance and would be hit adversely.

Section 97 of the Act deems some arrangements to lack commercial substance. It covers those situations wherein if you take individual steps, they appear perfectly valid and independent, but they may not be consistent with the transaction as a whole. It seems to be in accordance with the Ramsay case wherein it was observed that transactions with effect of offsetting and cancelling each other result in impermissible avoidance.

The section, as originally enacted, excluded certain circumstances which cannot be regarded as sufficient causes for existence of commercial substance. These circumstances were in the nature referred to by the Supreme Court in the case of Vodafone as the reasons for treating the transaction as genuine, namely length of investment, payment of tax, etc. In other words, the section, as originally enacted, nullified the reasons given by the Supreme Court in determining existence of commercial substance. The Shome Committee Report of 2012 recommended the section to be amended, considering it was in blaring contrast with the law declared by the Court.

The section now states that conditions laid down in the section shall be 'relevant but not sufficient' to determine commercial substance. The difference between the two seems to be that, earlier these were wholly irrelevant to the matter, but now are important factors to ascertain the 'the lack of commercial substance or not'. Therefore, when a taxpayer has been holding investment for a considerable period, has continued the business in India, has continued to pay taxes, etc., it indicates a business sense behind the whole transaction indicating a commercial substance.

D. Consequences of application of GAAR

The consequence of application of GAAR is significant. Section 98 of the Act empowers the tax authority to look at the impermissible arrangement in substance, and strip off the parts which were giving rise to the undue

tax benefit. Effectively, this enables the tax authority to rearrange portions within the arrangement to the best of his judgment. The section lists down certain consequences as well, including disregarding of corporate structure, treating debt as equity or capital as revenue and vice versa, and recharacterisation of any deduction or expenditure. But the list is not exhaustive – it is more in the nature of a broad guide to the tax authority.

Of the above, disregarding the corporate structure has far reaching consequences. The provision allows the tax authority to lift the corporate veil and treat multiple legal entities as one. The jurisprudence around lifting corporate veils so far was restricted only to cases involving mala fide intent. With GAAR now codified, this receives statutory sanction.

It is important to note, nonetheless, that the consequences under the GAAR are only in relation to income-taxation and would not extend to other laws such as foreign exchange. To illustrate – say, an Indian company imports goods from a sister company in Dubai, which in turn buys such goods from an unrelated third party. If under GAAR this arrangement is held to be impermissible, the foreign exchange authorities in India could not require repatriation of the Dubai company profits to India.

Section 101 provides the Government with the power to frame guidelines, subject to which the provisions of Chapter X-A shall apply. Draft guidelines have been issued by the Government under this section, laying down illustrations of facts in which GAAR would apply.

E. Meaning of 'tax benefit'

As aforesaid, an arrangement is impermissible if the main purpose to enter into it is to obtain a 'tax benefit'. The Act defines 'tax benefit' inclusively. A reduction, avoidance or deferral of tax, an increase in refund, a reduction in taxable income or an increase in loss, are instances of tax benefits as statutorily laid down. Tax benefit could arise from an application of domestic laws or any treaty. Thus, treaties are specifically covered under the ambit of GAAR.

The definition of 'tax benefit' is in relation to the relevant previous year or any other previous year. What follows is that even if the transaction was entered into in any other previous year which results in a tax benefit in the previous year, the provisions of GAAR will be attracted to that extent. Therefore, even though the arrangement has been entered into prior to April 2017, tax benefit being availed after April 2017 will be governed by Chapter X-A. GAAR seems to have a retrospective application to that limited extent.

F. Corresponding adjustments for GAAR

The consequence of application of GAAR would always be to increase the taxable income of a taxpayer. It might be contended that where such an increase is effected, there should be a corresponding reduction in the income of the other person, otherwise it would lead to double taxation. However, the tax department has repeatedly asserted in its circulars that such corresponding adjustments will not be given. This view of the circulars may not be accurate in law and is possible to argue so, at least in certain situations. The logic behind the same is that once a legal fiction is created, it has to be taken to its logical end.

The Trust Deficiency

The provisions enacted to implement general anti-avoidance in the Indian income-tax law are bound to create a rift between the taxpayer and the authorities. The implementation or adjudication relating to GAAR could be divided into two broad steps:

- Determination whether an arrangement is an impermissible avoidance arrangement, and,

- If so, determination of the tax consequences that arise from such declaration of impermissibility

Section 144BA lays down a proper procedure relating to the declaration regarding impermissibility of an arrangement. The CIT /Principal CIT, and the Approving Panel which is a high-functionary body, have been empowered to adjudicate on impermissibility. However, the section falls short of laying down a procedure for determination of tax consequences. It just says that where consequences are determined in line with the directions of the CIT/Pr. CIT or the Approving Panel, the assessing officer shall get prior approval from the CIT/Pr. CIT for the assessment so completed. Thus, in practice, the assessing officer shall be responsible for determining the tax consequences. Whether such empowerment of the lower functionaries in the tax department is appropriate, and befitting, is a question we may ask ourselves.

Trust is certainly eroded. When it comes to GAAR, the crux of all arguments from the taxpayer's side henceforth would be related to establishing the commercial substance of an arrangement. Though Section 97 provides for a deeming fiction regarding what is to be understood as lacking commercial substance, the plain natural meaning of the phrase 'lacks commercial substance' is yet to be understood. Corporate structures often make use of investment companies and SPVs for reasons beyond merely tax benefits. Such corporate structures, and the relevance of such investment companies and SPVs would be questioned by the tax authorities on a routine basis and it would be an arduous exercise to prove commercial substance.

Conclusion

One of the requirements for transforming from a developing economy to a developed economy is a well codified law to protect tax leakage. Introduction of the GAAR is one such move. With GAAR in place, Indian businesses need to have a relook at all their business arrangements, not merely the ones made for tax avoidance. Every arrangement, either with a related party or an unrelated party, if resulting in a tax benefit, whether intentionally or unintentionally, has to be relooked into. So far, taxpayers were not required to maintain any documents to prove business purpose of a transaction or arrangement. Going forward, however, the onus would lie on the taxpayer to establish that a transaction is not undertaken with the objective of tax avoidance.

Since GAAR overrides tax treaties as well, this exercise has to be extended to transactions entered into with non-residents as well. Given that GAAR is an anti-avoidance measure and that the revenue authorities have been given wide powers under the statute, the taxpayer would have to be proactive to ensure that revenue authorities do not arbitrarily exercise their jurisdiction. The taxpayer would have to preemptively identify explanations for each and every business transaction. Undoubtedly, this would consume significant time and resources, but would definitely protect against high-pitched and adverse tax adjustments.

Contrary to popular belief, GAAR is not enacted only to take care of mega cross-border business deals, involving millions of dollars between Indian companies and foreign companies or between foreign companies. These provisions apply even for routine day-to-day transactions within Indian companies, within the country itself. In the wake of these new provisions, much needs to be done by in-house legal and finance teams in every company to ensure that the hit is not adverse for them.

Dr. K. Shivaram, *Sr. Advocate*

Tax litigation in India – Vision 2022 – Platinum Jubilee of India's Independence a – Role of tax professionals and tax administration in the Era of Technology and Innovation – Road Ahead

1. Introduction

In 1997, when India celebrated 50 years of Independence, the Chamber of Income Tax Consultants celebrated this golden anniversary in a unique way by dedicating a publication titled "50 Landmark Judgments on Direct Taxes" which was released by then Chief Justice of Bombay High Court, Hon'ble Justice Mr. M. B. Shah. The Hon'ble Prime Minister of India, Shri Narendra Modi, has a great vision for India and when we celebrate our Platinum Jubilee of Independence of India, we as citizens of this great country, should make a honest attempt to fulfil his vision of nation building process by suggesting ways and means to reduce the tax litigation, ensure better tax administration and adopt better tax-payer friendly tax laws.

Hon'ble Justice Mr. R. C. Lahoti, the former Chief Justice of India, while addressing the National Tax Conference at Jaipur stated – *"Corruption is a cancer, eating into the roots of the society. It is difficult to fight against corruption because the chances of success are bleak. But this is no reason for despondency. The laws alone cannot prevent the commission of crime. Nor can a tax-payer who is placed like a lamb before a corrupt official who is like a wolf, fight against corruption. It is a combined, united and forceful effort of the tax practitioners that can do a lot for preventing corruption. So also you can exercise your influence in shaping the budget and thereby the economy and welfare - destiny of the nation. Associations and organisations must collectively, but unostentatiously, honour and recognise the honest and condemn the corrupt. The process may be slow but is evolutionary and is bound to have its curative effect. The honest and deserving must feel encouraged; the dishonest and corrupt must feel marginalised".* (Excerpts - AIFTP Journal, Sept 2002 P. No. 7)

Many a times assessees inform us that they are made to adopt unethical practices to avoid the harassment, though they are very well aware that they will succeed in appeal. After all, once an assessment is made, there is a tax demand, interest, penalty and notice for prosecution. For appeals, there is no time limit fixed for hearing or passing of orders and it may take years to secure an order from the appellate forum. Even if the assessee succeeds in appeal, the Revenue will invariably, if disputed tax at stake is large, carry the matter up to the Supreme Court. To reach finality it may take more than three decades and in such a situation, the assessee takes a calculated risk by adopting

unethical practices to avoid the litigation and cost involved.

I would like to share my views on tax litigation in India and how tax professionals can contribute to the development of the nation. In India, the Revenue Department is one of the biggest litigants. More than 60'% of tax litigation before the Income Tax Appellate Tribunal is fomented by the Revenue. In the High Courts and the Apex Court, more than 70% of tax litigation is initiated by Revenue. It is very unfortunate that, though the Revenue is the biggest litigant, they do not have an All India Tax Litigation Cell – which can administer the tax litigation on an All-India basis. In *CIT vs. Krishna K.Agarwal (2017) 245 Taxman 75 (SC),* the Revenue has filed a SLP before the Supreme Court by filing condonation of delay application of 3,381 days, though the issue involved was already covered by the Apex Court. Dismissing the appeal of the Revenue the Hon'ble Apex Court had observed that "**the** *concerned authorities need to wake up*".

Professional organisations and tax practitioners, with the help of Right to Information Act, can bring to the attention of the authorities concerned, the orders of Courts or Tribunals – where the Courts have passed general orders to implement better administration of justice, which are not implemented and request the authorities concerned to take appropriate remedial measures.

2. Tax litigations – problems and suggestions

2.1 Assessment proceedings

Returns are to be filed with due care and after advising the assessees to avoid adventurous tax planning. As 90 per cent of the returns are accepted, the professionals have a greater responsibility to advice the assessees to pay the tax rightfully due to the Government. In the assessment proceedings, if proper compliance is ensured, then substantial litigation can be avoided. If all the notices are complied with and all the submissions are made in writing, there will be very little scope for the Assessing Officer to make unfair additions. It is the duty of assessees and their representatives to place all the material on record. Article 265 of the Constitution of our country mandates that 'no tax should be collected without the authority of law'. However some of the officers make additions, knowingly well that the same will be deleted in appeal. In spite of continuous representations by the tax professional organisations to introduce the accountability provisions, the Government has not introduced any such provision. It is suggested that the accountability provision as suggested by Dr. Raja J. Chelliah in his committee report. (1992) 197 ITR 177 (St.) (at . 257), may be introduced. CBDT has come out with the Circular, No. 14 | (XL . 35) 11-4-1955. Stating that *'it is the duty of the assessing Officer to bring to the notice of the assessee that any deduction which he is entitled but not claimed and assist him in attaining the deduction.'* It is desired that the mindset of the Revenue officials must be changed from tax collectors to tax service providers

2.2 Commissioner of Income Tax (Appeals)

Commissioners of Income Tax (Appeals) are the First Appellate Authority. They have the power of enhancement and can do what the Assessing Officer may have failed to do. It is desired that if Commissioner of Income Tax (Appeals) are made to work as Departmental Representatives for at least one year before the Tribunal. This will help them to discharge their judicial functions better. In 1992, the Chamber of Tax Consultants, with the help of the then Chief Commissioner of Income Tax, Mumbai, had a very interactive half day workshop with all Commissioners of Income Tax (Appeals) to discuss various practical difficulties faced by the assessees. After the meeting, the minutes were circulated, which has helped speedy disposal of matters. Tax professionals have responsibility to represent their clients competently before the

First Appellate Authority. It has been observed that in a number of matters, the assessee does not file the statement of facts. It is pertinent that in an appeal before the Tribunal, the assessee cannot file statement of facts. Hence, when an appeal is challenged before High Court the statement of facts becomes a very important piece of evidence to support the case of the assessees. Similarly, when additional evidence is produced, the assessee must make an application under rule 46A of the Income Tax Rules. Many a times, even the Commissioner (Appeals) accepts the additional evidence without following the due process of law. As there is no time limit prescribed, many a times, the remand reports are not furnished within a reasonable time, which delays the disposal of appeals. There has to be a time limit prescribed for furnishing the remand report. Knowing the law and procedures properly helps the tax consultants to make quality representations.

2.3 Disputes Resolution Panel

Only the issues relating to Transfer Pricing in international transactions, taxpayers can avail of the Dispute Resolution Panel forum. A thought for consideration is, a similar provision can be extended to domestic taxpayers.

2.4 Income Tax Appellate Tribunal

Income Tax Appellate Tribunal is the final fact finding authority under the Income Tax Act. Against the order of the Tribunal, an appeal can be filed before the High Court only on a substantial question of law. The total pendency of appeals before the Tribunal as on 31-3-2017 is 90,000 appeals. The matters are heard within two years of filing of an appeal before the Tribunal. It is desirable that the matters may be heard within six months of filing of appeals. It is observed that 80% of the orders of the Tribunal are accepted by the assessees and Revenue. Only 20% of the matters are carried to the High Court. Figures published in the souvenir of the ITAT on the occasion of Platinum Jubilee celebrations show that 81.85% of the decisions rendered by the ITAT are upheld by the High Courts.

It has also been observed that many young professionals appear before the ITAT. Many of them are very promising and the need of the hour is that they need to follow the conventions and ethics of the profession. As practice of training juniors in 'Chamber Culture mode' is diminishing, the juniors will now have to learn pleadings by watching the Tribunal proceedings, observing their seniors argue matters. If they have to excel, they have to follow the code of ethics.

Many young professionals have joined the Bench and some of them are very good at law. We hope that they will be groomed as ideal members of the ITAT. It is the Bar and the Bench collectively that make the ITAT – one of the finest and model institutions of our country.

It is very unfortunate that the Government is proposing to appoint the members of the Tribunal for a fixed tenure of five years and thereafter, renew the tenures at their option for another five years. With respect, such a law is not in the interest of this glorious institution and will discourage many young professionals to join the Bench due to this restriction of five years term. The Members, who join, may always have the apprehension that if he decides the matters against the Government, then he may not be given one more term of five years. As the law stands today, a retired Member is not allowed to practice before the Income Tax Appellate Tribunal. If the proposed change is implemented, then a chartered accountant or on Advocate who joins the Bench may be told to vacate after five years' term and it will be difficult for him to re-establish his practice once again. I am therefore of the firm opinion that the present system of appointing Members should continue and not be changed.

2.5 Repetitive Appeals

S. 158AA, provides that; when an appeal is pending before the Supreme Court in an assessee's own case, the Revenue can make an application before the Tribunal to keep the issue

alive. Can the provision be likewise extended - when an issue is pending before Apex Court not necessarily of the same assessee? A thought for consideration is that when an issue is decided by the High Court, the same is binding on all the assessees which are within the jurisdiction of respective High Court. The Revenue might have taken the matter before the Apex Court and in such a situation the Revenue may be permitted to file the declaration before the Tribunal and the Tribunal can give liberty to the Revenue to approach the Assessing Officer to give effect to its order. If the section is properly implemented with necessary amendments, it may help in reducing the litigation before Supreme Court and High Courts.

2.6 High Court

An Appeal can be filed only on substantial questions of law before High Court. 80% of appeals are dismissed at the admission stage itself. After admission, it takes nearly 15 years to reach finality in tax matters. In Mumbai, some appeals admitted in the year 2000 are yet to be taken for final hearing. The delay in disposal of the matters is due to shortage of Judges. Ideally the High Court must be able to dispose a matter within six months of filing of appeal. Where large number of matters are pending, there should be at least two tax Benches continuously constituted to deal with tax matters. Otherwise the pendency of appeals will increase. In earlier days, the High Court appeals were handled by the Ministry of Law and Justice and one solicitor used to file the Vakalatnama in all the matters. This system was discontinued. It is desirable that to maintain the continuity of such practice. The filing of vakalatnama may be given to one law firm who can be held accountable and briefing can be done from the panel of lawyers of the tax Department. One adjournment in High Court costs more than ` 25,000 to the tax-payers of our country. This can be saved by proper management.

The Hon'ble Bombay High Court in *CIT vs. TCL Ltd. (2016) 241 Taxman 138* has passed a detailed order asking the Chief Commissioner of Income Tax to host the details of matters admitted before the Bombay High Court, matters accepted by the Revenue, etc. online. Though the assurance was given by filing an affidavit, however, no action has been taken by the tax administration in this regards. It has been observed that the Hon'ble Apex Court and High Courts have passed a number of orders asking the Tribunal to refer the matters to the High Court. 90 per cent of the matters of the Revenue have not been referred to the High Courts mainly because the Revenue has not moved the requisite application before the Tribunal to refer the matter to High Court. This has resulted into loss of crores of rupees of tax which is due to the Government, which would have benefited the nation. Similarly, as per the pre-1998 tax provisions on reference jurisdiction, when the Apex Court or High Court decides a tax reference, the matter had to come back to the Tribunal to give the effect and thereafter, the effect could be given by the Assessing Officer. It seems that in 90% of matters where the Revenue had succeeded before the Apex Court and High Courts, no effect has been given resulting into loss of crores of rupees to the nation. This is mainly due to lack of accountability in the tax administration.

Who can raise such questions? If the Govt. is serious on the implementation, they may request Hon'ble Justice Mr. R. V Easwar (Retd.) to prepare a white paper on the subject and suggest ways and means to reduce unintended litigation and also on how to give effect to the orders and recover the tax which is rightfully due to Govt. Professional organisations have suggested that all orders passed by the Chief Commissioner or Commissioner may be made appealable to the Tribunal, so that the burden of the High Court is reduced. Though in filing an appeal by the revenue, the monetary limit is fixed [refer Circular No. 21/2015 dt. 10-12-2015 (2015) 379 ITR 107 (St)], a thought for consideration is that whether an appeal can be filed to the High Court, can be decided by a committee of independent panel, wherein

a Retired High Court Judge, who has the requisite taxation knowledge could be made the Chairman, and one retired Member of the ITAT and one Commissioner can sit together, analyse the judgment and then take a decision – whether appeal can be filed to the High Court or Supreme Court? If this process is followed, the success rate of the Revenue will increase and only deserving matters would be taken to the High Court and Apex Court. In the process, the taxpayers' money, which is now utilised for unproductive purposes of litigation, can be saved.

At present appeals are filed mainly because of three reasons (a) the amount involved is large (b) fear of audit, wherein the officer who has taken the decision not to file the appeal may be questioned in future which may affect his promotion and (c) no accountability, assuming the appeal is dismissed, no question will be asked why appeal was filed in the first place.

2.7 Supreme Court

An appeal to the Supreme Court is beyond the reach of the common citizen of our country. It is only the tax administration or the big corporates, who can afford to take up the matters to the Supreme Court. One adjournment will cost the assessee a minimum of ` 10 lakhs.

Professional organisations have made representations, from time-to-time, for setting up the Benches of the Supreme Court in four regions and the then Hon'ble Prime Minister of India, Dr. Manmohan Singh was in favour of this proposal. However, as the Supreme Court was not in favour of setting up Benches in four regions and hence, the proposal could not be implemented.

Professional organisations have also made representation to link all the High Courts with the Supreme Court – So that the litigants sitting at respective High Court may argue the matter before the Supreme Court. To start with, only SLP matters may be taken at the option of the assessee. If it works well, the same may be extended to other matters. The Income Tax Appellate Tribunal has started the E-Benches of the ITAT, which are working satisfactorily. Hence, the same module can be implemented for the Apex Court. If all the courts are linked with the Apex Court, it will reduce the pendency in tax matters and litigation costs will be reduced substantially.

Professional organisations have made suggestions to the Government that when an important question of law is involved and it affects a large number of cases, the Tribunal may be given power to refer the matter directly to the Supreme Court. Section 257 of the Income-tax Act can be amended accordingly. This will help in reducing the pendency in various High Courts and finality on the issue can be achieved within reasonable time.

2.8 Authority for Advance Rulings

It is desired that the Authority for Advance Rulings may be brought under the umbrella of Ministry of Law and Justice, which at present, functions under the Ministry of Finance. It is desired that its Members may be selected amongst the Members of the ITAT, who are better equipped to deal with international taxation issues.

2.9 Settlement Commission

The concept of Settlement Commission is very good. However, there are various conditions to be satisfied for approaching the Settlement Commission. It is desired that law may be amended in a way to facilitate any assessee to approach the Settlement Commission at any stage and such an opportunity can be availed only once. It is very unfortunate that more than 40 years have passed but the Government has not appointed a single professional either from the field of law or accountancy as Member of the Settlement Commission. An ideal Settlement Commission should have one reprehensive from the Revenue, one from the Accountancy field and one from the field of Law. There has

to be more transparency in the process of appointment of Members of the Settlement Commission.

2.10 Revision before Commissioner

Provisional power has been given to the Commissioner to use their discretion and allow the relief which is due to the assessee. There are instances earlier where, an application was made and the Commissioners gave the relief even without calling the assessee. In case of rejection of the application, the only remedy available to the assessee is to approach the High Court by way of writ petition. Professional organisations have made representations from time-to-time to make an amendment in the Income-tax Act, urging that all the orders passed by the Commissioner may be made appealable to the Tribunal. If such an amendment is introduced, it will save substantial time of the Court and assessee can have quick access to the justice awarded by the Income Tax Appellate Tribunal.

2.11 Prosecution

It is very unfortunate that the prosecutions are initiated and launched in some cases for technical offences. When prosecution is launched, it takes decades to finalise the matter before the Magistrate Court. There has to be a specialised Court to deal with prosecutions under Direct Taxes and prosecutions must be finalised within reasonable time.

3. Arbitration in tax proceedings

A thought for consideration, is whether there can be arbitration proceedings to settle the tax disputes. According to me, it may be possible to have arbitration proceedings in taxation matters. The Arbitrator must be either a retired Judge or from the eminent professionals whose integrity is beyond doubt. They should be able to give the ruling within two months of filing of the petition.

4. Research in taxation

The professional organisations may take lead in research in taxation. It should be an ongoing process. e.g. digitalisation of tax administration, eradication of corruption in tax administration, bringing more assessees under tax net, reduction in tax litigation etc. Once the paper is presented by the group, it can be made public for the comments. After receiving the view of the tax professionals and taxpayers, a final paper may be preferred and presented to the Government for their consideration. For the research work, one may involve law students, retired officials, professionals and universities. The Chamber has many young professionals who can display their potential by proper guidance. They may be motivated to work on the research paper and each year. one research paper may be prepared and be presented to the Hon'ble Finance Minister for his consideration.

5. Conclusion

Hon'ble Justice Mr. Dalveer Bhandari in the Publication "Judicial Reforms: Recent Global Trends" at page No 5 stated as under:- *"Urgent judicial and legal reforms are absolutely imperative in our country not only to clear the backlog of cases but also to ensure that future cases are decided promptly".* The Hon'ble Justice has highlighted about 12 reasons which cause delay. According to me, same will also hold good for tax litigations – which are pending before various Courts and the Tribunal. The Chamber of Tax Consultants, being one of the oldest associations of our country, can forward objective suggestions on better tax law and tax administration for our country. Our little contribution will help in the nation building process. India needs a strong Tax Bar with honesty, integrity, ethics and knowledge, who can stand up and fight against corruption to achieve the dreams of our beloved Prime Minister to have a corruption free India.

Jai hind !

S.R. Wadhwa, *Advocate*

Mediation and Conciliation of Tax Disputes

Mediation and conciliation of tax disputes are processes in which the parties to a dispute, (tax department and the taxpayer) with the assistance of a neutral third party (mediator or conciliator), identify the disputed issues, consider alternatives, and endeavour to reach an amicable settlement. Such processes are a part of the Alternative Dispute Resolution (ADR) and are intended to avoid prolonged and expensive tax litigation through normal judicial processes of appeals etc. In fact, such ADRs are recognition of the principle that whereas every person has a legal obligation to pay his income tax due to the State every year, he has also a right to expect from the State to know his final tax liability within a reasonable time.

2. In mediation, a mediator plays an advisory role on the issues-in-dispute and gives his expert advice on the likely terms of their settlement. He assists the parties in the decision making process without giving specific advice on its contents. In conciliation, the conciliator also offers a solution often based on the independent opinion of a disinterested expert. Such an approach between the tax department and the concerned taxpayers can avoid a large number of tax disputes and help final determination of the tax liability within a reasonable time. This approach has been termed as "co-operative compliance" by the Organisation for Economic Co-operation and Development (OECD in short). It is based on transparency and trust from both sides. Resolving the tax disputes amicably can be categorised in three parts, namely;

(i) Independent third party mediation/ conciliation where both parties accept a third party intervention in the procedure to get them together in cases where an agreement on their own is not possible.

(ii) Settlement (Agreement between the tax administration and the taxpayer).

(iii) Arbitration (Agreement to accept the decision made by an independent third party).

3. In India, the protracted litigation, notably in income tax matters, and retrospective amendments to the Income-tax Act of a substantive nature, has unfortunately created a perception that the system of tax administration is unfavourable to the taxpayers. For the year 2017, World Bank has placed India at a very low rank at 172 in the matter of “paying taxes” out of 190 countries. This ranking has remained unchanged from the year 2016.

4. A tax dispute, through the judicial determination process, namely; appeals to the Commissioner of Income Tax (Appeals), [CIT(A) in short] Income Tax Appellate Tribunal, [ITAT in short] High Courts and the Supreme Court, takes

between 10-20 years to get resolved. The income tax being an annual tax, such a long period in settling a tax dispute, apart from involving huge expense in tax litigation, creates uncertainties in taking investment decisions by the taxpayers adversely affecting the economic growth of the country. It is, therefore, necessary to look for alternative methods for speedy resolution of tax disputes.

5. In UK, following an internal review of the tax disputes and their outcome, Her Majesty's Revenue and Customs (HMRC) Service introduced the application of Alternative Dispute Resolution (ADR) procedures including the use of facilitative mediation in resolving tax disputes. Several mechanisms have been put in place by which confrontationist approach to tax disputes has been rationalised through efficient case management, avoidance of procedural formalities and increasing opportunities for settlement and alternative dispute resolution. The ADR techniques include the use of independent and experienced third party trained mediators either to conduct mediation or to facilitate programmes of structured discussion adhering to an agreed time table.

6. In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) defines ADR as "those practices other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them". It includes arbitration, conciliation, mediation, negotiation, conferencing, adjudication, case appraisal and neutral evaluation.

7. The USA tax mediation regime is more robust. Its Internal Revenue Service (IRS) offers a number of ADR mechanisms that can be engaged at various points in the assessment and appeal processes. These include Fast Track Settlement (FTS), Fast Track Mediation (FTM) and Post Appeal Mediation (PAM). The result is that very few cases land up in the tax courts.

8. Nearer home, Bangladesh has started a system of conciliation from the year 2011 through an independent facilitator to be appointed by the National Board of Revenue and covering all the tax disputes pending at any stage in the judicial process.

9. The Indian tax mediation process is presently at a nascent stage. There is virtually no attempt to make an agreed computation of income after scrutiny of the accounts by the Assessing Officer (AO in short) and avoid highly expensive and time consuming judicial process.

10. However, as part of the ADR, the Dispute Resolution Panel (DRP in short) and the Income-tax & Wealth-tax Settlement Commission (ITSC in short) are the two institutions, in the area of settlement, designated to settle the tax disputes in accordance with the legal provisions contained in the Act.

Dispute Resolution Panel – DRP

11. The DRP was set up by the Finance (No. 2) Act, 2009 to act as an alternative dispute resolution forum in respect of foreign companies and disputed tax issues involving transfer pricing adjustments (section 144C(15)(b) of the Act). With effect from 1st April, 2016, assessments involving 'impermissible tax avoidance arrangements' are excluded from the purview of the DRP (section 144C(14), read with section 96 of the Act). An eligible tax payer aggrieved by the order of the AO has the option of making a reference to the DRP, instead of filing an appeal to the CIT(A). The DRP is a collegium comprising of three CsIT constituted by the Central Board of Direct Taxes (CBDT in short). After hearing the taxpayer or his representatives and the AO, the DRP gives directions on the basis of which, the AO passes the final order of assessment. Its order is binding on the AO but not on the taxpayer who can file an appeal to the ITAT against its directions. The following latest statistics, available in public domain, reveal the number of cases filed before the DRP and the quantum of taxes involved therein:

Year-wise data regarding objections filed before DRP

F.Y.	A.Y.	Total cases filed during the cycle	Amount involved (`)
2009-10	2010-11	1,154	37,59,500/-
2010-11	2011-12	938	42,83,500/-
2011-12	2012-13	1,041	68,97,700/-
2012-13	2013-14	1,070	80,33,200/-
2013-14	2014-15	1,015	98,56,500/-
2014-15	2015-16	1,103	1,23,80,800/-*

**Information regarding amount involved in not available in respect of CCIT (IT), SZ, Bengaluru*

Source: Annual Report 2014-15 published by Ministry of Finance (Budget Division)

Drawbacks in DRP

12. The main drawbacks in the functioning of the DRP are the following:

(i) Its scope is limited to the assessment orders of foreign companies and taxpayers whose assessments involve transfer pricing adjustments.

(ii) There is no attempt at mediation and conciliation or to arrive at an agreement on the disputed issues. The CsIT constituting a DRP, being from the Department, have the tendency to give directions largely favouring the revenue. Most of the AOs' orders, in consequence of the directions of the DRP, are taken in appeals before the ITAT.

(iii) There are also complaints that the orders of the DRP are not well reasoned. A typical order, though lengthy, contains largely the extracts from the draft assessment order of the AO and submissions made by the taxpayer. The DRP's observations on the objections of the taxpayer are generally not dealt with adequately in a reasoned manner.

(iv) The courts have often criticised the quality of DRP's orders, which usually brush aside even the arguments of the taxpayer without cogent reasons [Delhi High Court in *GAP International Sourcing India Pvt. Ltd. vs. DCIT (2011) 44 SOT 56 (Del.)* and V*odafone Essar Ltd. vs. Dispute Resolution Panel (2012) 340 ITR 352 (Del.)]. The Hon'ble Supreme Court, in Sahara India Forum vs. CIT 300 ITR 403 (SC),* held that ignoring the submissions of the taxpayer by the DRP without stating the reasons is inconsistent with the rules of natural justice.]

(v) The absence of research staff and inadequate Benches to deal with the large number of cases are also the other reasons for inefficient functioning of this alternative dispute resolution forum.

Recommendations for improvement of DRP

(i) There is an extreme shortage of guidelines and instructions on issues involving transfer pricing and interpretation of Double Taxation Avoidance Agreements (DTAAs in short). The CBDT needs to clarify the issues by public circulars keeping in view the guidelines of the OECD.

(ii) Safe harbour rules need to be more liberal so as to ensure their acceptance and reducing litigation.

(iii) Advance Pricing Agreements between the Board and the taxpayer should be encouraged and made more popular to reduce the tax disputes.

(iv) Every judgment of the Tribunal and the High Court on a question of law should be examined at a senior level in the Ministry of Law and general instructions should be issued about its applicability in other similar future cases. If the judgment is not in accordance with legislative intent,

the law should be amended at the earliest opportunity.

(v) An independent expert opinion should be obtained by the DRP for its guidance and decision to settle the issues-in-dispute finally.

Income-tax Settlement Commission

13. The Income-tax and Wealth-tax Settlement Commission (ITSC in short) was set up by the Taxation Laws (Amendment) Act, 1975 w.e.f. 1-4-1976 following the recommendations of the Direct Taxes Enquiry Committee in 1972 popularly known as the Wanchoo Committee after the name of its, Chairman Mr. Justice Shri K.N. Wanchoo, retired Chief Justice of Supreme Court. Its objective was to enable a one-time tax evader or an unintending defaulter in making a clean breast of his affairs and thereby to avoid unnecessary strain on the scarce investigation resources of the Department in cases of doubtful benefit to the revenue while needlessly proliferating tax litigation and holding up collections.

14. Chapter XIX-A, sections 245A to 245L of the Act, Rules 44C, 44CA and 44D of the Income-tax Rules, 1962 and the Income-tax Settlement Commission (Procedure) Rules 1997, govern the law for the filing and disposal of settlement applications. Briefly stated, a settlement application can be filed only if:-

(i) The assessment/reassessment proceedings are pending before the AO;

(ii) The applicant makes a true and full disclosure of his income, not disclosed before the AO;

(iii) States the manner of deriving income and

(iv) Makes the payment of tax and interest due on the additional income before making the application.

15. The applicant has also to inform the AO on the day the settlement application is filed so that the Commission assumes jurisdiction over the case to the exclusion of the AO. Only one settlement application can be furnished during the life time of a taxpayer.

16. The minimum additional tax payable for all the years involved in the application has to be ` 10 lakhs. In search and seizure cases, it has to be ` 50 lakhs in the case of a specified person and ` 10 lakhs in the case of a person related to the specified person, as defined in the proviso to section 245C(1) read with Explanation thereto.

17. The order of the settlement is final and binding both on the applicant and the Department. It can be challenged before the High Court by way of a writ petition only if the order of the Commission is contrary to law or is perverse on facts.

18. The order of settlement has to be passed within 18 months from the end of the month in which the settlement application is filed and relates to all the assessment years covered by the application.

19. The Commission has wide powers of granting immunity from penalty and prosecution under the Act. It is normally granted if the additional income if any, worked out by the Commission in not account of any intentional suppression or misrepresentation of facts. The immunity granted can be withdrawn and settlement declared void at any time if it is subsequently found by the Commission that it was obtained by fraud or misrepresentation of facts. [Section 245D(6)].

20 At present, there are seven benches of the Commission located at Delhi, Mumbai, Chennai and Kolkata. Tables 1 & 2, given below, show the number of applications filed and disposed of during the years 2009-10 to 2015-16 (up to December, 2015):-

F.Y.	Total No. of cases pending at the beginning of the year i.e. 1st April	No. of cases received during the year	Additions/ due to High Court order	Total for disposal	Total disposal u/s. 245D(4) during the year (including rejection)	Total pendency for disposal
1	2	3	4	5	6	7
2009-10	1340	48	53	1388	203	1238
2010-11	1356	108	138	1611	423	1184
2011-12	1209	350	(-)6	1553	376	1177
2012-13	1186	410	(-)4	1592	443	1149
2013-14	1114	363	1	1324	673	441
2014-15	696	507	8	1211	635	576
April to Dec. 2015	494	434	18	946	268	678

Reasons for declining number of settlement applications

21. The declining number of settlement applications, despite the enlargement in the scope of the Commission by Finance Act – 2014 to cover cases of reassessment and those set aside by the ITAT u/s. 254(1) and CIT u/ss. 263 and 264 of the Act, is largely because of the following reasons:

(i) Needless legal requirement of the pendency of proceedings before the AO.

(ii) Lack of clarity in the admission of settlement applications largely on what constitutes "true and full disclosure of income and the manner in which such income is derived."

(iii) Absence of any legal guidelines for abatement of cases. Clauses (iiia) and (iv) of section 245HA(1) do not enjoin the Commission to give any reason to abate the settlement application. If the Commission does not pass the order of settlement within 18 months or does not provide the terms of settlement, without any fault on the part of the taxpayer, the proceedings before the Commission will abate.

(iv) The Commission is manned entirely by the retired officers of the Income-tax Department whose status has recently been reduced by reducing their pay to that of a CIT.

Recommendations

(i) Removal of the requirement of pendency of proceedings

22. Since the taxpayer gets only one chance in his life time to get his tax liabilities settled by the Commission, the requirement of the pendency should be removed. Even if the proceedings are pending before the High Court, the ITAT or the CIT(A), the taxpayer may get his tax liabilities settled after withdrawing the appeals with the permission of the authority concerned.

23. The recommendations of the Wanchoo Committee for settlement of cases were in pursuance of the practices prevailing in other countries notably in UK and USA where there are no restrictions, unlike in India. In UK, a taxpayer can get his tax liability settled on

the basis of an assurance given by the Finance Secretary in the House of Commence in 1923 and another similar statement made by the Chancellor of the Exchequer on 5th October, 1944. In USA, section 7121 of the US Internal Revenue Code, 1954, authorises the Secretary of the Treasury or his delegate to approve such agreement relating to the tax liabilities of any person under the internal revenue tax for the taxable period. The various restrictions on filing a settlement application need to be removed following the practices in other countries, notably UK and USA.

(ii) Define true and full disclosure of income

24. If all the restrictions on the lines of the practices prevalent in UK and USA cannot be removed, at least the requirement of "true and full" disclosure of income contained in section 245C(1) of the Act may be regulated by defining it in the Act or the rules. This requirement has led to endless judicial disputes, [Refer, among others, Supreme Court in *Ajmera Housing Corporation (2010) 328 ITR 642 (SC); Delhi High Court in CIT vs. ITSC (2015) 360 ITR 407 (Del.); Gujarat High Court in PCIT vs. ITSC (2016) 65 taxmann.com 309 (Guj) & Bombay High Court in DIT vs. ITSC (2014) 365 ITR 108 (Bom)].* The requirement should be made simple and similar to the computation of income for the purpose of furnishing an income-tax return before the Assessing Officer, namely, specifying the supporting documents like audited accounts, tax audit reports, computation and certification of income being true and full by a qualified Chartered Accountant etc. on the lines as specified for a defective return of income in the Explanation below the proviso to sub-section (9) of section 139 of the Act. After all, every" return of income is also required to contain income to be true to the best of knowledge and belief of the tax payer. The Commission has wide powers to deal effectively with incorrect settlement applications by refusing immunity from penalty and/or prosecution if all the material facts in support of the additional income are not disclosed or truthfully stated.

(iii) Remove the requirement of the manner of deriving income

25. The requirement of the "manner of deriving income" has also outlived its utility and is the main cause of endless litigation particularly where the applicant desires to disclose his unexplained assets and deposits. This requirement was recommended by the Wanchoo Committee and incorporated in the law when the tax fraud investigations used conducted by the tax offices on industry-specific tax evasion practices. This concept has been given up. Now, the cases are selected for scrutiny based on the concept of risk measurement involving possible understatement of income.

(iv) Specify criteria for rejection of the settlement application

26. The criteria for the rejection of a settlement application at the stage of admission should be specified as in the case of an invalid tax return, namely;

(a) The specified documents, without a reasonable cause, are not attached with the settlement application in support of the income being true and full.

(b) Pendency for the years in question is not truly stated.

(c) The tax and interest on the basis of additional income disclosed is not paid.

15 days time should be given to the applicant before rejecting his application for fulfilment of the conditions at (a) to (c).

(v) Abatement of settlement application to be at the request of the applicant

27. Clauses (iiia) and (iv) of section 245HA (1) of the Act give unbridled powers to

the Commission to abate and reject, even after admission, any settlement application where:-

(i) Any application, an order under sub-section (4) of section 245D has been passed but without providing for the terms of settlement; or,

(ii) Any other application, an order under sub-section (4) of section 245D has not been passed within the specified period of eighteen months from the end of the month in the application is furnishes as specified in sub-section (4A) of section 245D of the Act.

28. These provisions discourage the intending applicants from approaching the Settlement Commission. Once the application is admitted and all the incriminating facts mentioned therein are made known to the Income-tax Department but the Commission does not specify the terms of settlement or does not settle the case, the applicant will have to face the normal process of assessment by the AO and undergo prolonged and ruinous tax litigation with the additional disadvantage of the AO using the incriminating evidence supplied by the taxpayer himself even for his criminal prosecution. The abatement provisions should be removed. Alternatively, the abatement should be at the specific request of the applicant, where the computation of income proposed to be made by the Commission is not acceptable to him. Otherwise, if the Commission is unable to settle the case within the prescribed period of 18 months, the additional income disclosed before it should be deemed to be accepted.

29. The Commission is a judicial Tribunal because of section 245L of the Act, as interpreted by the Supreme Court in *CIT vs. B.N. Bhattachargee (1979) 118 ITR 461 (SC)* and *CIT vs. Anjum M.H. Ghaswala (2001) 252 ITR 1, 12(SC)].* However, since it is manned exclusively by retired officers of the Income-tax Department and their tenure is generally of only two years, the important requirements to be followed by them should be provided either in the Income-tax Rules or in the Income-tax Settlement Commission (Procedure) Rules, similar to another judicial Tribunal namely; the Income Tax Appellate Tribunal. Such requirements should include the following:-

(a) As far as possible, the Commission shall pass the order of settlement in agreement with the applicant and the Commissioner of Income Tax concerned.

(b) Before making any addition to the disclosed income, a specific opportunity shall be allowed.

(c) Every order of the Commission, as in the case of the Income Tax Appellate Tribunal, shall be announced in the open court and the record of the same shall be maintained in the logbook of each of the members of the Bench settling the case.

(d) Where a matter is referred by the Chairman of the Settlement Commission for constituting a Special Bench for the disposal of a particular case, the time taken by the Special Bench will be excluded for limitation purposes prescribed in sections 245D(2C) and 245D(4A)(iii) of the Act.

30. Most importantly, the applicants should be encouraged to take advantage of the settlement provisions. The Central Board of Direct Taxes, as has been recently done by the Central Board of Excise and Customs, both working in the Department of Revenue of the Government of India, should instruct its field officers that in every case of investigation/search and seizure, in the show cause notice issued to the concerned taxpayer, the option of filing a settlement application before the Settlement Commission should

be specifically mentioned. Such an option in cases involving tax fraud investigation will encourage the concerned taxpayers to have their tax liabilities finally determined and tax realised without prolonged tax litigation of highly doubtful benefit to the Revenue.

31. At present, every case of an applicant, both at the time of admission and settlement, is required to be examined within the Department for which a Departmental Hand Book on "Effective Handling of Cases Before the Settlement Commission" is believed to have been brought out by the Board in 2014 for the use of the Departmental officers. This is discouraging the assessees from approaching the Settlement Commission. Since the Commission is manned by senior officers of the Department of the rank of retired Principal Chief Commissioners/Chief Commissioners of Income-tax (PCCIT in short) and even Member of CBDT, such a Hand Book is counter-productive and is the main cause of the Commission ceasing to be an effective forum for mediation and conciliation of tax disputes. It tantamounts to the Board expressing a lack of confidence in their competence. This Hand Book needs to be withdrawn forthwith and replaced by a one of an informatory character meant both the taxpayers and the Departmental officers.

32. The recent devaluation in the status of the members of the Commission by reducing their pay to that of a Commissioner of Income Tax is counter-productive particularly when it involves very negligible extra expenditure. Wanchoo Committee had recommended that such persons should be of the rank of the members of Board. Following its recommendation, the members of the Commission used to be of the status of members of the Board. The proviso to section 245B (3) of the Act specifically provides that where a member of the Board is appointed to the Settlement Commission, he shall cease to be the member of the Board. In order, therefore, to encourage members of the Board, Principal CCITs and CCITs to join the Commission, their pay should be increased to that of the member of the Board. Since these officers, only 21 in number, join the Commission on retirement, they will be entitled to draw the pay of the scale of pay as reduced by the pension to which they are even otherwise entitled. There will thus be inconsequential additional burden on the exchequer but will make the posts in the Commission more attractive.

Conclusion

33. As stated above, the concept of mediation and conciliation, in the sense of determining the tax liabilities of a taxpayer by agreement, has not been introduced in India. It needs to be introduced urgently. Even the two institutions, DRP and Settlement Commission, which were intended to determine the tax liabilities of the assessee by agreement, have in practice not achieved the purpose for which they were set up. It is, therefore, essential if the abysmally low categorisation of India by the World Bank, in the matter of paying taxes, at rank 172 out of 190 countries, has to be improved, the practice of determination of the tax liability of a taxpayer by discussion and agreement, as is prevalent in and expected by most of the capital and technology exporting countries, is adopted in India at the soonest.

Be not Afraid of anything. You will do Marvelous work. It is Fearlessness that brings Heaven even in a moment.

— Swami Vivekananda

CA P. N. Shah

Role and Responsibilities of Professional Bodies in the Current Scenario

Background

The users of professional services require an assurance that the members of any profession, be it legal, accounting, medical, engineering etc., whose services are retained, are persons of character and integrity as well as competent and knowledgeable to render such services. In order to provide this assurance the professional bodies, whether they are statutory or voluntary organizers have to play a significant role and have great responsibility to the society. It is in this context that Parliament has enacted laws to set up statutory bodies like Institute of Chartered Accountants of India and similar Institutes for Company Secretaries and Cost Accountants, Indian Medical Council, Bar Council of Indian etc. The role and responsibilities of these Institutions are well defined in the respective statutes. They have to ensure that the education and training of students adequately match with the requirements of the society. They have also to maintain high standards of examination and ensure that proper professional opportunities are made available to new members joining the profession. Further, these statutory bodies have to ensure that members of the profession maintain high standards of professional integrity and discipline in their life. That is the reason that the respective statutes give power to the councils of the statutory bodies to take disciplinary action against their members and to award punishment to erring members.

As compared to the above role of statutory bodies, voluntary professional organisations have to play a supporting role. No professional can remain static. He has to update his knowledge and skills by continuing education. He has to keep himself abreast with daily changing society and new developments. Commercial and other laws change frequently and courts pronounce judgments interpreting the complex laws. Voluntary professional organisations have a great role and responsibility in this field. They have to ensure that the professionals who have become their members are kept abreast of these new developments as well as new technology.

In this article, some of the issues relating to development of one's professional life and the role and responsibilities of professional bodies in the current scenario in that context are discussed.

Profession vs. Business

The essence of a profession is "Pride of service in preference to personal gain". In contrast, a person engaged in a business may keep maximisation of profits as his goal. In recent years, there are some professionals who try to carry on the profession as a business venture. There are others who are also tempted to convert the profession into business. If we examine the legal provisions governing various

professions, we will notice that the emphasis in these provisions is that no professional should engage in any business if he is holding certificate of practice to practice that profession. Such a professional cannot enter into partnership with a non-professional for carrying on a business. When a person is carrying on a particular profession he has to observe high standards of integrity, objectivity, independence and confidentiality. In other words, he has to carry on his professional activities in a professional manner and not as a businessman. This is one area where the professional bodies can educate their members so that professionals are constantly reminded about their role in the profession.

Professional Ethics

As stated earlier, the members of the society would like to engage a professional who is a person of character and integrity. The character and integrity of a professional will depend on his personal qualities. This will depend on the environment in which he is brought up, taken his education and training as well as his workplace. One may say that this depends on his SANSKAR. However, his character can be moulded by a professional body who can guide and encourage its members to live up to the high ethical standards in the profession. The prestige and confidence enjoyed by a professional depends to a great extent on the manner in which the processional code is implemented by the professional body of which he is a member.

In this context what is necessary is to create a public image by the professional body that members of that professional body are competent, that they are keeping public interest above self interest, that they are honest and that the erring members are awarded punishment expeditiously. To create this public image, the professional bodies have identified the following ethical standards by which every professional should conduct his professional and other dealings with others.

(i) Integrity

A professional should be straight forward, honest and sincere in rendering professional and other services.

(ii) Objectivity

A professional should be fair and should not allow personal prejudice or bias, conflict of interest or influence of others to overcome in the conduct of his professional or other activities.

(iii) Independence

Integrity and independence are the most essential characteristics of any professional. Independence implies that the judgment of a professional is not subordinate to the wishes or directions of another person who might have engaged him or his own self interest.

(iv) Confidentiality

Information acquired in the course of his professional capacity has to be treated as most confidential. This should not be disclosed to any one without specific authority of the client or unless it is required to be disclosed for compliance with legal or professional requirements.

(v) Technical Standards

He must discharge his duties in accordance with the technical and professional standards relevant to the work assigned to him.

(vi) Professional Competence

He must maintain high level of competence throughout his professional carrier. He should undertake only such work as he is competent to handle and complete within the given time frame.

(vii) Ethical Behaviour

A professional should conduct himself in a manner consistent with the good reputation of the profession and refrain from any conduct which might bring discredit to the profession.

(viii) Conduct in other Fields

A professional should maintain these high standards of integrity, objectivity independence, confidentiality etc., even in his personal affairs.

For professionals in tax practice one of the voluntary professional bodies has formulated "Code of Ethics" to be followed by such professionals. It will be useful to refer to some of the contents of this Code of Ethics which assures the society at large that professionals following these guidelines can be relied upon.

(i) Honesty

A professional shall, at all times, conduct himself in a manner befitting his status as a privileged member of his profession and as a gentleman. He shall, at all times, in his dealings with the Court, Tax Officers, Departmental Representatives and clients act honourably and never in a manner which shows lack of honesty or probity. A professional shall fearlessly uphold the interests of his clients and in his conduct conform to the rules in letter and in spirit.

(ii) Duty to the Court

(a) A professional shall always conduct himself honourably and while pleading a case before a Court act with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his duty and right to submit his grievance to proper authorities. (b) He shall maintain towards the Court a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community and the rendering of justice fearlessly. (c) He shall not influence the decision of a Court or any authority by any illegal or improper means. Private communications with the Court relating to heard/pending matters are forbidden. (d) He shall use his best efforts to restrain and prevent his client from resorting to unfair practice or from doing anything in relation to the Court, opposing counsel or the Revenue which he himself ought not to do. He shall refuse to represent the client who indulges in such improper conduct.

(iii) Duty to the client

(a) The professional is bound to accept any brief in the Courts or Tribunals or before any other authority in or before which he professes to practice at a fee consistent with his standing in the profession and the nature of the case. Special circumstances may justify his refusal to accept a particular case. (b) He shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case, he shall, in that event refund such part of the fees, if any, collected in advance, as has not been earned. (c) It shall be his duty fearlessly to uphold the interest of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other, regardless of his personal opinion, bearing in mind that his loyalty is to the law which requires that no man should be made liable to pay tax levied on him without the authority of law. (d) He shall not stipulate for a fee contingent on the result of litigation or agree to share the proceeds thereof. (e) He shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client. (f) He should keep accounts of the clients money entrusted to him, and the accounts should show amounts received from the clients or on his behalf and the expenses incurred for him.

(iv) General Conduct

(a) A professional shall not solicit work or advertise either directly or indirectly. (b) He shall not offer private hospitality or favours of any kind to the Court except where they are his family members, close relatives and personal close friends of long standing. In such a case, he shall not appear before the Court.

Education and Research

In modern times, no person, whether he is engaged in a profession or other occupation,

can claim to be absolutely perfect. He has to continuously educate himself by updating his knowledge. For this purpose all professionals and others have to depend on the professional bodies who can impart this knowledge in the field in which that professional body operates. It is possible to impart such knowledge by organising seminars, conferences, workshops, lecture meetings, residential courses, study circles etc., on topics of current interest. This is also possible by publication of books and other literature on current topics at periodical intervals at affordable cost. This will be a step in the direction of continuing education and training for professionals and others interested in the relevant topics.

Besides the above effort in imparting education and training to professionals and others the professional bodies have to continuously engage themselves in research on topics of interest to professionals to whom they serve. They have to be vigilant about the existing legislation and their amendments and also about new legislations which are introduced from time to time. They have to play a proactive role by approaching the authorities concerned with this legislation and persuading them to take corrective steps so that complex legislation is simplified and the professionals and others do not have to face hardship in their day to day life.

Further, the professional bodies have also to study the judicial pronouncements made by various Courts and inform their members about the impact of such judgments on the relevant issues. If desired/necessary the professional body may also make representations to appropriate authorities for amendment of legislation.

Social Welfare

It is not necessary that the professional bodies should look after the welfare of the professionals who are their members. It has a responsibility to the society at large. The basic needs of the underprivileged members of the society are roti, kapada, makan, education, medical facilities and employment. Lot of efforts are required to improve the quality of life of the common man. Our Government is allocating funds for the improvement of roads, houses, food, water supply, toilets, education, medical facilities etc., for the common man in villages and urban areas. Sometimes we notice that the mechanism for implementing these schemes is faulty and no real benefit reaches the deserving persons. It is in this field that professionals and professional bodies can play a useful role by suggesting better methods for implementation of these welfare schemes.

Corruption

The cancer of corruption is all pervasive in our country. If those in charge of governance indulge in this illegal activity, those who are governed feel that they have no other option but to participate in this activity even for getting legitimate things done. This has resulted in fall of moral standards in society. The present Government appears to be determined to deal with this problem. It has taken some steps to curb this tendency. However, those engaged in the professions such as legal, accounting, medical, education, engineering etc., and the professional bodies, whether statutory or voluntary, will have to take a lead and educate the people to resist participation in such illegal activity.

At one of the conferences organised by a professional body one of the Hon'ble Judges of the Supreme Court, in his inaugural address to professionals, referred to this topic of cancer of corruption in the field of tax administration which is spreading in the vitals of our economy. In his speech he emphasised that cancer of corruption cannot be eradicated unless all professional organisations declare a war against this evil. He urged upon all tax professionals and professional bodies to work towards eradication of this evil in these words-

(i) The associations and organisations of tax practitioners may refuse to recognise

and submit to the jurisdiction of corrupt officials. Social recognition acts as a stimulant and social boycott as a deterrent. The two are most powerful weapons of defence and offence which belong to Indian polity and are consistent with the principles of non-violence taught by the Father of the Nation, Mahatma Gandhi. Associations and organisations must collectively but unostentatiously honour and recognise the honest and condemn the corrupt. The process may be slow but is evolutionary and is bound to have its curative effect. The honest and deserving must feel encouraged; the dishonest and corrupt must feel marginalised.

(ii) The Conference of Tax Practitioners must conduct research and this should be an ongoing process and suggest how complexity of laws, where corruption breeds, can be eradicated and the laws simplified.

(iii) The solution lies in fighting with the issues and marginalising those who are trouble shooters. Not that all are corrupt and dishonest. The misfortune is that in spite of the honest being in plenty they are sideline lack recognition and are getting marginalised day-in and day-out. We have to reverse this process."

In the context of present environment, professional bodies can do no better than emulate the above message of this great profession who has set very high standards in the legal profession.

To Sum Up

In this article an attempt has been made to explain what is the role and responsibility of a professional body in the context of the present environment. When a person wants to choose his career and take a decision whether to join a profession or business, he should be ready to make a sacrifice if he selects to join a profession. In any profession the motto is pride of service in preference to personal gain. Therefore, a professional has to keep upper most in his mind the fundamental principles enunciated by professional bodies while performing his duties.

In order to meet the challenges that we face today the professional bodies will have to ensure that they conduct their affairs in the most transparent manner. They should ensure that persons who are in charge of the affairs of professional body are knowledgeable, competent and are able to devote sufficient time for the affairs of the professional body. Here are some of the suggestions which a professional body should consider and try to emulate in order to render better service to its members.

- Recognise the changes in economy / business environment such as focus on value, dynamic business and organisation structures, developments in the Information Technology and Telecommunication, new Government policies, globalisation of business and competitive pressures.
- Recognise the path to success by adapting to the changes, knowledge management and acquiring skills to work with future environment influenced by technological and other changes.
- Recognise the opportunities for professionals in the emerging areas of professional services changed management services, strategy management, general practice specialisation and serving global organisations.
- Recognise the professional body's role as a proactive, innovative and flexible organisation, in equipping professionals with top quality education and values.
- Recognise the need to be known as World Class Advisor.

CA T. N. Manoharan

Vision 2025 for the Accounting Profession

Introduction

Every profession has an objective and purpose for its origin and sustenance. Accounting profession is no exception. While the role and significance of the accounting profession keeps evolving to match with the changing expectations of the stakeholders, laws and regulations, the underlying philosophy remains constant. The commitment of the profession to the society is enshrined in the motto adopted by The Institute of Chartered Accountants of India (ICAI) from the Kadhopanishad – *"Ya esa suptesu jagarti"* – "That person who is awake in those that sleep". Even before India became Republic in 1950, the Government of India enacted "The Chartered Accountants Act, 1949" and conferred the statutory and special recognition on the profession by chartering it and conferring autonomy on ICAI. This demonstrates the importance attributed to our profession by the Parliament and the need to regulate it with sound principles and standards. Our profession is the conscience keeper of the finance world as we perform the accounting, auditing and assurance services. The profession is recognised as a partner in nation building as we provide value added services to significant components of the economy in general and to the business enterprises in particular in terms of planning, budgeting, funding, restructuring, strategising growth and expansion, cost optimization so on and so forth.

Knowledge Management and Innovation

The profession today stands on the threshold of dynamism and change. We need to be diligent in knowledge management and innovation. It goes without saying that any laxity in this regard on our part could be fatal. The Government, the regulators, the society and the clients do expect the profession to take proactive measures for knowledge updating and skill upgradation. Both in the core areas of our practice such as assurance function as well as in the non-core areas such as consultancy/advisory functions, we need to be empowered consistently. Any inaction can create a void which will be filled by those outside our profession. John F. Kennedy said that there are risks and costs to action but they are far less than the long range risks of comfortable inaction. We just cannot afford to be indifferent to the changes happening and cannot be ignorant of the developments around us. New Corporate Governance Norms, new Accounting Standards (Ind AS as well as ICDS besides the Assurance Standards), GST which is expected to be in place by July, 2017

evolution of International taxation, emergence of Data Analytics as an effective tool and the Artificial Intelligence joining the work force are all factors one should proactively embrace and march ahead.

Practising accountancy profession is like riding a bicycle and one does not fall off unless he stops pedalling. Learning is akin to pedalling. No other factor can inspire more confidence and faith in the minds of the stakeholders on our profession than the demonstrative quest for knowledge and competence gained out of it. The profession owes to the stakeholders an assurance that its members are the most competent and empowered lot to deliver services with quality. The profession can ill afford to be negligent on this aspect of sustenance and reputation. Quality in service leads to excellence, which is a definite attribute that paves way for growth and development of the profession. However, there are limits to the excellence we can achieve on a narrow base. The profession needs to innovate and re-engineer itself to a new trajectory of divergence and efficiency. The profession needs to evolve new products, new services, new systems, procedures and methodologies to maximise utility but minimise the cost. Excellence is like the summit of a pyramid, larger the base higher the summit. We should not spare any endeavour to broaden the base of the quality of our services with skills, standards and values and build the pyramid of excellence, the summit of which is unmatched by that of any other profession.

Capacity Building of Firms

It is common knowledge that Indian entrepreneurs are consolidating their businesses to grow big and face global competition. Multinationals are establishing subsidiaries of large size in India. Takeovers, mergers, amalgamations and collaborations are the order of the day. Professionals should also become conscious of this factor and gear up to restructure their firms, reorient their skills and expand their firm size. When an enterprise or a business group grows and the professional firm rendering service to it does not, the chances of replacement by a bigger firm cannot be ruled out.

Although, there is commendable improvement in the growth and expansion of the firms over the last one decade, still we have a long way to go. To the growing Indian business enterprises, our profession must be able to assure that our firms would measure up to the size that is required to ably cater to the array of services expected of us. All services under one roof and pan India presence should be the goal for the upcoming and growing firms. While multi-national accounting firms are exploiting India by their presence, Indian firms should position globally to tap the potential across continents. By 2025, we must aspire to witness at least 500 firms with more than 20 partners and among those firms at least 100 firms must be having pan national presence together with overseas reach.

Sanctity of signature and Independence

Unlike a few other professions where the accountability is primarily to the client, in our profession the accountability extends to various stakeholders. For instance, when a member of the profession is exercising the assurance function in the nature of statutory audit and appends his signature, he is not only accountable to the shareholders who are the owners of the company but also to the investors, depositors, lenders – banks and institutions, regulators, customers and all those who make decisions relying on the authenticity of the financial statements so attested. Expression of independent and qualitative opinion is imperative for securing and fulfilling the accountability aspect of the profession. Attest function is the exclusive domain of our profession. We have been given this recognition on the faith that we will

discharge it with utmost care and competence. Considering the fact that audit is not a privilege but a responsibility, it requires to be shouldered carefully by skilled and credible hands. Besides, audit is a time bound exercise and, therefore, adequate trained manpower, infrastructure and audit tools and manuals are inevitable for a firm to acquit it creditably in discharging such function. Assurance function demands excellence, integrity and independence and when properly discharged commands unshakable faith, respect and image. If warranted, based on facts and figures, we should have the mettle to express an adverse opinion on the financial statements of the client who ends up paying for such an opinion. Any dereliction in this regard might dilute our significance and exclusivity. When we consciously discharge our duties to meet with the genuine expectations of the stakeholders, our stature and rights get automatically preserved and cherished. Rights which flow from duties not done properly are not worth having.

Adherence to various standards governing the profession; ensuring proper documentation of work done and resorting to expression of opinion without fear or favour leaves no room for a gap in performance. Succumbing to pressure of a branch manager of a bank to complete an audit in undue haste or to classify certain NPAs as good debts may at best please him but undoubtedly erodes the image of the professional even in his mind. Losing sight of the significance of quality in work may result in short term gains to that professional but brings disrepute to the entire profession. If the nation's interest is upheld and protected while serving a client, it brings greater glory to the profession and the brand image is enhanced by reinforcing stronger faith and instilling greater confidence on our profession.

The signature of any professional is an expression of credibility. So is the case with the signature of a member of our profession which is truly trusted and highly respected. The status of the signature of a person becomes elevated and turns out to be a precious one on acquiring professional qualification as a Chartered Accountant. Even if a miniscule section of the society perceives that the signature of a member of our profession is available for the asking or solely for a consideration that would be a dreadful scenario and could lead to erosion of goodwill which our forefathers have so strenuously built over six decades.

Ethical values

Some members of the profession strive and survive on account of the goodwill created by our forefathers but they don't do anything to demean the profession. Many members contribute to and enhance such goodwill by their exemplary conduct, impeccable integrity and qualitative delivery of services. Unfortunately, the conduct of a few is such that it has the diminishing effect on the goodwill of the profession and erodes the image overnight. We need to introspect as to which category we should belong to and the answer is obvious. Fee based approach in everything we do would be destructive in the long run whereas value based approach would enhance our reputation. When intangibles such as quality and brand value are not compromised then tangibles in the form of prosperity would automatically follow but in the long run. To achieve this one needs to have not only passion but also patience. Mahatma Gandhi said that there is enough for every one's need but not for the greed. The Father of the nation also indicated that 'ends' do not justify the 'means' and means should be as good as the ends. It might pay to be unethical in the short run, but in return one loses self-esteem and peace of mind, which is too precious a price one should dread to pay and suffer.

Lord T. B. McCauley said, "The measure of man's real character is what he would do

if he knew he would never be found out". Everyone aspires to grow and reach greater heights. It will be nice to always bear in mind that ability may take us to the top but it requires character to stay there. Otherwise, the fall could be mighty. Quality in service without compromising on ethical values begets not only prosperity in the long run but undoubtedly helps us to build image and command respect. In matters of innovation and empowerment, one should swim with the current, but in matters of values and principles, one should stand like a rock. The future is going to be tougher in this regard and all the same we need to gear up to face the challenge and ensure that there is no performance gap.

Professional Social Responsibility (PSR)

A member of our profession is considered to belong to the elite segment of the Indian society. About 27% of the Indian population is perceived to be below the poverty line. We owe it to the society to contribute in uplifting the lives of the downtrodden and under privileged masses. The standing and respectability of the profession can touch lofty heights only if the profession is able to positively contribute to the socio-economic development of the society. Several measures can be resorted to as part of PSR initiative and some of them can be readily spelt out.

Firstly, ICAI can enhance the level of contribution in the policy formulations by various ministries of the Central Government and of the State Governments on socio economic reforms and their effective implementation. Secondly, members with requisite exposure, aptitude and inclination can plunge into public life in large numbers and be part of the political system to be able to contribute in the policy making at the national and state level; Thirdly, members need to accept positions such as Independent Directors of companies, trustees of public charitable trusts, governing board members of educational, health care and not for profit organisations, assume leadership in chamber's of commerce, management and trade associations. Fourthly, every medium and large firm can establish a charitable institution and carry out activities to meet the societal needs in a small way.

Conclusion

As we continue our glorious journey, it's time that we take stock of the socio-economic changes unfolding around us and adjust the course of our journey accordingly for larger benefit of the society and the nation. We may not have the ability to change the course of the wind but we can set the sail appropriately to proceed in the noble path we choose to progress. French philosopher Jean-Paul Sartre said that we have no destinies other than those we forge ourselves. Let us make the society feel proud of our profession and thereby justify our existence. No other profession can boast of having as proximate a role and nexus as ours with the economic development of our country. Let us reinvent the significance of our role in partnering, participating and partaking in the task of building a credible economy in our incredible India. Jai Hind.

Society does not go down because of the activities of criminals, But because of the inactivities of the good people.

— Swami Vivekananda

CA Sunil Talati

Challenges to the Accounting & Tax Professionals

Preamble

The profession of Accounting and Tax is considered to be the most noble profession amongst many other professions. Whatever is the place and whatever is the nature of business, a person has to prepare and maintain his accounts and/comply with the Tax Laws of the country, be it Direct Taxes or Indirect Taxes. The profession of Accounting and Tax is governed by the Institute of Chartered Accountants of India so far as Chartered Accountants are concerned. However the substantial part of Trade and Business conducted by Small and Medium size Entrepreneurs are being handled by Tax Consultants / Practitioners / Advocates etc. Most of the Trade and Business is represented before Direct and Indirect Tax Authorities by Chartered Accountants and Tax Consultants. They really enjoy a special status and respect within the tax department and also in the society at large. Since liberalisation there is a substantial growth and development in this profession. To give a simple example, the profession of Chartered Accountancy had a total strength of 2000 members in 1950 to 20000 in 1980. This increased to 93 000 in 2000. To be more specific when I was the President of ICAI in 2007 the total number of Chartered Accountants in India were 141516 which has increased to 242526 in 2016. Simultaneously there is a slow but the steady growth in other Tax Consultants also. Hitherto filing of returns of incomes based on accounts prepared by an accountant and filing the return of Income (by making apparent disallowances and claiming various deductions) was considered to be not that intricate or complicated matter. Even if cases were taken up for scrutiny certain mistakes committed by accountants or tax consultants were capable of being taken care of. But now the time has changed. The provisions in the Act have changed. The attitude and approach of tax official have changed. Expectations and demands from clients have changed. Concept of accountability and responsibility from regulations have also changed. And above all there are substantial changes in the manner in which business is done. The size and quantity of volumes of business have changed. The method and systems of maintaining accounts have changed. The details and basis of auditing, verifying the same have changed, Requirements and compliance under direct and indirect taxes have changed and above all the attitude and actions of tax officials also have drastically changed.

Challenges and opportunities

Continuity gives us roots, change gives us branches and such changes allow us to stretch,

grow and reach to newer heights. Nothing endures but changes. Indeed it is the "Change for Better" that has impelled the evolution of Indian Accounting Profession, adding new layers of lustre to a tradition of excellence with every passing year. We all professionals involved in accounting and taxation must appreciate and welcome the changes. What lies behind us and what lies before us are miniscule matters compared to what lies within us. Change is the only constant thing in life innovate and the change gets better. With innovation particularly in internet, mobile, communication and in computerization, changes have now become not only regular but at a very fast speed. Those who cannot keep the pace with such rapid changes are thrown out and those who move with the changes can only grow and be in line with the fast developing, innovating and growing changes in every walk of life. Therefore let me say that change is inevitable and is the only thing in this world which is eternal. The ever changing and dynamic nature of substantial changes and improvisation in Accounting Standards, in auditing standards, adoption of new techniques and methods and friendly but compliance oriented changes in taxation laws has made the life of accounting and tax professional not difficult but highly demanding with heavy expectations from clients, stake holders and regulators. One has therefore to find out opportunities from such fast growing changes and meet with the challenges smilingly.

Challenges for Accounting Profession

1) Indian Accountancy profession has been a dynamic journey of professional excellence, integrity and enormous opportunities to serve the society. This inspiring journey continued unabated in India for decades, but in recent years it has also taken firm roots in hitherto unchartered territories in foreign lands, particularly in the wake of ever increasing globalisation of Indian accountancy profession. So as to withstand the global competition it has become inevitable for Indian Chartered Accountants to be fully equipped to face the onslaught of big firms and other such competition from multinational accounting and law firms. It has become imperative for Indian accountants to study understand and acquire complete knowledge of IFRS. The Institute of Chartered Accountants of India has come out with the Ind-AS. Therefore this is the biggest challenge for Indian Accountants to learn Ind-AS, teach the same to the auditee and in term get it implemented and audited. The illiterate of the 21st century will not be those who cannot read and write, but those who can learn, unlearn, and re-learn. In last one decade the Indian Accountancy Profession has undergone paradigm shift, and the phenomenal continues to this day. The greatest challenge for this ongoing transition is constant capacity building, life long learning and being in-tune with changing times.

2) The second biggest challenge in the accounting profession is to keep track of existing 32 Accounting Standards, 15 new Ind-AS, 33 Auditing Standards, 8 new Income Computation and Disclosures Standards besides knowing 600 sections of Companies Act and 300 sections of Income Tax Act. It is humanly impossible for an Individual to be expert in all these at one go, and therefore the need of not only capacity building, need of not only having more partners or hands but also to be techno savvy. While emphasising on technology-driven capacity building, let's take stock and analyse how new technologies are being applied across the profession. The trend focuses on three areas of technology that have particular relevance. First, given that accountancy is grounded in financial data, improved

capabilities in data, including big data and analytics, will have a significant impact. The importance of data also emphasises the need for good cyber security. Second, technologies such as cloud, mobile and social media deeply change the way that we can interact with clients and across businesses. Third, new financial technologies, including digital-currencies and distributed ledgers, will also have significant relevance to financial services and associated areas of accounting. As such not only the knowledge of all Accounting Standards but knowledge of entering, feeding, retrieving and understanding the financial data in electronic forms is a huge challenge before accounting profession.

3) Accounting profession in my view is at Inflection Point. Vast technological changes that are happening in every field of life has a direct impact on accounting. Gone are the days when account writing or book keeping was a simple method like debit and credit entries, ledger, trial balance grouping and then profit and loss account and Balance Sheet. The nature of transactions, the volume of transactions and the manner and method in which transaction are taking place more on electronic data has made the life of accountant miserable. To illustrate a simple purchase made by customer on website or by using an app on mobile goes through number of accounting transactions. (The choice of product, the sale price, quantity order, discount thereon based on quantity, payment through credit card, debit card, cash on delivery, receipt of the goods at the hand of customer, entering such receipts in the books, rejection of whole or part of the goods ordered, acceptance of rejection of credit card and its consequences, charges to be paid to the credit card agency and other agencies involved in accepting orders, delivering the orders and making payment to the vendor etc. are involved even in just single transaction or in multiple transactions.) Vast technological changes in the human life not only in shopping daily requirements but also in shopping of luxurious goods, travel, medical, hospitality and inbound and outbound transactions have become so complex that an accountant not only has to be an expert in technology but has to remain extremely agile, conscious and always on toes. The biggest challenge before the accounting profession is not only to be an expert Individually having technical knowhow of advance technological application for accounting but also to have a good accounting team when the entire business environment and complete functions of an entity is running and functioning on SAP, Oracle, Spread Sheets or any kind of tailor made accounting software. Though standard famous accounting software like Tally 9 and Quick book are most popular and commonly used by small and medium entrepreneurs, the chances of mistakes, frauds and security theft is always lingering on any accountant in the organization.

4) Besides the challenges within the accounting professionals there are challenges from outside. The recent change in the new Companies Act requiring compulsory rotation of statutory auditors is one of the biggest challenges though for a limited few it is a golden opportunity. The amendment was incorporated in the section of appointment of auditors with a very noble cause. The continuity of the auditors with certain group of companies or management was sending messages that such auditors have become loyal and therefore may tend to compromise

while submitting the audit report. As they say that the justice is not to be done but it must appears to have been done, same way though auditors are independent the concept is that in the eyes of public it must appear that such auditors are independent. However the challenges before the profession is that substantial audit vacancies that have been causing are taken away by big firms applying various kinds of business tactics, marketing and other means. This is a big challenge particularly for small and medium size accounting firms.

5) Over and above the challenges of growth and increase in the accounting and auditing practices, there is a lingering challenge of coping up with compliance with the new Companies Act. Besides strict adherence to the Auditing Standards and also verifying the compliances of Accounting Standards there are now challenges before the accounting profession to see on continuous basis of fraud, mismanagement and non-compliance to statutory provisions by management and timely reporting thereof. As business increasingly span national borders, accountants have to deal with multiple accounting systems, provisions, Acts, regulations, rules and notifications. It has become extremely important to stay current as substantial changes simultaneously bring substantial challenges.

6) The list can be endless but to convey the important challenges before accounting profession is continuing demand for skilled professionals. Because of several regulatory compliance requirements are ongoing and workloads continue growing. The need for experienced personnel is rapidly increasing and not only accountants but even the businessman have to take stringent steps to retain and hire loyal skilled employees.

7) The auditors are historically known to be a watch dog. But now there is a paradigm shift and the role of watch dog is played more by shareholders, stake holders and Government agencies by deeply scrutinising financial statements and other informations including under RTI. There are financial activists, there are special scrutinisers and there are intelligence units who are keeping a vigilant eye on the performance of the accountants. Therefore there is a huge challenge before accountants to maintain highest ethical standards, remain independent and simultaneously exhibit great expertise and intelligence.

Challenges for Tax Professionals

1) Though in India Chartered Accountants who handle the accounts of the client or are involved in auditing of such clients are by and large also involved in preparation of the tax returns and presentation before tax authorities. The challenges face by the accountants, by and large are also the challenges for tax professionals. But there is a huge market of tax professionals who are either tax advocates or tax practitioner. Not strictly governed or monitored by any regulators. But with the increased scope of work and increased compliance requirements these tax professionals also have their own challenges. The first and foremost is the onslaught of computerisation, replacement of manual work by computers and most important online compliances instead of personal meetings and consequences thereof. As we all know earlier it was not possible to think of a tax professional's office without a typewriter. The typewriter

now has become an Antique piece and is replaced by Computers, Laptops, iPads and Mobiles. Everything is now Online.

2) One big challenge before the tax professional is the knowledge, art and mastery over computerisation in place of manual work. The challenges are there for computing and working out advance tax and online payment, compliances of TDS particularly online generating of Forms 16A, 26AS and filing of forms like 15CA,15CB, 26Q, 24Q etc. A tax expert will be thrown out of practice if he is not equipped with all these computerised environment and involving himself either by self or through adequate trust worthy supporting team. This is the biggest challenge one has to address very sincerely.

3) In my view the greatest challenge before the Tax Professional is educating the public on the need to have trusted, qualified and ethical tax professionals handling their tax matters. The competitive forces in the area of technologies developed for tax preparation try to replace qualified analytical thinking in the tax preparation process. The tax code is increasing in size and complexity every year. Software can only crunch the numbers: adding, subtracting, multiplying, and dividing. It cannot replace the qualified tax professional's ability to apply the correct law to one's tax situation.

4) The recent amendments in Income-tax Act penalising for incorrect details in tax audit report is not only the eye opener but is a big challenge for the tax professionals. Now the correctness of the details to be filed in such tax audit report, the relevance of reliance on the client, the in built systems of tax audit performed by article assistance , junior or dependable professionals and signing all will undergo an exercise of great care and caution. For a professional it is not a question of token penalty but is a matter of deciding whether it is a case of gross negligence or a simple error or a pardonable mistake. This is a big challenge for which all tax professionals have to tighten the belt and gear up for the new era of tax compliances.

5) For those tax professionals who are not governed by any regulators, were hitherto filing the return of income, the sole consequences of which was always on the assessee. But now just like prevailing practice in western countries a time has come when the name and details of the tax return preparer has to be mentioned. It will now be a case of direct accountability of a person who shall be filing the return of income based on audited accounts, relying on tax audit report, based on unaudited accounts given by the client or merely a return under presumptive taxation based on turnover. These are the challenges which are going to come which may saddle additional responsibility as well as liability on tax professionals.

6) Amongst tax professional another Big Challenge is the concept of new Government shifting from Tax Planning to Tax Compliance. Gone are the days when Tax Consultants were extremely busy in various kinds of Tax Planning of the clients and making them happy with reduced liability of Income tax and corresponding benefits in fees. With the amendments in Income tax like Introduction of special levy of Income Tax on assessee subject to Survey and search, drastic changes in levy of Penalties on them as also for Under reporting of Income and Miss reporting of income it is now going to be not only challenging but a herculean task for

tax professionals to file in real sense a true and correct Income Tax Return. In my view now those Professionals who guide and advice their clients to disclose true and correct Income will be more in Demand.

7) With a whole world having become a global village, the business are increasingly going GLOCAL Global and Local. The need of complying with Transfer Pricing Regime, both International and Domestic has to be seen as a big Challenge by the Tax Professional. Coupled with these the requirements of ICDS also is a big challenge as it applies to all assessees. The ready provisions on waiting of GAAR and such other increasingly steps to curtail tax abuse are going to have a tough and challenging time for tax professionals.

8) Last but not the least and at the same time most important challenge that is going to be faced by Tax Professionals is the incoming regime of GST. It is for the first time seen that for One Nation One Tax, Government is so proactive, working overnight and not only Ministry but hundreds of Officers are also working sincerely and diligently for a smooth and pre targeted introduction of GST. This new GST regime is going to be a huge Challenge as there are so many rules and forms to be taken care of and a proper and smooth compliance will lead the tax professionals to a totally new era of practice.

Challenges to the Accounting & Tax Professionals

Based on my analysis of Challenges and Opportunities to Professionals, after 20 years a Tax professional may be like

1) Having no books no paper on his table.

2) Surrounded by computer, laptop, mobile and electronic atmosphere round his neck.

3) Having his main office at a prominent place and a huge back office in remote area.

4) Submitting all compliances to Income tax Department or ROC by mails and mobiles and not sitting in corridors of Government Offices.

5) Attending regularly various coaching and training classes to appraise himself with latest changes and developments.

6) Reading newspapers, magazines and Articles online and not papers or print outs.

7) May be working along with his wife from home or travel destination.

8) Not signing any papers and doing with digital signatures, doing away with inwards and outwards and other filing in Box files but storing everything in cloud.

9) Concept of dressing in suit and tie will vanish and will meet M D and Chairman in Jeans and T-shirt.

10) Will forget how to write with a pen or ink and will work with fingers touch screens and receiving and sending all documents by scanning.

11) If not Robots but Artificial Intelligence will replace routine verification and auditing techniques.

12) Will realise the need of growth, both vertical and horizontal and consequently will involve himself in Pan India presence with networking of other foreign SME tax professionals.


CA T. P. Ostwal & CA Kush Vatsaraj

International Tax Disruption – Way Forward

Greek philosopher Heraclitus once said that "Everything changes and nothing stands still." What varies, however, is the pace of change. When change is gradual and incremental, it is possible to adapt to it without much difficulty – the last 50 years have seen subtle and gradual changes in international taxation laws. More recently, however, development has gone into overdrive, disrupting the very fabric of international taxation. The rate at which change is taking place is faster than ever before, yet, one can expect that future change will never be as slow as it is today.

International tax issues have never been as high on the political agenda as they are today. The integration of national economies and markets has increased substantially in recent years, putting a strain on the century old international tax rules. Weaknesses in these rules had created opportunities for base erosion and profit shifting (BEPS) – plugging such holes has required bold moves by policy makers, not only to restore confidence in the system but also to ensure that profits are taxed where economic activities take place and value is created. Over several decades, in step with globalisation of the economy, world-wide trade has grown exponentially. The significance of the tax provisions and rules used by tax administrations has increased in light of the growing international trade and the world economic crisis after 2008.

The general attitude and approach towards the ethics of tax avoidance has changed. While earlier, tax evasion was frowned upon, now the global consensus is that even tax avoidance is immoral. World over, citizens and activists, and in some cases even few countries, are pushing governments and corporations to shun sweat-heart deals, lax laws, aggressive tax planning and inadequate disclosure and to instead embrace tougher laws, more transparency and honest payment of "fair" share of taxes. Countries that had built their economy by advertising themselves as tax-havens are now facing pressure to mend their wayward behaviour. There is increasing bitterness towards large multinationals and their rich owners getting away with paying near-zero taxes and stashing money in, often undisclosed, offshore trusts and bank accounts.

This brings us to the first of many disruptions that the world has recently faced in the sphere of international taxation – increasing transparency and threat from whistle-blowers. The signing of tax information exchange agreements between many countries with counterparts that are known for harbouring tax evaders, unnamed offshore accounts and shell companies has resulted in tax administrations having access to more information regarding tax planning and possible evasion done by taxpayers. When legal channels of getting information fail, or when

conflicts of interest prevent information from getting out, whistle-blowers leak the data, often to devastating effect to the parties involved. Sometimes, other countries also purchase such data illegally and share it with other countries.

The outcry over tax evasion has been exacerbated by recent events which rocked the world – the "Liechtenstein Leaks", "Lux-Leaks", "Panama Papers", and "Portcullis Leak". These events shocked people, not only the ease by which tax evasion and avoidance had been taking place, but also by the scale of such practices and the involvement of politicians and other high profile figures. These leaks not only revealed how prevalent tax malpractices around the world are, they also showed that the very people expected to prevent such things from happening were often involved, to varying degrees, in their perpetration.

In the Lux-Leaks case, two former PwC employees passed on documents exposing Luxembourg's secret, sweet-heart tax agreements with multinationals to a journalist. Their earlier conviction by a lower court for leaking the documents has been appealed by their lawyers, who want them exonerated, arguing – as have tax campaigners and even Europe's competition commissioner – that they provided a valuable public service in divulging deals that deprived other countries, including Luxembourg's neighbours, of tax revenue. The case highlights weaknesses in protection for whistle-blowers. It has also spawned big changes.

One is a push to strengthen those protections. There is a fine line between leaking information about misconduct for moral reasons and for personal gains or to help the competition. Increased whistle-blower protection should be accompanied by more accountability and transparency in corporate and parliamentary governance. There should be inbuilt safeguards and maybe even incentives, for people to voluntarily come forward and report misconduct to independent bodies within the organisation or Government. Financial incentives however, may not be enough. Eliminating the fear against prosecution and ensuring protection from retribution by the exposed will go a long way in helping whistle-blowers make the decision of whether to come forward.

It would be bad for everyone if misdeeds only came to light through scandalous leaks to the media – the public trust in Governments and corporations would fall, and Governments and corporations would be unable to trust their officials and employees to handle confidential information with sensitivity. What the future needs is the creation of proper channels and mechanisms for those who obtain information that indicates or proves illegal or unethical activities to be able to report or pass on such information so that it can be investigated and that appropriate action can be taken.

Another fallout from information leaks is the backlash against corporate tax-trickery, which has sparked investigations into Apple, Amazon and others, and forcing tax havens to close egregious loopholes. While some of it may seem politically motivated, such as the European Commission's targeting of tax-deals given to US corporations, it cannot be denied that near-zero taxes paid by multinationals on profits of billions of dollars is a trend that deserves to be reversed. Scandals such as Petrobras-Odebrecht in South America, Samsung in South Korea, Rolls Royce in Asia and Europe, to name a few have added to the mistrust that the middle-class and poor have against "Wall-Street" and the "One Per cent".Politicians like Donald Trump and Narendra Modi have been able to leverage this sentiment to great effect. The impact this has on international taxation is that it forces Governments to take aggressive stances against even otherwise legitimate tax planning for the sake of electoral support.

The erosion of secrecy is another consequence. Governments are now being pushed to reveal information on their tax agreements with big companies and also give up previous withheld information regarding shell companies, trusts

and bank accounts. Many argue that disclosure of information by tax-havens is not enough – they demand the complete dismantling of unfair tax practices that are having adverse consequences on the amount of tax collected, and therefore the amount that can be spent by the governments on infrastructure, healthcare and the economy. The days of tax evasion through use of unnamed and untraceable bank accounts or layers of shell companies and trusts, are numbered. While protecting whistle-blowers does not necessarily require international cooperation, improving transparency and tackling tax-havens would fail without joint global efforts.

One such significant global exercise was the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS). The far reaching consequences of the BEPS project on the scene of international taxation were not anticipated when the project was announced in 2013. Although the G20 leaders agreed that measures had to be taken to counter aggressive tax planning, there was a great deal of scepticism whether such an ambitious project, requiring the consensus of so many countries, with many conflicts of interests, could be reached on the wide array of proposed measures. However, as it has been seen, despite the initial uncertainty and even outright derision for the effectiveness of the OECD's approach, many recommended provisions are already adopted in domestic legislation of numerous countries. The initiative by the OECD, which included the 15 'BEPS' Action Plans and the recently concluded "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS" (or the Multilateral Instrument "MLI"), was a giant step in consensus based, multilateral action against tax evasion. Earlier, multilateral co-operation at this scale and with such urgency had been reserved for preventing wars, protecting the environment and combating pandemics or famine. The coming together of so many countries that agreed to make wholesale changes so that tax laws are more standardised, consistent and more rational has disrupted the international tax paradigm.

Aside from addressing the increasing base erosion and profit shifting due to practices of global corporations, the initiative also seeks to tackle the challenges posed by the digital and technological revolution sweeping across the global economy. Governments and global organisations are increasingly concerned that some large digital companies are exploiting the mobility and intangible nature of digital platforms and goods to sidestep taxes. The BEPS project is part of a global drive to close the tax gap posed by the digital economy that looks set to transform tax collection worldwide. Future tax laws need to ensure that appropriate taxes on revenues derived from digital trade are levied and collected. However, if these laws are anything like the complicated hotchpotch that results from policymakers' hasty attempts to devise laws to "correct" perceived imbalances, they will make it more difficult and costlier to acquire digital technologies, conduct internet based business and significantly reduce the impact that digitalisation can have on global economic growth.

The BEPS Action Plan serves as a consensus-based guide for Governments on how to change tax laws with suggested minimum standards and measures and also as a commentary on what is acceptable and what is not. It is also an indication to corporations, on what lies ahead. The BEPS Action Plan and the MLI have successfully initiated a global change in tax laws and bilateral treaties. In addition to exhaustive guidance on taxing the digital economy, the BEPS Action Plan contains rules and measures designed to deal with a wide gamut of issues affecting international taxation such as transfer pricing issues, thin capitalisation, controlled foreign corporations, taxation of complicated transactions involving intangibles, improving transparency in reporting by corporations and tax administrations' access to information and documentation, improving dispute resolution mechanisms, preventing abuse of tax treaty provisions and limiting (or regulating) access to benefits under tax treaties.

India has already implemented several such changes in the past few years – introducing the Equalisation Levy, a Thin Capitalisation regime, Secondary Adjustments in transfer pricing, Country-by-Country Reporting requirements, Place of Effective Management Rules, and General Anti-Avoidance Rules. Other countries have also followed suit by adopting measures dealing with BEPS into their domestic laws. Corporations doing business globally obviously have to rethink their strategy and way of doing business in light of such changes.

Had a single country tried to take on such changes independently within such a short span of time, the likely disruption to other countries or to global corporations would not have been significant. However, when numerous countries, especially those large economies on which the economies of most other countries are dependent, agree to make these changes simultaneously, it is bound to cause serious disruption.

Bilateral DTAAs, which take years to negotiate and then to amend, were simultaneously amended when several countries signed the MLI. A significant number of signatories did not have bilateral agreements with other signatories to the MLI – they were spared the arduous task of having to negotiate them. Especially for those countries with smaller economies, negotiating treaties is a difficult task given their lack of bargaining power – being a part of the MLI gave them the position of an equal at the negotiating table. The MLI has potentially standardised and amended almost 3,000 treaties at once, helping to tackle treaty abuse. Global corporate structures that have been built with a view to take advantage of beneficial provisions under specific tax treaties would become redundant if such provisions are done away with or if they become available under all treaties. The benefits companies foresaw in creating a presence in favourable jurisdictions only to avail preferential treatment to capital gains and dividend could be wiped out, significantly affecting the profits or returns which were otherwise expected to be earned.

The impact of the BEPS Actions and MLI will not be felt only by corporates whose tax planning will be made obsolete. The countries which have so far centered their economy on multinational companies setting up shop on their inviting shores due to available tax arbitrage will face great upheavals when these multinationals decide to pack up and shut shop in light of the loss of future tax advantages. Unless these Governments have already come up with or can swiftly devise something to offer other than lower taxes and convince companies to stay, the post-BEPS hangover will leave behind a severe headache.

While multinationals and companies are facing concerns over the manner in which they conduct their global business, they are also increasingly coming under attack for just being global. A wave of anti-globalisation and protectionist nationalism is sweeping across the world. It started with the surprising decision by the UK to leave the European Union. Before the world had time to come to terms with Brexit, the proponents of free-trade, global integration and 'internationalism' were dealt another blow with the election of Donald Trump as the President.

On one hand, companies are facing increasing pressure to be more transparent in their global dealings, to stop resorting to aggressive tax planning and pay their fair share of taxes; on the other hand they are being bullied into sacrificing profits and the interests of their shareholders in favour of national interest. The concept of letting market forces and comparative advantage decide where capital should flow and how trade is done is being ignored. The increasing popularity of anti-globalisation and aggressive populist nationalism is being seen in countries like France, Netherlands, Germany, and Italy. Even in India, the strategy employed by Patanjali Ayurveda, the FMCG company promoted by Baba Ramdev, compares "foreign" MNCs to the East India Company and declares a war on them for trying to drain India's wealth. The popularity and ready acceptance of such rhetoric

is testament to the power of nationalism, which can bring decades of marketing strategy and brand building to its knees. This outlook which allows Donald Trump to threaten the building of an actual wall at the Mexican border has the potential to disrupt not just international taxation, but international trade also.

Global trade is no longer driving global growth like it once was. In 2016 it grew at just 1.7%, lagging world economic growth for the first time in 15 years and for only the second time since 1982, according to the World Trade Organisation. 2017 is expected to see a further slowdown. The decline in cross-border lending and FDI and increase in protectionist measures will have profound implications for cross border trade and capital flows. If more countries follow suit and embrace anti-globalisation and nationalistic stances, there is no telling what damage can be done.

There is also increasing pressure on public finances, post the financial crisis of 2008, which had a lasting impact on economies, leaving several countries with problematic budget deficits. Governments are struggling to fund public spending in critical areas such as education, healthcare and infrastructure. Several governments have required bailouts from international financial institutions, compromises with bond-holders and even resorted to selling government assets. With countries unable to afford more debt and stimulate domestic savings and investment, raising tax collections through rate increases or base widening appears to be the only option. Against the backdrop of an increasingly globalized economy, governments have decided to establish a more integrated worldwide tax framework and re-examine many branches of international tax law.

Corporate tax rates across the world are falling by themselves as economies mature, the cost of collection of tax and administration falls, and the domestic tax base widens. However, tax advisors and corporates must accept the fact that the era of complicated structures and zero-taxes is gone. Only embracing the disruption and changes and adapting their practices to suit the reality of the future rather will enable them to deal with the changes. Implementing leaner and less complex structures that are more flexible to changing global tax laws and trends are more suitable than multi-layered, complicated structures of the past.

While some disruptions are affecting the principles of taxation, another disruptor will change the way tax administrations work. Till now, tax administrations could afford to adopt a wait-and-see approach to innovations and technological advances – there was never a real urgency for tax departments to heed technological disruptions. Today however, that luxury is no longer available.

Information, or data, is power is today's world. Taxpayers constantly upgrade technology and adopt digitisation and have access to greater quantity and better quality data which is far superior to that at the taxman's disposal. Today, those who possess the ability to gather data quickly and accurately, manipulate it and turn it into knowledge will be better placed to reap the benefits from this era of unprecedented innovation. The tax industry is fair game for disruption. Technology has already shaken up and revolutionised several industries. Taxation is no exception. Those in the tax field must now brace themselves to disrupt or be disrupted.

One only has to look at the many tax administrations that are already embracing technological change today with the goal of improving data collection and ultimately boosting tax revenues. Countries in the emerging markets, including Russia, Mexico and Brazil, have taken the initiative in embracing digital to help with their tax efforts. The trend is also visible in developed countries such as the UK, which has declared its plans to make its tax system fully digital by 2020.

The outcome of technology is that the tax function is now being disrupted by what was once thought

of as an effective, but rather sleepy governmental agency. Tax authorities have moved swiftly from paper tax returns to e-filing. The next natural step is to move to e-accounting, e-matching and e-auditing. Some are now at the beginning of e-assessments, where traditional tax returns will be replaced by digital tax accounts. This is all possible because of real-time and large scale data collection and analysis digital tools. Brazil planned to go live in 2016 with its e-Social programme, a module of its standardised public digital bookkeeping system, which will require companies to file electronic books with payroll information to capture data faster and to assess real-time.

Digital automation advances, through process automation, will see software programmes replace people in performing repetitive, form driven tasks. Those people, in turn, will be leveraged to perform less standardised assignments. Further, cognitive artificial intelligence will bring more change, putting high level planning decisions in the hands of computers boosting the efficiency and capacity of e-assessments, grievance-redressal and also reduce costs of tax administration. Errors will reduce. Analysis will improve. Reduced human interaction will reduce the scope of corruption and harassment. Global co-operation will be improved, with tax administrations able to share information and insights at the click of a button.

In the current scenario, international taxation is undergoing numerous, significant disruptions, that too simultaneously. While the recent disruptions in the field of international taxation have had both positive and negative impacts on Governments and corporations, one clear winner has emerged – professionals in the field of taxation. The experts who have built their business by assisting corporations with structuring, tax planning, setting up and conducting business and in navigating the often rough seas of global tax and corporate laws greatly benefit from the scale and pace of disruptions. Lawyers have benefitted from rising litigation and legal compliances required by increasingly complex regulations around the world. Accountants who understand the various reporting and disclosure requirements across jurisdictions and are able to be creative within the bounds of the law are in great demand. However, professionals also face the danger of backlash if they are seen as promoting "corrupt" practices and helping their corporate and HNI clients get away with "theft". The mantra of innovate or perish has never been truer for tax professionals.

It is important to choose the right strategy for the future when the pace of change in business models, regulation and technology continues to accelerate. The answer to riding the wave of changes is adopting the right technology, processes and people. Tax departments can no longer afford to pursue a wait and see strategy when it comes to adopting the latest technological advances. While many disruptors of international tax are from within the field, some are external.

Dealing with the internal disruptors such as increased data sharing and transparency due to tax information exchange agreements, the BEPS project and MLI, etc. will largely require dealing with changes in the law. These changes, though significant, will be easier to deal with since they will take place mainly on the basis of taxation considerations. Dealing with external disruptors such as technology and digitisation, changes in geo-political and socio-economic outlook and attitudes, and every changing global supply and value however, will be less straightforward since these changes will be driven or guided primarily by non-tax considerations.

Heraclitus was correct in saying that change is inevitable. The way forward is trying and anticipating the direction of change, being prepared for when such changes eventually occur, and by being nimble enough to deal effectively with the unforeseeable changes. The only way to beat the disruptions, however, is to cause or be the disruptor yourself.

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GST – Changing Landscape of Indirect Taxes

With the receipt of Presidential assent to the four bills, The Central GST Bill, 2017; The Integrated GST Bill, 2017; The GST (Compensation to States) Bill, 2017; and The Union Territory GST Bill, 2017 Goods and Services Tax (GST) will soon become a reality in India. The present article intends to highlight the transformation of indirect taxes from multiple levies to a single levy of GST.

In India legislative powers have been divided between the Union & the State Governments by way of a Union List, State List & a Concurrent List. Both the Centre and the States enact laws as per the mandate in the Constitution.

Presently, the Constitution of India empowers the Central Government to levy excise duty on manufacturing and service tax on the supply of services. Further, it empowers the State Governments to levy sales tax or value added tax (VAT) on the sale of goods. This division of fiscal powers has led to a multiplicity of indirect taxes in the country. In addition, Central Sales Tax (CST) is levied on inter-State sale of goods by the Central Government, but collected and retained by the exporting States. Further, many States levy an entry tax on the entry of goods in local areas. Taxes by Union Government, State Governments and the local Governments have resulted in difficulties and harassment to the taxpayer as the taxpayer is required to deal with several authorities and maintain separate records for each of them.

Though all indirect taxes share some common feature, each of these taxes are different from each other in various aspects such as purpose of levy, taxable event, rates, threshold limits, etc. There are separate compliances for each such tax and each tax law has its own exemption/ concession lists.

Various Indirect Taxes levied in India

Let us first have a look at the few of the indirect taxes that are applicable in India:-

1. Excise Duty

Excise Duty is an indirect tax levied on those goods which are manufactured in India in terms of Entry 84 of the Union List of the Constitution of India. The taxable event in this case is manufacture and the liability of Central Excise duty arises as soon as the goods are manufactured. It is a tax on manufacturing which is paid by the manufacturer, who passes its incidence on to other customers and recovers the same from them.

The rules and provisions as mentioned in the Central Excise Act, 1944 are applicable for the levy of excise duty in India. This tax is levied by the Centre.

2. Service Tax

Service Tax is a tax which is levied under Entry 97 of the Union List of the Constitution of India on the services provided by a service provider in India. As on date, service tax rate is charged at the rate of 14%. In addition to this, Swachh Bharat Cess (0.5%) and Krishi Kalyan Cess (0.5%) are levied bringing up the applicable rate to 15%. Small service providers with an income of less than INR 10 lakh per annum are exempted from paying this tax.

3. Value Added Tax (VAT)

VAT stands for Value Added Tax and is levied on the sale of goods in India. VAT is levied at all stages of the sale & distribution channel that include an instance of value addition. The term 'value addition' means that the increment in the value of goods at each stage of its sale or transfer. VAT is basically a State subject, derived from Entry 54 of the State List of the Constitution of India.

4. Entry Tax

Entry tax is levied under Entry 52 of the State List of the Constitution of India. This tax is levied on the movement of goods from one State to another and is imposed by the recipient State to protect its tax base.

5. Customs Duty

Customs duty is an indirect tax which is leviable on import & export of goods. The Customs Act, 1962 provides the regulations on the levy and collection of this duty, import and export procedures, penalties, prohibitions, and offence.

6. Stamp duty

This indirect tax is charged by the State Governments on the transfer of immovable property within their jurisdiction. In addition, stamp duty is mandatory on all types of legal documents. The rates of stamp duty vary from one State to another.

7. Entertainment tax

The State Governments charge such tax on every transaction related to entertainment. Some forms of entertainment on which entertainment tax is levied include amusement parks, video games, arcades, exhibitions, celebrity stage shows, sports activities etc.

Challenges in the current Indirect Tax regime

Having had a look at few of the indirect taxes applicable in India and the governing bodies for the same, let us consider the various pain points in the present indirect tax regime.

1. Cascading effect

To understand the basic problem of cascading of taxes, let us take an example. Suppose Mr. X sells goods to Mr. Y for ` 100 and charges sales tax (say ` 5); then Mr. Y re-sells those goods to Mr. Z for ` 120 after charging sales tax (say ` 6). While Mr. Y was computing his sales tax liability, he also included the sales tax paid on previous purchase i.e. ` 5 in his sale price as the same was a cost to him, which is how it (` 6) becomes a tax on tax.

This was the case with the sales tax few years ago. At that time, VAT was introduced whereby at every next stage, person gets credit of the tax paid at earlier stage. This means that when Mr. Y pays tax of ` 6, he deducts ` 5 paid earlier.

An identical concept is also present in Excise Duty and Service Tax, in the form of the CENVAT credit scheme. The problem of cascading effect of taxes

was resolved to a large extent, by these measures.

However, the current system of multiple levies distributed between Centre & States results into cascading (i.e. tax on tax) effect as no credit of State duties (VAT or stamp duty) is allowed against Central Tax. CST credit paid in the originating State is also not allowed as credit in the receiving State. This results in the increase in the overall burden of tax in the hands of end customer and creates distortion in the market.

2. Exemptions & concessions

Under the current taxation system, the Governments at Centre and the States have granted various exemptions & concessions to give benefits to different goods/ services. This grant of exemption leads to the distortion in the concept of tax on value addition alone and thus, breaks the credit chain. Also, these kinds of benefits do not create a level playing field especially when the same commodity is taxed at different rates in different jurisdictions.

3. Lack of uniformity in provisions and rates

The present VAT structure & provisions across the States lacks uniformity which is not restricted only to the rates of tax but also the credit provisions as well as procedures. This leads to ambiguity and lack of clarity at the end of businesses.

4. Multiple points of taxation

Under the current system there are multiple points of taxation. Excise is levied when goods manufactured are cleared from the factory premises, State VAT is levied on sale of goods. Entry tax is levied on entry of goods into a particular State.

5. Disputes in classification of transactions as goods or services

Under the present regime, due to the federal structure of the Government and the splitting of the legislative powers between the Centre & the States, a transaction which involves both goods as well as services often becomes a subject matter of disputes as there is no single authority which can tax such a transaction in a wholesome manner. This at times also leads to the situation wherein there is overlap of the taxation base.

6. Narrow base

Due to different thresholds under different laws as well as numerous exemptions and concessions, the current tax base under indirect tax is narrow.

As seen above, the current indirect tax regime is very complex and structured in such a way that results in loss of credit of taxes paid at various stages thereby breaking the credit chain. This results in cascading effect on taxes which can be one of the major contributors to the inflation in prices of the final products in the hands of end consumer. The present indirect tax structure also contributes towards hindrance to open market and results in concentration of industries in States with lower tax rates which in turn affects the growth of States charging higher taxes.

GST is going to be one of the major tax reforms for Indian economy and a real game changer for most of the businesses. GST will subsume various Central and State taxes and provide common levy for supply of both goods and services. Some of the taxes getting subsumed in GST are excise duty, service tax, sales tax, entry tax, luxury tax, entertainment tax, etc. One of the prominent features of GST is the shift from origin based levy (as under the current indirect tax regime) to destination based consumption levy. Further, GST law aims to integrate the economy by allowing the free movement of goods and services across the States which will

provide common market for all the businesses and aid in reducing the distortion.

To begin with, let us now have a look at how GST is going to contribute in addressing the pain points of the industries under the current indirect tax structure.

One of the objectives of GST is to provide one tax for whole nation. This does not mean that there will be just one rate of tax for the entire nation. Since the Constitution has given the States the power to charge GST at rates within a band, it is quite possible that there can still be different State GST rates across the country which would lead to differential rates of GST across the country. But, the intention of this law is to remove the bottlenecks and allow seamless flow of credit across the country, barring few exceptions.

Today, credit of Central taxes such as excise duty, service tax, Central Sales Tax, etc. cannot be used to discharge State tax liabilities and similarly, credit of State VAT, entry tax, entertainment tax etc. paid cannot be utilised for paying off the Central tax liabilities, excise duty or service tax.

A close reading of the GST Acts, would reveal that the above objective of allowing seamless flow of credit may not be achieved completely as there would be a restriction on cross utilisation of CGST and SGST *inter se*. However, one can appreciate the fact that credit of IGST will be available for payment of IGST, CGST & SGST, in the same order which can be a beneficial provision as against the current restriction on availability of credit of CST. Nonetheless, one must keep in mind that the grant of credit is a benevolent provision available under the law and is not a right of any taxpayer. Hence, certain restrictions will continue to be placed on availability of input tax credit, such as those used for purposes other than business, some specified goods and services and so on.

Another objective of GST is to allow free movement of goods and services by rationalising the tax structure. Currently, due to levy of Central Sales Tax on inter-state movement of goods with no concessional tax rates and no input tax credit benefit, goods cannot move free across the State boundaries. Business decisions relating to procurement and supply of goods are governed by the tax incidence to be borne of such procurements and supplies. This certainly is an impediment to the open market and free trade across the country. In GST, since every movement of goods to a different registered person will attract levy of GST and the credit of the same will be available to the recipient, there will be a little scope for any credit blockage. Hence the free flow of credit will permit free movement of goods.

GST also aims to address another major issue relating to dual taxation on a transaction, one by Central laws and the other by State laws. In GST, both Centre & State will be entitled to levy taxes on goods as well as services, the dispute relating to taxing authority for such supplies would subside. For instance, transactions relating to works contract and supply of food as part of services have always been a matter of dispute before the Courts with regards their classification as goods or services. Similarly, transactions involving transfer of right to use goods have time and again been area of contention between Centre and States for levying taxes. Under GST law, such transactions have been clearly treated as supply of services and will be taxed accordingly.

Powers granted to Centre and State

Constitution (101st) Amendment Act, 2016 empowers both Centre and State to make laws with respect to GST. Nevertheless, some exclusive powers have been retained by Centre to tax supply of goods and/or services in the course of inter-State trade or commerce. To that extent, supply of goods and/or services in the course of import into the territory of India have

been deemed as inter-state supplies. However, the tax so collected by the Centre on the inter-State supplies will be shared between the Centre and States.

States and Union Territories have also been empowered to levy and collect GST on supplies made in territorial waters.

With grant of such extensive powers to both Centre and States simultaneously, the next key concern for the businesses will be dual administration. Where on one hand the objective of GST is to remove the difficulties faced by the assessees in dealing with different tax authorities, grant of such powers to both authorities for tax administration does not seem to be resolving their concern. In fact the above issue relating to cross-empowerment for tax administration has also been an issue for debate between Centre and the States. A consensus on the much-debated issue on the administrative split on the above was reached in GST Council's meeting on 16th January, 2017.

As per the press news, 90% of total assessees with a turnover of ` 1.5 crore or less will be administered by State authorities and remaining 10% assessees will be administered by the Centre. All assessees falling above that limit, will be administered by both Centre and States in a 50:50 ratio. However, there is no clarity on the mechanism to be adopted for splitting the assessees in above ratios. Unless a proper mechanism is adopted for calculating the above ratios, one assessee may still have to deal with two tax authorities.

Though as an administrator, both the Centre and the States have reached to a consensus and resolved the disputes between them, whether this is also going to resolve the concern of the businesses relating to dual administration can be answered only once there is clarity on the above division of assessees.

Deferment of GST on Petroleum products

Contribution of petroleum products in total sales tax revenue of States varies from 15% to 30%[1]. Fearing the loss of this significant chunk of revenue in the GST regime, the States did not agree to share this revenue with the Centre. Considering the demand of the states, the five petroleum products namely, petroleum crude, high speed diesel, petrol, natural gas and aviation turbine fuel have been kept outside the ambit of GST for the time being. These five products will be subsequently covered under GST as they are specifically mentioned in the Constitution (101st) Amendment Act, 2016. However, the levy and collection of GST on the same has been deferred for few initial years of GST era. In the meanwhile, Centre and State will continue to levy the current duties and taxes leviable on the above products. The above decision for keeping these five products outside GST is a measure to support States for few initial years in the GST regime. It appears that gradually when the States' revenue share under GST will stabilise, these products will be eventually brought within the ambit of GST. This is required as most of the companies using petroleum products as their inputs will lose the input tax credit which is against the basic premise of GST.

On a concluding note, we should appreciate that every law has its own pros and cons and GST which will transform the indirect tax regime in India is no exception. However, businesses can derive benefits by understanding the law and ensuring transition to the same in a smooth manner.

1. Sample data taken for calculation from states of Maharashtra, Gujarat, Uttar Pradesh and Tamil Nadu


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GST : A New Era of Co-operative Federalism in India

The GST is the largest ever tax reform in the fiscal history of India. It charts a new course for fiscal federalism in India that focuses on co-operation as against self-interests. It is a giant leap from the legacy tax system to one more suited to the needs of a dynamic and vibrant economy that India is today.

The spirit of co-operative federalism requires both the Union and the State Governments to sacrifice their fiscal autonomy in favour of a collective decision making process. The giving up of the fiscal autonomy is unprecedented and reflects that the Modern economy of today calls for increasing co-operation among the economic players for the common good, as against focusing on individual gains. The collective action is significant, given that increasingly the transactions are becoming global in nature and not confined to the boundaries of the States.

The current taxation system in India provides truncated taxation powers to the Centre and the States and is not in tune with the modern businesses and the complex supply chains. For instance, the Centre cannot levy taxes on goods beyond the point of manufacture and the States do not have the have the powers to tax services. The patchwork of taxes has led to balkanisation of the common market and fragmentation of the supply chains. The differential taxes in different States give rise to arbitrage opportunities. Taxes such as Central Sales Tax (an origin-based tax) and Entry Tax being non-creditable further add to the costs of businesses. To add to the woes, India has about 600 check posts. Goods carriage vehicles in India barely travel 280 km. per day against a world average of 400 km. per day. The World Bank has observed that 60% of truck drivers' time is spent off-road, negotiating at check posts and at toll plazas.

The GST overcomes these gaps. While the States will get the power to tax both goods and services, the Centre will be able to levy taxes beyond the manufacturing point, across the full supply chain. At the same time, the tax provisions that restricted inter-State movement of goods within the country will now be dispensed with. These provisions are absolutely fundamental to modernising the tax system and making it simple and efficient. GST will be supply chain neutral and will obviate the need for bundling or unbundling of goods and services for taxation purposes.

About 150 countries have implemented GST and India will soon join this club. However, India stands apart for the unique GST design that it has adopted. India's GST is unique in several respects, as brought out in this article that compares India's GST model with that followed in other jurisdictions.

GST in a Federation

There are two dimensions or challenges of designing a GST in a federation– whether the Centre and the States should have complete autonomy in levying and collecting the taxes or if they should collectively agree to have their individual taxes consolidated into a single national tax, the revenues from which get shared in some agreed manner among the constituent units. Countries like Australia, China, and Germany have adopted the model of a single national tax. Canada and India are the only two countries that follow the model of dual GST, preserving the autonomy of the States to levy their own tax.

In China, the VAT law and administration is centralised, but the revenues are shared with the provinces.

In Australia, the GST is a single national tax which is levied and collected by the Centre, but the proceeds of which are allocated entirely to the States. Revenues are shared through a horizontal fiscal equalisation formula, taking into account the State's public service needs, and its ability and efforts to raise revenues. The objective of the formula is that all the States have similar services and infrastructure. At the same time, any changes to the GST rate and some base elements need an agreement of all the States. The States agreed to subsume most of their transaction taxes which were giving rise to significant economic distortions. This arrangement, binding on all States, is governed by an inter-Governmental agreement outside the Constitution. The GST design is determined by a ministerial council, by consensus of all Governments.

In the EU, individual members have full fiscal autonomy to levy taxes as sovereign States. However, each member State is required to levy a value-added tax (VAT), which conforms to the EU VAT directive, approved by unanimous consent of all member States. The Directive, while giving some flexibility in VAT implementation, mandates significant harmonisation of tax base and rules. Member States have flexibility to set rates, but not below the specified floor rates. There are clear consequences of not implementing the agreed policy and the countries that do not implement VAT in the agreed form have the risk of losing their EU membership. Moreover, the Directive itself is binding on all of the Members, and any tax provisions in conflict with the Directive are not enforceable.

Under the Canadian model of the Harmonized Sales Tax (HST), the tax is levied as a combined federal and provincial tax in the participating provinces. Tax design and collection are controlled by the Centre, but the provinces have some flexibility to vary their tax rate. The provincial component of the HST is levied following the destination principle, and the revenues are collected are allocated among the federal and provincial Governments accordingly.

India has adopted a dual GST, which will be levied on a given base by both the Centre and the States concurrently. An Integrated GST (IGST) would be levied on inter-State supply (including stock transfers) of goods or services. Even within the dual tax structure, there are further special features in India's GST. The key among them is harmonisation between the GST adopted by the Centre (CGST) and that by the States (SGST).

In any dual tax structure, harmonisation between the two tax structures is critical for the success of the tax design. In Canada, the harmonisation is achieved by the Centre and the States agreeing to a common design. The provinces planning to levy the GST enter into an agreement with the Centre to levy a Harmonised Sales Tax (HST), with two components – federal and provincial. Harmonisation is optional and some provinces in Canada continue to retain their own tax structures instead of adopting HST. As against this, the Indian GST requires all the States to replace their existing taxes by GST. Harmonisation is not an option, but a prerequisite to GST implementation.

GST in India involves transfer of powers from individual Governments to a collective body, the GST Council, consisting of the finance ministers of the Centre and each of the States. The guiding principles of the GST Council are (a) development of a common national market, (b) equal treatment of all States, (c) the destination principle of taxation, (d) minimisation of compliance costs to the taxpayers, and (e) uniformity of the exemption list across all jurisdictions.

In Canada, the discussions between the federal and provincial governments are bilateral. The provinces have the autonomy to accept or reject the federal GST design. In India, any discussions relating to harmonisation of the design and other features of GST are an outcome of the collective decision by the GST Council, ratified by 75% majority. A consequence of this arrangement is that the GST design can have only limited variations, collectively allowed by the GST Council. An interesting feature is that even though the States do not have individual autonomy, they can collectively influence the outcome of the GST Council and can prevent the Centre from proceeding with the preferred federal design. Thus, the Indian GST forces the Centre and the States into a compromise, which is reflected in the final GST base, rates and administrative features.

Taxation of Cross-border transactions

Treatment of inter-state and international supplies of goods and services is one of the most crucial elements of the design of a Dual GST. Under a sub-national destination-based VAT, taxation of cross-border transactions poses a significant challenge in the absence of any inter-state fiscal border controls. Even if such border controls exist, taxation of services is a serious challenge. Cross-border VAT leakage is also a growing concern in the EU because of the removal of border controls between member countries.

In virtually all countries, VAT is levied on the basis of the destination principle.Application of the destination principle entails specification of the place of supply rules to define the destination of supplies. Exports are then zero-rated and imports attract tax at point of entry into the country. For application of tax on imports of services and intangible supplies, the reverse charge rule is used. Because of difficulties in applying the reverse charge to B2C importations, non-resident suppliers of electronic services (and other specified services) are increasingly being asked to register for the tax, and are required to collect and remit the tax on imports into the country.

The dual GST model of India entails application of the destination principle at both international and inter-state levels. The framework for application of GST at the international level is the same as elsewhere. However, its application at inter-state level is unique. In Canada, inter-state supplies attract tax of the destination state. In India, inter-state supplies attract IGST, which is then used as a clearing mechanism to settle outstanding SGST credits and debits.The place of supply rules in India are more complex as they entail determination of both 'to' and 'from' of each supply.Even self-supplies between two registration numbers would be treated as any other supply and will be subject to tax.

In the Indian GST model, the application of tax switches from SGST to IGST, depending on the location of the supplier. This is a unique and complicated feature. The Constitution does not give the States the mandate to apply the tax on suppliers who are not residents within the State. The system could have been simplified immensely by simply applying the destination based tax, irrespective of the location of the supplier. Such a system is followed in Canada.

Had India adopted the Canadian model, the States would have had the power to tax the supplies in their State, irrespective of the location of the supplier.

Brazil does not have a single comprehensive tax on goods and services. Rather, it has separate

taxes on goods and services, some levied by the Federal Government and others by local/sub-national Governments. Because the taxes are not levied purely on the basis of destination, the Brazilian model suffers from several compliance and administrative issues, and tax exporting and tax competition problems. These problems remain unresolved and there is no political consensus on a suitable model for the GST application.

GST Base

Within the broad structure of a consumption-type, destination-based, credit-invoice GST, ideally, the tax should be levied comprehensively on all goods and services at a single rate to achieve the objectives of simplicity and economic neutrality. However, Governments often deviate from this ideal either because of concerns about distribution of tax burden (e.g., food), or because of administrative and conceptual difficulties in applying the tax to certain sectors of the economy (e.g., health care, education, and financial services). Inevitably, there will be calls to exempt, or tax at a reduced rate, items of importance to the poor or other particular groups.

Many of the jurisdictions apply VAT/GST to a comprehensive base with minimal exceptions. For example, New Zealand applies GST to a very comprehensive base. It applies to all goods and services, with the exception of exports, a small list of financial services and certain real estate transactions. Even in Australia, most supplies are subject to GST. Due to socio-political demands, the list of zero-rated supplies is slightly broader compared to New Zealand and includes basic food supplies, medical services and drugs, education and child care. But, exemptions (as opposed to zero-rated supplies) are fairly narrow and include exemptions of some financial services and residential rentals.

Europe too applies VAT on a relatively comprehensive base. However, there are variations in individual countries with regard to exemptions. Zero-rating is not allowed by VAT directives other than for exports to non-EU countries. However, domestic zero-rates exist in practice in some member States as a result of accession negotiations (i.e., continuation of special provisions that existed prior to accession to the EU). For instance, supplies of basic food, children's clothing, and new houses are zero-rated. The VAT directive also prescribes the supplies that EU countries must exempt, such as medical and dental care, social services, education as well as most financial and insurance services and certain supplies of land and buildings etc. The countries do have the flexibility to provide exemptions to other supplies too.

In India, significant deviations from the international practice of taxing a comprehensive base have evolved due to the requirement of harmonisation and majority consensus of the GST Council. As a result, the GST base is narrow and excludes significant sectors. Some items are not included in the GST base by the Constitutional arrangement itself (e.g., exclusion of alcohol) and even where the items are within the scope of the base in the Constitution, many exemptions have been made. Spurred by the fear of letting go of their exclusive powers, the States have insisted on the exclusion of large chunks of the economy such as petroleum, alcohol, electricity and real estate from the GST base. Even services such as healthcare and education are likely to be exempted from GST.

Even though GST is meant to be a transformational tax, the exclusions reflect the legacy mind-set of the Governments. Those goods and services that are currently not subject to excise or service tax or VAT will remain outside the base and no credit will be provided for the inputs used in these sectors. For instance, at the demand of the States, land (and real property) have been excluded from GST on the grounds that it is already subject to stamp duty and registration fee. Countries like Australia, Canada, Singapore, South Africa, China, and

New Zealand apply GST to land and real estate even though they may also be subject to land transfer taxes.

Similarly, alcohol and petroleum have been exempted from GST at the States' insistence as they want to retain the exclusive right to tax alcohol and the autonomy in setting the taxes levied by them on petroleum, both of which are important sources of revenue for them. Given the socio-political considerations, health and education sectors also remain outside the GST ambit.

Exclusion of these significant sectors would have serious adverse consequences for the sectors and the economy. Further, it would lead to escalation of tax rates as the base becomes significantly narrow.

In most modern VAT jurisdictions, all transactions in commercial real property are taxable. Transactions in residential property are also taxable up to the point of first sale. Resale of residential property or long term rental of residential property are exempt. This is the system that prevails in Australia, Canada, New Zealand, Singapore and Japan. In Europe, all real property transactions are exempt from tax, but member States can grant an option to the suppliers to opt in or elect to pay tax on real property supplies. Where this option is available, it is to the advantage of supplier. To elect for this option, especially for commercial properties, any output tax collected by them on such supplies would be creditable to the recipients. Any tax paid by the suppliers on the construction inputs will also eligible for input tax credit.

India has followed a unique approach of taxing the real estate sector. Except for sale of land and completed real properties, whether new or used, everything else is taxable under GST. Thus, supply of real property prior to finish of construction or by lease or rental arrangements are subject to tax under GST.

The tables below give a comparison of the GST base in other countries compared to India on the main items in the consumer basket.

Taxation of necessities under GST

Country	Food	Clothing	Education and healthcare
Australia	Zero-rated	Taxable	Zero-rated
Canada	Zero-rated	Taxable	Zero-rated
China	Taxable	Taxable	Exempt
EU countries	Variable: Taxable or Reduced rate	Taxable	Exempt
India	Taxable	Taxable	Exempt
Japan	Taxable	Taxable	Taxable
New Zealand	Taxable	Taxable	Taxable
Singapore	Taxable	Taxable	Taxable
South Africa	Taxable	Taxable	Exempt

Taxation of demerit goods under GST

Country	Petroleum	Electricity	Tobacco	Alcohol
Australia	Taxable	Taxable	Taxable	Taxable
Canada	Taxable	Taxable	Taxable	Taxable
China	Taxable	Taxable	Taxable	Taxable
EU countries	Taxable	Taxable	Taxable	Taxable
India	Exempt	Exempt	Taxable	Exempt
Japan	Taxable	Taxable	Taxable	Taxable
New Zealand	Taxable	Taxable	Taxable	Taxable
Singapore	Taxable	Taxable	Taxable	Taxable
South Africa	Taxable	Taxable	Taxable	Taxable

It is recognised that exemptions (as opposed to zero-rating, or taxation at reduced rates) cause significant distortions in a GST system. They lead to cascading, which creates distortions in the economy. The benefit of an exemption is lost if the tax is applied at the next point in the supply chain. They often hurt the competitive position of domestic producers, who suffer the burden of blocked input taxes. Moreover, they complicate administration and increase the risk of tax evasion and avoidance. Exemptions also benefit all consumers, regardless of their income. The bulk of the benefit goes to upper-income households who spend the most. They are thus mistargeted subsidies to the rich.

GST Rates

Successful GST models adopted by other countries have a very broad base and a relatively modest tax rate, especially at the time of inception. For example, the New Zealand GSTwas introduced at the rate of 10%, with a base consisting of virtually all goods and services (with the exception of financial services). The Singapore GST was introduced at 3%, but the rate has now been raised to 7% to meet the additional revenue requirements of the Government. In international jurisdictions, it is recognised that GST at high rates would encounter significant consumer resistance, especially at the retail level, and would give rise to pressures for exemptions and/or lower rates for items of daily consumption. With the notable exception of Scandinavian countries, where the tax is levied at the standard rate of 25%, few countries have been successful in levying and sustaining a VAT/GST at rates in excess of 20%.

Also, many of the countries with VAT/ GST earlier had multiple rates but are now converging to a single rate. For instance, China has multiple rates, but these are only transitionary. It is anticipated that ultimately, the Chinese VAT will have only two rates, i.e., 11% and 17%. In the case of demerit/luxury goods, a non-creditable supplementary excise is levied over and above the VAT.

As against this, India is set to introduce GST with a multiple rate structure. There would be four tax rates for goods, namely 5%, 12%, 18% and 28%. Services will also have two or more rates. Besides, some goods and services would be under the list of exempt items. Precious metals will attract a separate rate, yet to be decided. A cess over the peak rate of 28% on certain specified luxury and sin goods would be imposed for a period of five years. The cess collections will be used to compensate the States for any revenue loss on account of implementation of GST.

The tables below provides the GST rates in some of the jurisdictions with GST/VAT.

Selected statistics on VAT Rates around the World

	Sub-Saharan Africa	Asia-Pacific	Europe	Middle-East and Central Asia	Western Hemisphere	World
Number of countries	38	21	41	20	32	152
Number of countries with multiple rates	13	4	38	9	19	83
Share of countries with multiple rates (%)	34	19	93	45	59	55
Maximum Standard Rate (%)	20	17	27	20	22	27
Minimum Standard Rate (%)	5	5	15	5	5	5

Source: IMF

GST rates: International experience

Country	Single
Australia	Single rate at 10 per cent Zero-rated: Some supplies are GST-free (e.g., basic food supplies, most medical services and drugs, education, child care
Canada	Single rate of 7% at inception, now reduced to 5%
China	Standard rate of 17 per cent and 5 lower VAT rates (13%, 11%, 6%, 5% and 3%)
EU countries	Floor rate of 15 per cent under the EU VAT directive, with no maximum. In practice the rate is between 17 to 27, with 21.5 per cent average Two reduced rates are allowed for certain goods and services, but not lower than 5% At the same time, different concepts exist such as super reduced rates (below 5%), parking rates and zero rates kept from before 1991, and some regional VAT rates
India	Multiple rates - 5%, 12%, 18% and 28%. Separate tax rate for precious metals
Japan	Single rate of 3% at inception, now increased to 8%
New Zealand	15 per cent single rate Very narrow list for zero rate (e.g., exports, sale of ongoing business, emission unit transactions)
Singapore	Single rate of 3% at inception, now increased to 7%
South Africa	Single rate of 14%

As can be seen from above, the international trend is to levy the VAT / GST at few rates, if not the single rates. Out of 152 countries who have GST, 69 have a single tax rate. Even those who have multiple rates, the number of rates is likely to be not more than 3. Moreover, the level of tax rates itself is much lower than what has been proposed in India. The average standard rate of all the GST countries is only 15.4%.

Another important aspect is that in all countries with VAT/ GST the GST rates are common for both goods and services. India, however, proposes to apply a different rate (18%) for most services as opposed to goods, the bulk of which are likely to be taxed at 12% or 28%. The different rates for goods and services may lead to distortions. For instance, luxury cars would most likely be subject to 28% and a cess not exceeding 15%. As against this high tax burden, the leasing of luxury cars being a service, could attract only 18% GST.

Input tax credit system

In concept, the input tax credit system under the Indian GST is similar to that in other international jurisdictions. The input tax credit will be available only on the basis of validated invoices. Given that the GST would consist of CGST and SGST, the two components would need to be tracked separately, and one cannot be offset against the other. Moreover, the credits are allowed only once the supplier has paid the tax to the Government. Even if the receiver has paid the amount of tax to the supplier and the goods and/or services so procured are eligible for

ITC, no credit would be available, till the time tax so collected by the supplier is deposited to the Government.

Credit of CGST paid on inputs would be allowed to be used only for paying CGST on the output and the credit of SGST paid on inputs may be used only for paying SGST. The two streams of input tax credit (ITC) cannot be cross utilised, except in specified circumstances of inter-State supplies for payment of IGST.

Accounts would be settled periodically between the Centre and the State to ensure that the credit of SGST used for payment of IGST is transferred by the originating State to the Centre. Similarly the IGST used for payment of SGST would be transferred by Centre to the destination State. Further the SGST portion of IGST collected on B2C supplies would also be transferred by Centre to the destination State. The transfer of funds would be carried out on the basis of information contained in the returns filed by the taxpayers.

Given the many exclusions from the GST base, there will be many restrictions to the credit. For instance, no credit will be allowed for inputs used in real estate and construction, petroleum and alcohol sectors. No refund for excess credits will be given, except in the case of exports or inverted duty structure. Even the timing and other conditions for giving credit are driven by the legacy mind-set of the Governments.

In most other jurisdictions there are virtually no restrictions on credits and refunds for excess credit are prompt. In Australia, for instance, any excess VAT credits are refundable. Prior to making a refund, it is paired up against any other tax debts held by that specific taxpayer prior to being paid out. The refund it typically paid within 14 days of filing the GST return. New Zealand and Canada too provide for refunds to be paid within 15 days of filing a return.

The refunds in the EU countries are more restrictive, except in the case of exports. In addition, a business registered for VAT in one EU member state can reclaim refund of VAT incurred in another member state. Non-EU businesses are also entitled to refunds of VAT incurred in the EU. In South Africa, refunds are usually paid out or allowed for a credit against future payments.

The IT backbone

The administrative architecture of GST in India will be fully supported by the IT infrastructure provided by the Goods and Service Tax Network (GSTN). The GSTN shall provide a shared IT infrastructure and services to Central and State Governments, taxpayers and other stakeholders for implementation of GST. It would take on the critical functions of registration of taxpayers, managing the tax returns, computation and settlement of IGST, matching of tax payment details with banking network, providing various MIS reports to the Central and the State Governments based on the taxpayer return information and matching the reversal and reclaim of input tax credit. It has also developed back-end modules like assessment, audit, refund, appeal etc. for the States and Union Territories (19 as on date) who have entered into an agreement with the GSTN for the extended range of services.

Thus, GSTN will provide a fully automated architecture, based on 100% cross matching of the input and output invoices. In the case of post GST functions such as audit, clarity is still to evolve on the degree of flexibility that the Centre and State Governments will have in exercising discretion. The Governments have agreed that States will administer and control 90 per cent of the assessees below ` 1.5 crore annual turnover, and the remaining

10 per cent will come under the Centre. Both the Centre and the Sates will share control of assessees with annual turnover of over ` 1.5 crore in 50:50 ratio. Endeavour will be that each taxpayer should be assessed only once and by only one authority. Regardless of this, there is a need for bringing uniformity in policies and procedures for individual Governments in these functions.

The only other country with a similar architecture is China, which has adopted a "Golden Tax System (GTS)" that provides an automated system of VAT invoice issuance control and detection of potentially fraudulent invoices. GTS was originally implemented to combat VAT fraud and invoice counterfeiting since the invoices issued and verified from the central system have unique identifier codes. As per legal requirements, companies registered in China can issue VAT invoices only using the Government owned GTS, which issues GT numbers for the VAT invoices sent to it. Thus, without the GTS, a company cannot issue or print special VAT invoices. The company will not able to verify input VAT invoices and would not be able to submit VAT returns.

The Golden Tax System followed by China is a robust system as it minimises the chances of fraudulent claims for input tax credit, if not completely eliminating them, for both purchases and sales. It is expected that even the GSTN in India, because it is faceless, will minimise corruption, not just due to the automated processes but also because the post-return filing processes like audit will be transparent and visible to all stakeholders.

Conclusion

The tax system in any jurisdiction has to cater to the local needs and circumstances, and India is no exception. GST / VAT has been implemented in 152 countries, but no two tax systems are completely alike. They follow a common architecture but deviate substantially in many essential design features including the tax base and rates, systems for input tax credits and administrative architecture.

GST in India is unique in all respects. First, it is the only model of dual GST around the world which is fully harmonised across all jurisdictions. Second, the sovereign function of levying and designing the tax are delegated to the collective body of GST Council. Third, the GST base and rates deviate substantially from the international trend of applying the tax to a comprehensive base at a single, uniform tax rate. Fourth, the IGST system for application of tax to cross border inter-State transactions is also unique and India will be the only country to be embarking on this path. Lastly, the GSTN system is backed by state-of-the-art IT infrastructure which will make both administration and compliances fully automated, minimising human interface and associated inefficiencies.

Tax reform of this order or magnitude is bound to be subject to hiccups in implementation. It has not been easy to reach consensus on a flawless model of GST at inception. But, it has been an interesting experiment in co-operative federalism and it is expected that as the Governments gain experience and comfort with the operation of GST, the spirit of co-operation will facilitate its eventual transformation to a flawless design.

Everything is easy when you are busy. But nothing is easy when you are lazy.

— *Swami Vivekananda*

CA Ninad Karpe

Technology Disruptions

Technology has been disruptive in every sphere of life. It has caused large-scale changes in many of our daily activities. Take banking, as an example. In the 1980s, when I had opened a Bank account, I used to visit the bank at least once a week for some banking transaction or operation. Later, almost fifteen years ago, I had opened an account with a new bank and I have never visited the branch. Starting with phone banking, I moved on to Internet Banking and now App based banking.

Throughout history we have invariably underestimated the power of technology to change our world. The arrival of the printing press didn't just allow us to print books. It increased literacy, improved education and dissipation of knowledge. The introduction of the production assembly line caused a massive exodus from the rural into urban areas. It improved efficiency and radically brought down the cost of production. These technologies had far-reaching effect beyond the original use for which they were conceived. In fact, technology has now become ubiquitous, almost invisible. When you drive your car in the morning, you don't really realise the amount of technology that is embedded in the moving vehicle.

Like many professions, tax professionals have embraced technology which has improved their efficiency and productivity. Will this change in the future? Will tax professionals struggle to keep pace with technological disruptions? Will disruptions completely change the way the profession is carried out in future?

I don't have the clairvoyance to predict the future; but have attempted to predict some of the tecnhology trends which will have a significant impact on the future:

Communication

Imagine for a moment that your e-mail server stops working. No e-mails! Can you work? My guess is that you will just stop working. Now, imagine your office in the year 2020. You will have to work in an environment where e-mails are dead. So, what next? Collaboration!

Various apps and tools of collaboration have proliferated in the past few years. Every day, there are nearly 50 billion messages exchanged only on WhatsApp. There are many more messenger tools used across the world. As these tools refine and improve, e-mails will be confined to history books. In any case, they should now, having had a good run for the past 30 years.

Another big change which is likely to happen is in the manner of communcation. Text has been the primary mode of communication for tax professionals (as for all others), for a long time. It will soon get replaced with video. Video will become the "new Text". Consumption of videos is proliferating at a rapid pace. YouTube now has over a billion users and every day, people watch hundreds of millions of hours on YouTube and generate billions of views. By 2020, more than eighty per cent of all our communication will be by video. In this scenario, tax professionals will have

to fundamentally alter the manner in which they communicate.

Big Data & Analytics

Big Data is a large volume of data, structured and unstructured, which is difficult to process using traditional databases and software. A lot of IT investment in the corporate sector is going into Big Data computing, which reveals patterns, trends and associations.

There is an enormous amount of data, which gets generated in professional services firms and the time is ripe to use Big Data techniques to mine this information and come up with meaningful patterns and trends.

Big Data can create customised reports for the tax professional and his client, personalised assistance to juniors, dashboards to clients on the progress of their case, reports to the managing partner of a firm and a summary chart for all partners – the list of possibilities is endless. Also, the analytics of a client's case can enable intervention at an early stage.

Big Data can do the unthinkable – analyse trends, predict future behaviour, crunch massive information and bring out some meaningful correlations. This is beyond using productivity and word processing tools that are currently on offer. We are now looking at the professional services firm of tomorrow, powered by Big Data.

IBM has developed WATSON, a technology platform that uses natural language processing and machine learning to decipher insights from large amounts of data. WATSON has access to 200m pages of structured and unstructured content – equivalent to four terabytes of disk storage. Professional services firms of the future will extensively use platforms like WATSON.

Robots

Massive amounts of money are now being invested in robotic technology. Robots have become commonplace in any medium or large factory and are now beginning to function in shared spaces with humans. The new generation of robots is more social and personal. With the proliferation of the Internet of Things, cloud computing and mobility, robots can now access information and make decisions which are unparalleled.

HONDA has developed ASIMO, a humanoid designed to be a multi-functional assistant, with an ability to walk and even run up to 6 kms per hour. Weighing 48 kgs and at 4 feet 3 inches tall, ASIMO has demonstrated that it can climb stairs, open a bottle, pour drinks and even kick a soccer ball in a penalty shoot-out.

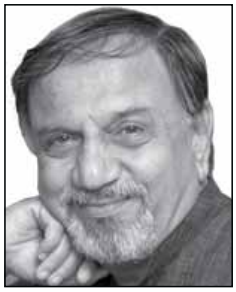
By 2030, robots will be able to do all the menial and routine jobs presently done by human beings. In fact, robots will be able to pass the toughest law exams!

A glimpse of the impact of this can be seen in the financial services sector in the US and many other developed countries, where providers have started using Robo-Advisors. What are Robo-Advisors?

They are a class of financial advisors that provide financial advice or portfolio management online with minimal human intervention. Currently, most robo-advisors employ algorithms such as modern portfolio theory that originally served the traditional advisory community, which has used algorithmically-based automated investment solutions (dubbed in the industry as "rebalancing software") to conduct portfolio management. Presently, Robo-Advisors manage approximately USD 50 bn of funds and within the next 10 years, it is expected to reach a staggering USD 5-7 trillion!

Much of the focus of Robo-Advisors has been on portfolio management. Will they undertake other routine tax advice in future?

There are many more trends which will have an impact on the professional services firm of tomorrow. While there will be many changes, it certainly holds some exciting moments for the professionals of tomorrow.



Shailesh Gandhi, *Former Central Information Commissioner*

Right to Information & Income Tax

One of the crucial elements of a democracy is the freedom of expression. A catena of Supreme Court judgments has accepted that this includes freedom of press and right to information. Thus our freedom to speak and express ourselves is on par with freedom of press and the right to information. Freedom of speech and press have been growing and expanding in the last seven decades. However we properly recognised and codified the right to information only in 2005. Those in power are yet to reconcile with the right to information being the fundamental right of all citizens. It really empowers the individual citizen to seek information from the records of the mightiest.

It is worthwhile looking at the Constitutional provisions of Article 19 guaranteeing our fundamental right:

19. Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) To freedom of speech and expression;

(b) To assemble peaceably and without arms;

(c) To form associations or unions;

(d) To move freely throughout the territory of India;

(e) To reside and settle in any part of the territory of India; and

(f) Omitted

(g) To practise any profession, or to carry on any occupation, trade or business

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

With this background, we will now examine whether Income-tax returns and information regarding IT enquiries can be obtained under the RTI Act. We will also look at the Constitutional Provisions.

The Constitution has recognised our fundamental right to freedom of expression in Article 19(1)(a) and also accepted that some reasonable restrictions could be imposed on it "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

The RTI Act has clearly accepted this position and hence laid down that all information with Government belongs to people. Can it therefore deny any information to the owners of information? Such a denial will have to be within the boundaries defined by Article 19(2) of the constitution. Section 7(1) of the RTI Act has stated that denial of information has to be based only on the exemptions provided under Section 8 or 9 of the Act. Section 9 exempts information which would violate a private person's copyright. Details of Income tax returns cannot be construed as being copyrighted. Thus disclosure of information about income tax returns would have to be tested on the basis of Section 8 of the RTI Act. By and large these are in line with the provisions of Article 19(2) and state:

8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give

(a) Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) Information received in confidence from foreign Government;

(g) Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) Information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this Section shall not be disclosed;

(j) Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

Many officers refuse to give information about income tax returns or enquiries on the grounds that these are exempt. Usually Section 8(1)(e) or (j) are invoked to justify the denial. This paper will examine whether this denial of a fundamental right is justified by the RTI Act and the Constitution. A

simple reading of Article 19(2) of the Constitution does not appear to justify this denial, since none of the permissible restrictions can include Income tax returns and information relating to it. Then we may see if it is covered under the exemptions of Section 8(1)(e) or (j) in the RTI Act. In *Reserve Bank of India vs. Jayantilal N. Mistry & Ors. (2016) 3 SCC 525* the Supreme Court has clearly ruled that information given in discharge of a statutory duty to a Government body cannot be claimed to have been held in a fiduciary relationship. It must also be noted that there is no expectation that the Income tax department will act in the interest of assessees or that the information is provided because of any trust in the department. These are the essential elements for information provided in a fiduciary capacity. Hence it appears that Section 8 (1) (e) cannot be used to deny the information.

It will be worthwhile now to consider whether the income tax details are exempt under Section 8(1) (j) of the RTI Act. There have been many decisions claiming it is squarely covered by this exemption since it qualifies as 'personal' information. It is certainly personal information, but has it been exempted in the law? The information requested, may be denied under Section 8(1)(j), under the following two circumstances –

a) Where the information requested is personal information and the nature of the information requested is such that it has apparently no relationship to any public activity or interest; or

b) Where the information requested is personal information, and the disclosure of the said information, would cause unwarranted invasion of the privacy of the individual.

If the information is personal information, it must be seen whether the information came to the public authority as a consequence of a public activity. Generally, most of the information in public records arises from a public activity. Applying for a job, ration card or passport or filing a income tax return are public activities. However, there may be some personal information which may be with public authorities which is not a consequence of a public activity, e.g. Medical records, or transactions with a public sector bank. Similarly, a public authority may come into possession of some information during a raid or seizure which may have no relationship to any public activity. Even if the information has arisen by a public activity, it would still be exempt if disclosing it would be an unwarranted invasion on the privacy of an individual. Privacy is to do with personal intimacies of the home, family, marriage, motherhood, procreation, child rearing, love, contraception, matters within a home, a person's body, sexual preferences, etc. as decided in 1962-(SC2)-GJX-0417-SC *Kharak Singh vs. The State of U. P. & Others; and R Rajagopal and Anr. vs. State of Tamil Nadu (1994), SC.*

This is in line with Article 19(2) which mentions placing restrictions on Article 19(1)(a) in the interest of 'decency or morality'. However even if someone contests this and believes that the information is not the result of any public activity, or disclosing it would be an unwarranted invasion on the privacy of an individual, they must subject it to the acid test of the proviso: 'Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person'

This proviso is meant as a test which must be applied before denying information and claiming exemption under Section 8(1)(j). Public servants have been used to answering questions raised in Parliament and the Legislature. It is difficult for them to develop the attitude of answering demands for information from citizens. Parliament has therefore provided this test which must be fulfilled. Hence, when they have a doubt, it is worthwhile for them to first consider if they would give this information to the elected representatives. They must first come to the subjective conclusion that they would not provide the information to MPs and MLAs, and record it when denying information to citizens.

Based on this, it appears that the RTI Act does not prohibit information about income tax returns or enquiries from disclosure.

It would be worthwhile reading the *ratio decidendi* of the judgment in *R. Rajagopal and Anr. vs. State of Tamil Nadu (1994), SC* which states:

26. We may now summarise the broad principles flowing from the above discussion :

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

This judgment, effectively lays down that matters of public record cannot claim privacy, unless it relates to 'decency or morality'. This reiterates the principle in Article 19(2) of the Constitution. Income tax returns do not qualify in the claim to privacy, nor can it be claimed that disclosure would affect 'decency or morality'.

An argument is often advanced that the Supreme Court has ruled in *Girish Ramchandra Deshpande vs. Central Information Commission & Ors. (2013) 1 SCC 212* that income tax returns are covered under Section 8(1)(j) of the RTI Act since it is personal information. This argument suffers from three defects:

1. The Girish Ramchandra Deshpande judgment does not establish any logical reasoning for its statement, nor does it

explain by reasoning how it has come to a certain conclusion. It does not state whether the information is not the outcome of a public activity or that disclosure would be an unwarranted invasion of privacy. It does not even establish whether an income tax return can be included as an essential element of the privacy of an individual. The statement is an *Obiter* and there is no *ratio decidendi* hence it cannot lay down the law which must be followed. It makes a bland statement, without analysing the law or giving any reasons: "The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information."

In *Rajiv Singh Dalal (Dr.) vs. Chaudhari Devilal University, Sirsa and Another (2008),* the Supreme Court has observed as follows. "38. The decision of a court is a precedent, if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent."

2. This judgment appears to be contrary to the clear ratio of the R. Rajagopal judgment which had been delivered earlier. Since there is no mention of the judgment or its ratio it appears to have been given without taking the precedent into account. An earlier judgment on the matter must be taken into consideration, and if its ratio has to be overturned, it can only be done by a larger Bench which must analyse the earlier judgment and record its reasons for overturning it. In the absence of any such exercise all adjudicatory authorities must take R. Rajagopal as the appropriate precedent laying down the law on privacy.

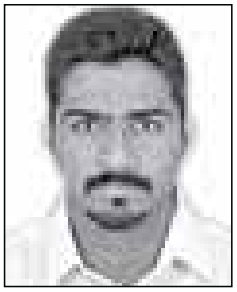
3. It has also not quoted or taken cognisance of the important proviso to Section 8(1)(j):

"Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person".

A reading of the judgment shows that when quoting the exemptions in Section 8(1) in para 11 has not even quoted the important proviso and this has the effect of it not dealing with it. This may have been by oversight. If the court had noticed the proviso it is likely to have come to a different conclusion.

Thus the author believes that the Girish Ramchandra Deshpande case does not lay down the law. Under these circumstances the law as laid down in R. Rajagopal, which is also in consonance with a plain reading of the RTI Act will prevail. These arguments lead one to the conclusion that Article 19(2) of the constitution read with the words of Section 8(1)(j) of the RTI Act clearly lay down that income tax returns ought to be disclosed when sought in the RTI Act. A larger public interest in disclosure needs to be furnished only when an exemption applies. In this case since no exemptions can be shown to apply, hence refusal is against the provisions of the law and the constitution.

Hence Income tax returns and information regarding enquiries must be disclosed as per the RTI Act. It is not commonly known that though election candidates declare their assets and liabilities these are not cross-checked with their income tax returns.

Nishant Gokhale & Deepak Bhaskar[1]

Electronic Evidence in Search and Seizure Proceedings under the Income-tax Act, 1961

Introduction

The relentless advancement of technology often tests the law's ability to deal with fundamental changes in society. Technology is one area which appears to have outpaced the law.

The Information Technology Act, 2000 brought about a wave of change in various Indian laws and its ripples were felt in the Income-tax Act, 1961 as well. It was amended to include electronic records within the definition of "document" and recognized electronic accounting systems within the meaning of "books of account". Subsequent Finance Acts have amended the Income Tax Act, 1961 to make it more viable in the digital environment.

However, statutory changes seldom translate into changes at the ground level. This was demonstrated in a curious case which came up before the Supreme Court for decision[2] It concerned a seizure under the Punjab General Sales Tax Act, 1948 wherein an assessee's cash books, registers and a computer hard-drive were seized. Under that Act, these were to be returned after making copies and the assessee verifying them. However the sales tax authorities were flummoxed by what to do with the hard-drive and the assessee too on how to "verify" it. The assessee therefore approached the High Court seeking its return, which took a bleak view of the sales tax authorities' conduct and imposed personal costs on the erring officers. The Supreme Court, however waived this observing that, "Internet and other information technologies brought with them the issues which were not foreseen by law ….It also did not foresee the difficulties which may be faced by the officers who may not have any scientific expertise or did not have the sufficient insight to tackle with the new situation."

While this case is only an example, it is representative of the real challenges faced by assessees as well as revenue when the coercive State powers are used without adequately accounting for the paradigm shift caused by technology.

This article examines the confluence of technology with search and seizure proceedings under the Income-tax Act, 1961. We explain

1 Deepak Bhaskar is a Litigation Associate at Trilegal and practises before the High Court of Karnataka, Bengaluru. He studied law at the University of Warwick, United Kingdom and holds post-graduate degrees in Intellectual Property Rights as well as Constitutional Law. Nishant Gokhale studied law at NUJS, Kolkata and presently litigates in New Delhi on issues related to criminal law.

2 *State of Punjab vs. Amritsar Beverages (2006) 7 SCC 607*

the nature of search and seizure proceedings and how searches in the physical world differ. We then examine the legal issues involved in electronic evidence cases in India and finally the steps taken by Income Tax authorities to keep pace with the changing time.

Part I: Search and Seizure Powers under the Income-tax Act

The statement *"The house of every man is his castle"* by Lord Coke is a cornerstone of privacy law.[3] Though the right to privacy has been held to be part of the constitutional scheme in India and is widely acknowledged internationally, the law routinely permits the State through its various agencies to enter houses, offices, vehicles and vessels for various reasons including searching for incriminating material in revenue and criminal cases.

In the face of conflicting interests of the individual's privacy and the State's requirement to gather evidence of criminality or wrongdoing, the legal regime has developed several safeguards which require to be satisfied before this power is exercised. The United States has the 4th Amendment which states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." India does not have an express constitutional guarantee against search and seizure but has legal safeguards built into individual statutes.

In criminal law, a Judicial Magistrate needs to be satisfied under the Criminal Procedure Code, 1973 that such an action is necessary. Revenue laws however, do not have this requirement of judicial oversight. In a 1981 in the Economic and Political Weekly, A.G. Noorani quoted Nani Palkhivala to state that section 132 of the Income-tax Act, 1961, "confers dangerously wide powers of search and seizure on the Income-Tax authorities without any external check or safeguard for the citizen".[4] The Supreme Court has held that "In a country which has adopted high rates of taxation, a major portion of the unaccounted money should normally fill the Government coffers. Instead of doing so it distorts the economy. Therefore, in the interest of the community it is only right that the fiscal authorities should have sufficient powers to prevent tax evasion.....Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense." It also held that the safeguards in the Act which permits only senior income tax officials to authorise these searches is a sufficient check against its misuse.[5] In that very case, it also held that there was no legal provision to discard evidence which was obtained through illegal search and seizure proceedings. The United States law doctrine of the "fruit of the poison tree" being inadmissible has been held to not apply in India except in cases of self-incrimination.[6] This further curtails the protections available to the assessees.

Another major check on the statutory power of seizure was built into the provision which required that for a search to take place under the Income-tax Act, 1961 there was a "reason to believe" that a person would not produce the necessary materials. This term has been extensively debated and interpreted by the judiciary and at its foundation was that this belief must arise out of good faith and cannot represent an action in caprice.[7] However the

3 Semayne's case, (1604) 5 Coke's Report 91: 76 E.R. 194

4 Noorani, A.G., The Power to Search, Economic and Political Weekly, Vol. 16, No. 24 (Jun. 13, 1981), pp. 1051-1052.

5 Pooran Mal vs. Director of Inspection AIR 1974 SC 348

6 Selvi vs. State of Karnataka (2010) 7 SCC 263

7 Matta A. M, Search and Seizure under Income Tax Law, 21 Journal of the Indian Law Institute, 4, pp. 575-59

Finance Act, 2017 has recently introduced a provision which changes this standard of "reason to believe" to a far more malleable standard of "reason to suspect" where even the basis for this suspicion being formed is not required to be disclosed. This change, coupled with the fact that the amendment takes effect retrospectively, has sparked fears amongst business in India of "tax terrorism".[8]

Given that the threshold to trigger a search and seizure proceeding is now set much lower, it is important to understand how these proceedings operate when it comes to electronic evidence. While the words "search" and "seizure" in the physical world seem self explanatory, understanding how they work in cases of electronic evidence is vital.

Part II: Physical vis-a-vis Electronic Search and Seizure

While it may appear intuitively that there is no distinction between physical and digital search and seizure proceedings, this view is misinformed and oftentimes counterproductive as observed in the sales tax case discussed above. Prof. Orin S. Kerr in a landmark essay[9] on electronic evidence warns that traditional rules of search and seizure seldom hold good for electronic evidence and this problematises the notions of both "search" and "seizure" in the context of electronic evidence.

In a physical context, "search" involves entering into a building or vehicle and looking through documents, cupboards and other places within the property where the materials being sought could potentially be. Physical information is usually limited by the space available as in for example, only a limited number of files will fit into a filing cabinet. Further, the scale of the search is often determined by the number of the personnel available to undertake it and usually, this can only take place once. Thereafter, whatever is found to be incriminating is seized and taken "off-site" for closer scrutiny.

For electronic evidence however, a "search" usually takes place only after the computers/ phones or other devices have been physically seized. The "search" can continue for an almost indefinite period of time and does not usually require more than a few technical personnel. The search also can often extend into various cloud-based systems or information from other sources which are viewable from the seized computer. Further, electronic evidence includes within it deleted data unlike physical evidence which once destroyed, is virtually impossible to reconstruct. Therefore, simply deleting a file from the computer does not mean that it is no longer accessible.

Quantitatively, one computer can often contain much more data than a physical search of one premises due to their ability to store large quantities and to access data on cloud-based platforms. Qualitatively, electronic evidence may also contain "metadata" which is data created in relation to other data such as when a file/system was last opened or modified. The technique most widely acknowledged in computer forensics is that of creating an "image" or "clone" of the drives of the computer under question rather than copying individual files. This image is a working replica of the original including all the metadata.

The scope of this image therefore becomes much wider, and extends to not just that information which is available, but in fact all the information which is on the computer. This in tax proceedings, is often a serious issue as tax authorities under section 138 of the Income-tax Act, 1961 can inform other agencies such as the Directorate of Enforcement, CBI or other investigative agencies about material found

8 Ran et al., The Finance Act, 2017: Implications and Constitutionality by Chakrabarti, available at http://www.mondaq.com/india/x/589176/Fiscal+Monetary+Policy/The+Finance+Act+2017+Implications+Constitutionality , last accessed on 6-5-2017.

9 Kerr, Orin S., Searches and Seizures in a Digital World, Harvard Law Review, Vol. 119, No. 2 (Dec., 2005), pp. 531-585

which, though not directly connected with the issues at hand for income tax purposes, could still be crimes. Although there are circulars issued from time to time, preventing any data other than PAN numbers and electronic income tax returns to be shared with other agencies, this appears to be in conflict with section 39 of the Criminal Procedure Code, 1973 which creates a positive duty to report the occurrence or likelihood of occurrence of a crime to the nearest magistrate. This seriously undermines the privacy of the person whose electronic material is seized and opens a Pandora's box of possible legal troubles for the assessee.

It is also pertinent to note that there is no "seizure" of electronic data, but it is in fact only copying the available data. This therefore is not the original system but in fact a mechanical copy of the original. This attains significance when primary and secondary evidence is discussed.

Part III: Collecting electronic evidence

Digital evidence collection can take place in at least three phases[10]: 1) the collection of stored evidence from third parties, 2) the collection of stored evidence from the target, 3) and the collection of evidence in transit. The first is usually the easiest as it involves obtaining information usually from bodies such as telecom companies or internet service providers who do not have any personal interest in the matter. However it has been observed that the service provider usually give a large amount of data to investigative agencies rather than sifting through the subscriber's data themselves. The second category usually teeters on the border-line of self-incrimination against which there is protection under Article 20(3) of the Constitution of India. However, section 132(1)(iib) of the Income Tax Act has been specifically brought in which requires that the assessee affords the authorised officer the necessary facility to inspect such books of account or other documents maintained electronically which includes passwords to the system, and technical details such as software used etc. The third category usually involves interception of voice or data through wire-tapping and e-mail monitoring which is permitted only under very limited circumstances and can be a serious violation of privacy if not properly handled.

Part IV: Primary and Secondary Evidence

Within the category of documentary evidence, primary evidence is the best evidence. It is a settled principle in the law of evidence that the best evidence should be used to prove a case. To illustrate this point with an example, if there is an incriminating video taken on a phone, then the mobile phone and the memory-chip itself would be primary evidence. If the same clip was appear on a VCD, then the VCD will be considered secondary evidence as it is only an outcome of a mechanical copying process from the memory chip, which brings with it the possibility of deterioration in quality and the loss of integrity of the data.

However, often primary evidence cannot be obtained if the machine is in a different country or would be bulky, infeasible or expensive to transport. An example of this would be in cases of large server systems such as those present in mobile telephone exchanges. Therefore in such cases, secondary evidence in the form of Call Detail Records of mobile phones is permitted to be led subject to compliance of requirements under the Indian Evidence Act.

Part V: Electronic Evidence in India

Section 65-B is a special provision related to electronic evidence introduced through the Information Technology Act, 2000.

These safeguards include that a responsible officer from the service provider certifies that

10 Kerr, Orin S., Digital Evidence and the New Criminal Procedure, Columbia Law Review, Vol. 105, No. 1 (Jan., 2005), pp. 279-318

the computer system processes data in the regular course of work and that the system was working properly at the relevant time. In the Parliament Attacks case[11], while deciding the question of admissibility of mobile phone call detail records case, it was held that a certificate under section 65-B was not mandatory and the responsible officer from the mobile company could testify to the authenticity of the call records in his testimony. The Supreme Court has subsequently overruled this point in the judgment to hold that a certificate under section 65-B is mandatory for any electronic evidence to ensure its "source and authenticity". The Supreme Court held this was necessary as "Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice."[12] However, despite this, the special procedures seem to be inconsistently applied across different cases as was done in Ratan Tata's case[13] where a CD containing intercepted telephone calls was introduced without complying with the procedure laid down under section 65-B of the Evidence Act. However, there is increasing awareness of this special procedure for electronic records amongst lawyers and the judiciary given the increasing range of areas in which it is applied.

Part VI: The Income Tax Department's Response to Digitization

Today, with the rise of e-commerce specifically and technology generally, it is vital that revenue officials are cognizant of challenges it presents. To the credit of the Central Board of Direct Taxes it took a progressive step in 2014 following a statement by the Finance Minister[14] that the Department "should equip itself with the state of the art technological skills, including, in the area of analysis of digital evidence". Soon thereafter, the 'Digital Evidence Investigation Manual'[15] (Manual) was published.

This Manual candidly admitted that its field officers were often unacquainted with technical issues related to digital evidence. It also explores in some depth a range of devices such as computers, hard disk drives, specialized accounting packages, cloud servers and CCTV footage. The Manual also gives almost step-by-step procedure for gathering electronic evidence and warns against common errors such as a data loss due to negligent handling, booting a computer system at a date later than the seizure date resulting in modifying the date and time of accessing the computers as well as detecting deleted files, and understanding server architecture.

The Manual also highlighted the need for proper legal processes to be followed to ensure that the integrity of the evidence collected is not compromised. This included having a proper chain of custody as well as properly documenting these proceedings. While the Indian Evidence Act, 1872 does not strictly apply to proceedings in the Income-tax Act, the Manual does state that the processes followed under section 65-B of the Evidence Act should "govern the integrity of the electronic record as evidence, as well as, the process for creating electronic record. Importantly, they impart faithful output of computer, the same evidentiary value as original without further proof or production of original. Accordingly, while handling any digital evidence, the procedure has to be in consonance of these provisions".

11 State (NCT of Delhi) vs. Navjot Sandhu (2005) 11 SCC 600

12 Anvar vs. Basheer AIR 2015 SC 180

13 MANU/SC/1090/2013

14 http://pib.nic.in/newsite/PrintRelease.aspx?relid=107335

15 Central Board of Direct Taxes, Digital Evidence Investigation Manual Available at https://irsofficersonline.gov.in/Documents/OfficalCommunique/11121201412945.pdf
Last accessed on 20/04/2017 at 15:00;

Conclusion

Globalisation has brought with it several advantages but also several problems of its own. The pace of change is rapid and its nature is almost exponential and transformative in how business and other day-to-day activities are conducted. Today Indian businesses and individuals too are migrating from maintaining paper records to digital records. To be viable as a legislation for enforcement and assessment, the Income-tax Act, 1961 requires sufficient foresight to be able to anticipate the paradigm changes in social functioning.

This article has attempted to just skim the surface of the issues arising out of electronic evidence and search and seizure proceedings under the Income-tax Act. However, newer challenges will continue to present themselves as technology advances.

It was reported in the papers that Income Tax authorities visited the offices of Bitcoin companies for a "technical discussion" on its legal and tax implications.[16] This new form of electronic currency clearly has posed new challenges to tax authorities the world over. It is thus clear that technology moves rapidly and though the law may adapt, those on the ground who have to implement it have insufficient guidance.

It is also important to realise the realities in which revenue officers operate. For example, there were according to the Manual only there forensic labs capable of analysing electronic evidence as well as the acute lack of technologically trained personnel within the department. This necessitated the use of outside consultants as experts which further leads to privacy concerns on how data found in income tax search and seizures is used. Further, the Manual itself has no force of law and also contains several problematic suggestions which affect the integrity and reliability of data such as changing the password for cloud-based servers.

At the heart of it the controversy of search and seizure in the digital age is the constant tussle between the citizen's right to privacy and the State's pervasive need to know. Technology has fundamentally changed how and where privacy rights extend and have also changed the areas where the State requires to intrude. A bare perusal of the Manual brings to light the enormity of the task at hand, in order to reduce the mismatch between the technological limitations of revenue officers reach and sophisticated technology sometimes available to the assessee.

Some of the problems of the procedures related to search and seizure under the Act remain the same in the era of technology and pose new challenges. Given that most books of records are now likely to be stored on digital media, it is imperative that the integrity of such evidence is not tampered with. In order to achieve this, it is important that the mandate of the law is followed inaccurately capturing the source of any such electronic records, and attesting to its authenticity, should the same be challenged at a later stage.

The law related to search and seizures under the Income-tax Act, 1961 therefore requires to be cognizant of changes in technology which fundamentally changes the nature of these proceedings. It is important that the rights of citizens to be protected against its arbitrary exercise of the coercive functions by strictly regulating its exercise by reaching a balance.

16 Ghunawat, Virendrasingh, Is Bitcoin trading illegal in India? Probe agencies agree, users disagree, India Today, available at http://indiatoday.intoday.in/story/is-bitcoin-trading-illegal-in-india-probe-agencies-agree-users-disagree/1/336567.html , last accessed 4-5-2017.


CA Hinesh R. Doshi, CA Haresh P. Kenia
Hon. Jt. Secretaries

The Chamber News

Important events and happenings that took place between 8th April, 2017 and 8th May, 2017 are being reported as under.

I. ADMISSION OF NEW MEMBERS:

1) The following new members were admitted in the Managing Council Meeting held on 20th April, 2017.

Life Membership

1	Mr. Dharia Kalpesh Suresh	CA	Mumbai
2	Mr. Kadam Milind Ramchandra	CA	Mumbai
3	Mr. Sheth Ketan Yashvantkumar	CA	Rajkot
4	Mr. Dasija Deepak Gopal	CA	Mumbai
5	Mr. Desai Neelesh Madhav	ITP	Mumbai

Ordinary Membership

1	Ms. Patel Kajal Dipeshkumar	CA	Mumbai
2	Mr. Desai Yogesh Parth	CA	Mumbai
3	Mr. Jain Vinod Pukhraj	CA	Mumbai
4	Mr. Kamdar Shailesh Surendra	CA	Mumbai
5	Mr. Doshi Vijay Balubhai	CA	Mumbai
6	Mr. Sharma Prashant Kishore	ICSI	Mumbai
7	Mrs. Jain Deepika Paraswal	CA	Mumbai
8	Mr. Chheda Ronak Hirachand	ITP	Mumbai
9	Ms. Malani Priyanka Pushp	CA	Mumbai
10	Ms. Gracias Liona Edwin	CA	Mumbai
11	Mr. Munot Prashant Vasantlal	CA	Pune
12	Mr. Gholap Romesh Jeevan	ITP	Mumbai
13	Mr. Janarthanan Bharath	Advocate	Mumbai
14	Mr. Shah Vishal Amit	CA	Mumbai
15	Ms. Mehta Chaiyali Ravindra	CA	Mumbai
16	Mr. Goel Manish Radheyshyam	CA	Mumbai

Student Membership

1	Mr. Jain Surendra Gaurav	CA	Jaipur
2	Mr. Vyas Hardik Tejprakash	LLB	Mumbai

3	Ms. Amee Kishor Suchak	CA	Mumbai
4	Ms. Mhatre Gandhalee Vijay	LLB	Mumbai
5	Mr. Rajoria Arnav Aman	CA	Mumbai
6	Ms. Shah Kriti Ashish	CA	Mumbai
7	Mr.vakil Vedant Amrish	CA	Mumbai

Associate Membership

1	Harinagar Sugar Mills Ltd.	Mumbai

II. PAST PROGRAMMES

1. ALLIED LAWS COMMITTEE
FIRST TAX MOOT COURT

Dr. Y. P. Trivedi Tax Moot Court Competition was held jointly with Government Law College, Mumbai on 14th and 15th April, 2017. The Preliminary Rounds were held at Government Law College, Semi Finals at ITAT and Finals were held at Walchand Hirachand Hall, IMC. CTC Team Chamber and six Colleges from Mumbai participated in the Competition.

1 Vivekananda Education Society College of Law
2 Siddharth College of Law
3 Adv. Balasaheb Apte College of Law
4 Narsee Monjee Institutes of Management Studies, School of Law
5 Government Law College
6 K. C. Law College

The Semi Final rounds of the competition were judged by ITAT Members and Final was judged by bench of Hon. Justice Shri M. S. Karnik, Bombay High Court, Hon. Shri G. S. Pannu, Accountant Member ITAT and Hon'ble Shri Saktijit Dey, Judicial Member ITAT.

The Competition was won by Government Law College and runner up was K. C. Law College. The Best Speaker was award to Mr. Bhavin Shah, K. C. Law College. The winners were felicitated by offering Trophy, Cash prize and Certificates by the hands of Hon'ble Justice Shri M. S. Karnik. Other participants were felicitated by giving certificates of participation. The competition was attended by Students, Past Presidents and members of the Chamber.

2. INDIRECT TAXES COMMITTEE

Orientation Course on "Revised Model GST Law" spreading over one week was held from 26-29th April, 2017 at Jaihind College Auditorium. The course was attended by more than 350 delegates and was addressed by eminent faculties in the field of Indirect Tax.

3. FELICITATION FUNCTION OF CA NILESH S. VIKAMSEY – PRESIDENT OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

CA Nilesh S. Vikamsey was felicitated on 29th April, 2017 at the Orientation course on GST Law Bill held at Jai Hind College for being elected as "PRESIDENT OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA" Mr. Ajay Singh Vice-President felicitated him by offering flower bouquet and CA Hitesh R. Shah President felicitated with a memento as a token of love and affection on behalf of the Managing Council and Members of The Chamber

of Tax Consultants. Shri Nilesh Vikamsey addressed the gathering and offered support to the Chamber.

4. INTERNATIONAL TAXATION COMMITTEE

The Basic Course on "FEMA and Taxation of Foreign Remittance" jointly with The Malad Chamber of Tax Consultants was held on 29th & 30th April, 2017 & 6th & 7th May, 2017 at Durgadevi Saraf Institute of Management Studies, Malad

5. STUDENT & IT CONNECT COMMITTEE

A. The Seminar on "Understanding of GST" was held at IMC on 15th April, 2017 for young members/students and office assistants. The seminar was addressed by CA Vikram Mehta, CA Ashit Shah, CA Ashwin Dedhia followed by panel discussion. The seminar received an overwhelming response from the students and members.

B. Student Orientation Workshop jointly with RVG Hostel was held on 30th April, 2017.

(For Details and Study Material of the Past Programme, kindly visit www.ctconline.org)

III. FUTURE PROGRAMMES

(For details of the Future Programmes, kindly visit www.ctconline.org or refer The CTC News of April, 2017)

1. DIRECT TAXES COMMITTEE

A. Full Day Workshop on "Income Computation & Disclosure Standards (ICDS) – Covering: Issues, Case Studies, Implementation and Reporting Requirement" will be held on 17th June, 2017 at Mysore Association Auditorium, Matunga, from 9.00 a.m. to 6.00 p.m.

B. Webinar on "Amendments to S. 115BBE and 271AAC of IT Act, 1961" will be held on 9th May, 2017 and will be addressed by CA Mahendra Sanghvi.

C. Webinar on Reassessment Proceedings under IT Act, 1961 will be held on 22nd May, 2017 and will be addressed by CA Ketan Vajani.

2. INTERNATIONAL TAXATION COMMITTEE

The "11th Residential Conference on International Taxation, 2017" will be held from 22nd June, 2017 to 25th June, 2017 at The Hotel Taj, Nashik.

3. STUDENT & IT CONNECT COMMITTEE:

A. Half Day Seminar on "DATA Crunching & Reporting with Pivot Tables" will be held on 26th May, 2017 at Jai Hind College, Churchgate.

B. Study Course titled "Articles Orientation Programme" (Only for Students) will be held on 2nd, 3rd, 9th, 10th, 16th and 17th June, 2017 at Mithibai Hall, Mithibai College, N. S. Road, JVPD Scheme, Vile Parle West, Mumbai-400 056.

4. NOTICE OF ELECTION

The election of the President and Fourteen Members of the Managing Council for the ensuing year 2017-18 shall take place on Monday, June 12th, 2017 at the Office of The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31 New Marine Lines, Mumbai – 400 020.

Nominations in the prescribed form should be filed so as to reach the office of the CTC not later than 6 p.m. on Thursday, June 1, 2017. The nomination forms shall be available at the CTC office from Friday, May 19th, 2017.

5. RENEWAL OF MEMBERSHIP FEES 2017-18

The Renewal fees for Annual Membership, Study Group, Study Circle and other Subscription for the financial year 2017-18 was due for payment on 30th April, 2017. The Renewal notices have been sent separately which contain entire information of members as per CTC Data Base. In case of any change of information of members shown in the form, kindly provide updated information along with the form. Members are requested to visit www.ctconline.org for online payment of the Renewal fees.

NOTICE OF ELECTION

To

The Members,
The Chamber of Tax Consultants,
Mumbai

The election of the President and Fourteen Members of the Managing Council for the ensuing year 2017-18 shall take place on **Monday, June 12, 2017 at the Office of The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai–400 020.**

Nominations in the prescribed form should be filed so as to reach the office of the CTC not later than 6 p.m. on Thursday, June 1, 2017. The nomination forms shall be available at the CTC office from Friday, May 19, 2017.

FOR AND ON BEHALF OF THE MANAGING COUNCIL
OF THE CHAMBER OF TAX CONSULTANTS

Sd/- Sd/-

HINESH R DOSHI / HARESH P KENIA

Hon. Jt. Secretaries

Place : Mumbai

Dated : 20th April, 2017

Office : 3, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020.

Notes:

1. Ordinary and Life Members are only eligible to vote at the election.
2. A Member who has completed at least two full years as a member shall be entitled to contest the election for Managing Council or to propose or second a candidate for the election. Each member can propose not more than three candidates.
3. The Candidate for the post of President should have completed Ten years of post qualification experience relating to tax laws or any branch of accountancy or Company Secretarial practice.
4. Member who is in arrears of any dues of the Chamber shall not be entitled to contest the election or to propose or second any candidate for the election or to vote at the election.
5 Withdrawal of nomination for the elections can be made by the candidate on or before 6.00 p.m. on Monday, June 5, 2017.
6. If elections are required to be held, the names of the valid candidates shall be intimated through the website of the Chamber as well as through the Notice Board of the Chamber and News Letter or by sending a circular to that effect at the registered address of the members. The Members are requested to check these mediums.
7. If elections are not required to be held, due to any reason whatsoever, the same shall be intimated through the website of the Chamber as well as through the Notice Board at the Chamber's office followed by intimation in News Letter.. The Members are requested to check through these mediums.
8. The voting, if required, will commence at 11.00 a.m. and shall end at 5.00 p.m.
9. The above is only a gist of the Election Rules. Please read Election Rules of the Chamber carefully.

INTERNATIONAL TAXATION COMMITTEE

Basic Course on FEMA & Taxation of Foreign Remittance Jointly with Malad Chamber of Tax Consultants held on 29th and 30th April, 2017 at Durgadevi Saraf Institute of Management Studies, Malad (W)

Inauguration of the Basic Course by lighting the lamp. Seen from L to R: CA Vipul Somaiya (MCTC), CA Adarsh Parekh (President, MCTC), CA Haresh P. Kenia (Hon. Jt. Secretary, CTC), CA Paresh Shah, (Faculty) and Mr. Ajay R. Singh (Vice-President, CTC)

Mr. Ajay R. Singh (Vice-President) giving opening remarks

CA. Haresh P. Kenia (Hon. Jt. Secretary, CTC) – Welcoming the Speakers, Seen from L to R: Mr. Ajay R. Singh (Vice-President, CTC), CA. Paresh Shah (Faculty), CA Adarsh Parekh, (President, MCTC), CA. Vipul Somaiya (MCTC)

Faculties

CA. Paresh Shah

CA. Umang Someshwar

Mr. N. Nagrajan

Dignitaries on dais seen from L to R: CA. Vinesh Shah (MCTC), CA. Parag S. Ved (Hon. Treasurer, CTC), CA. Umang Someshwar (Faculty), CA. Vipul Somaiya (MCTC), Mr. Darshan Shah (MCTC)

Basic Course on FEMA jointly with Malad Chamber of Tax Consultants held on 6th & 7th May 2017.

Faculties

CA Mrugen Trivedi

CA N.C. Hegde

CA Naresh Ajwani

CA Rutvik Sanghvi

INDIRECT TAXES COMMITTEE

Intensive Study Group on Direct Taxes held on 27th April, 2017 at SNDT Committee Room

CA. Devendra Jain
addressing the members

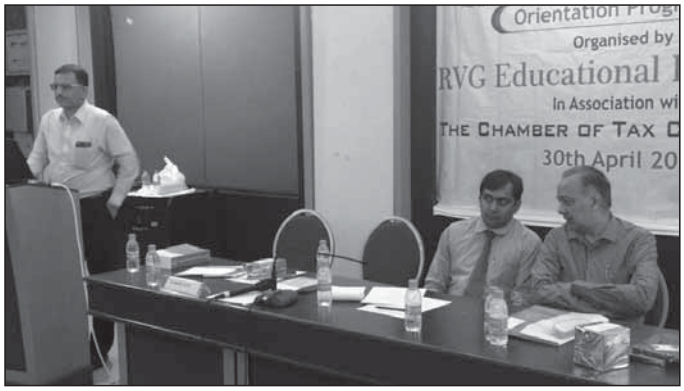
Indirect Tax Study Circle – GST Impact analysis on service sector based on revised MGL held on 18th April, 2017

CA. Parita Shah
addressing the members

CA. Payal Shah
addressing the members

STUDENT & IT CONNECT COMMITTEE

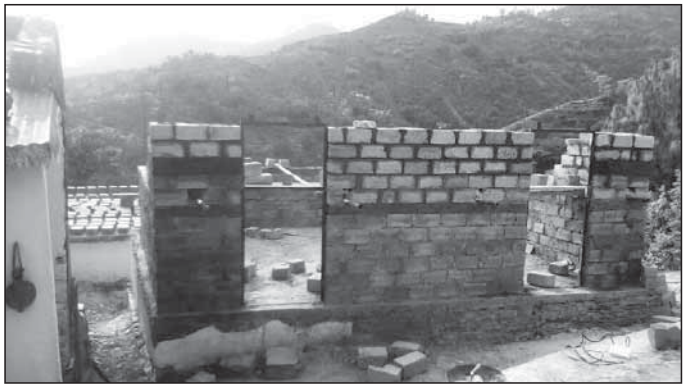
Student Orientation Workshop jointly with RVG Hostel held on 30th April, 2017 at RVG Hostel, Mumbai



CA Mehul Sheth, addressing the students on the subject "Audit". Seen from L to R: S/Shri CA. Aalok Mehta (Vice Chairman), CA. Parimal Parikh (Chairman)

CA Ashok Mehta addressing the Students on the subject "Direct Tax" Seen from L to R: S/Shri CA. Aalok Mehta (Vice Chairman), CA Parimal Parikh (Chairman)

THE CTC INITIATED PROJECT OF RECONSTRUCTION OF SHREE SADAN SHISHUKETAN PRIMARY SCHOOL, CHOPADA DIST, UTTARAKHAND AS A PART OF ITS UTTARAKHAND RELIEF PROJECT



INDIRECT TAXES COMMITTEE

Orientation Course on GST Law Bill held on 26th to 29th April, 2017 at Jai Hind College Auditorium, Churchgate

CA. Hitesh R. Shah (President) and CA. Naresh Sheth (Faculty) inaugurating the Orientation Course by lighting the lamp. Seen from L to R: S/Shri CA. Vikram Mehta (Chairman), CA. Sumit Jhunjhunwala (Convenor) and Mr. Ajay Singh (Vice-President)

CA. Hitesh R. Shah (President) giving opening remarks

CA. Vikram Mehta, Chairman welcoming the speakers

Dignitaries on dais. Seen from L to R: S/Shri CA Sumit Jhunjhunwala (Convenor), Mr Ajay Singh, (Vice-President), CA Hitesh R. Shah, (President), CA Naresh Sheth, (Faculty), CA Vikram Mehta, (Chairman)

Faculties

CA Naresh Sheth

CA Sunil Gabhawalla

CA Rajiv Luthia

Mr. Harsh Shah, Advocate

CA Vikram Mehta

CA Ashit Shah

CA A. R. Krishnan (Moderator) raising the queries at the Brains' Trust Session. Seen from L to R: CA Vikram Mehta (Chairman), CA S. S. Gupta, Mr. L. Badri Narayanan – Advocate, CA Parind Mehta (Brains' Trustees) and CA Sumit Jhunjhunwalla (Convenor).

Overwhelming response to Orientation Course on GST Law Bill Programme with 370 participants

FELICITATION FUNCTION

Felicitation of CA. Nilesh S. Vikamsey, on his being elected as President ICAI held on 29th April, 2017 at Jai Hind College Auditorium, Churchgate

CA Hitesh R. Shah (President) giving opening remarks

Mr. Ajay R. Singh – Advocate (Vice-President) presenting flower bouquet to CA Nilesh S. Vikamsey (President ICAI) Seen from L to R: CA Parag S. Ved (Treasurer)

CA Hitesh R. Shah (President) presenting a Memento to CA Nilesh S. Vikamsey (President ICAI), Seen from L to R: Mr. Ajay R. Singh - Advocate (Vice-President) and CA Parag S. Ved (Treasurer)

CA Nilesh S. Vikamsey (President ICAI) addressing the members. Seen from L to R: CA Haresh P. Kenia (Jt. Secretary), CA Hinesh R. Doshi (Jt. Secretary), CA Hitesh R. Shah (President), Mr. Ajay R. Singh - Advocate (Vice-President) and CA Parag S. Ved (Treasurer)

Dignitaries on the dais. Seen from L to R: CA Haresh P. Kenia (Jt. Secretary), CA Hinesh R. Doshi (Jt. Secretary), CA Hitesh R. Shah (President), CA Nilesh S. Vikamsey (President ICAI), Mr. Ajay R. Singh, Advocate (Vice-President), CA A. R. Krishnan and CA Vikram Mehta

PRESIDENT CA HITESH R. SHAH INVITED AS CHIEF GUEST BY WIRC OF ICSI

Chief Guest at 76th Management Skill Orientation Programme organised by WIRC of ICSI held on 21st April 2017 at ICSI – WIRC, Nariman Point

Chief Guest CA Hitesh Shah (President) giving valedictory address to the participants

CA Hitesh R. Shah (President) giving course completion certificate to the budding participants

Group photo of CA Hitesh R. Shah (President) with participants

ALLIED LAWS COMMITTEE

Dr. Y. P. Trivedi Tax Moot Court Competition held on 14th and 15th April, 2017 at Government Law College and ITAT

Preliminary Round Judges

Seen from L to R: Mr. Vipul Joshi (Advocate) and Mr. Kunal Katariya (Advocate)

Seen from L to R: Mr. K. Gopal (Advocate) and CA Mahendra Sanghvi

Seen from L to R - Mr. Sunil Lala (Advocate) and CA Shailesh Bandi

Semi Final

President CA. Hitesh R. Shah along with Past Presidents and Hon'ble Members, ITAT. Seen from L to R: CA Devendra Jain, CA Mahendra Sanghvi (Past President), Mr. Manoj Kumar Aggarwal (Member ITAT), Mr. Ramit Kochar (Member ITAT), Mr. Pawan Singh (Member ITAT), Mr. Ram Lal Negi (Member ITAT), Mr, Vipul Joshi (Past President), Mr. Rahul Hakani (Chairman), Mr. Hitesh R. Shah (President), Mr. K. Gopal (Past President)

Semi Final round at ITAT court room judged by Hon'ble members of ITAT – Seen from L to R: Mr. Pawan Singh and Mr. Manoj Kumar Aggarwal

Semi Final round at ITAT court room judged by Hon'ble members of ITAT – Seen from L to R: Mr. Ramit Kochar & Mr. Ram Lal Negi.

Law students arguing in the Semi Final round before Hon'ble members of ITAT

Final Round

Student of K.C. College and Government Law College arguing in the Final Round of Moot Court before the Hon'ble Justice Mr. Karnik (Bombay High Court), Hon'ble senior members ITAT Mr. G. S. Pannu and Mr. Saktajit Dey at Walchand Hirachand Hall, IMC.

Dignitaries on the dais - Seen from L to R - Prof. Dilip Shinde (Govt. Law College), Mr. Rahul Hakani (Chairman), Dr. Y P. Trivedi, Mr. G. S. Pannu (MITAT), Mr. Justice M. S. Karnik (Bombay High Court), Mr. Saktijit Dey (MITAT), Mr. Hitesh R. Shah (President), Mr. Ajay Nathani (Principal Govt. Law College), Mr. Yuvraj (Moot Court Association)

Dr. Y. P. Trivedi Tax Moot Court Competition

Final Round

Dr. Y P. Trivedi (Sr. Advocate) addressing the students - Seen from L to R: Prof. Dilip Shinde (Govt. Law College), Mr. Rahul Hakani (Chairman), Mr. G. S. Pannu (Member, ITAT), Justice M. S. Karnik (Bombay High Court), Mr. Saktijit Dey (Member, ITAT), Mr. Hitesh R. Shah (President), Mr. Ajay Nathani (Principal Govt. Law College), Mr. Yuvraj (Moot Court Association)

Valedictory address by Justice M. S. Karnik (Bombay High Court) – Seen from L to R: Prof. Dilip Shinde (Govt. Law College), Mr. Rahul Hakani (Chairman), Dr. Y P. Trivedi, Mr. G. S. Pannu (Member ITAT), Mr. Saktijit Dey (Member, ITAT), Mr. Hitesh R. Shah (President), Mr. Ajay Nathani (Principal Govt. Law College), Mr. Yuvraj (Moot Court Association)

Best Speaker Mr. Bhavin Shah (K. C. Law College)

Runner up, K.C. Law College

Winner Govt. Law College

Mr. G. S. Pannu (Member ITAT), addressing the students.– Seen from L to R: Prof. Dilip Shinde (Govt. Law College), Mr. Rahul Hakani (Chairman), Dr. Y P. Trivedi, Justice M. S. Karnik (Bombay High Court) Mr. Saktijit Dey (Member, ITAT), Mr. Hitesh R. Shah (President), Mr. Ajay Nathani (Principal Govt. Law College), Mr. Yuvraj (Moot Court Association)

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