

# NATIONAL JUDICIAL ACADEMY



**SEMINAR FOR MEMBERS OF THE INCOME TAX APPELLATE  
TRIBUNAL [SE-04]**

**11<sup>th</sup> to 13<sup>th</sup> February, 2020**

## **Programme Report**

**PROGRAMME CO-ORDINATORS**

***Mr. Rahul Ishwar Sonawane, Research Fellow and Mr. Shashwat Gupta,  
Law Associate***

The National Judicial Academy organized a seminar for members of the Income Tax Appellate Tribunal (ITAT) from 11<sup>th</sup> to 13<sup>th</sup> February, 2020 which was attended by 31 participants. The seminar provided a forum for the members to discuss and examine the constitutional and statutory mandate of ITATs; adjudicatory challenges and solutions to bottlenecks in its effective functioning. The seminar also provided a perspective on emerging issues in tax law by engaging participants in discussions on evolving jurisprudence in tax laws; seminal rules of interpretation; and evidentiary standards in tax laws. The sessions also included discussions on methods for court and case management and theory of precedent.

### **Session 1- Constitutional and Statutory Basis of Taxation**

**Chair- Justice R. V. Easwar**

**Speaker - Mr. S. Ravi**

The speaker elaborated upon the allocation of legislative power of the Centre and the States by focusing upon Article 246 and Seventh Schedule of the Constitution of India. The legislative competence of the Parliament and the State Assemblies which have been delineated in 7<sup>th</sup> Schedule were highlighted and the residuary power of legislation provided under Entry 97 in List I was also emphasized. The speaker discussed the concept of “Aspect Theory” and highlighted the judgment *Federation of Hotel and Restaurant Association of India v. Union of India*, [(1989) 3 SCC 634]. Elucidating Article 265 it was stated that there can be no levy of taxation without authority of law. It was emphasized that any legislation levying tax should incorporate three major components i.e. subject of tax; person liable to pay tax and rate of tax. A tax is levied for a public purpose and for the common benefit of the public at large. The doctrine of pith and substance and the difference between unauthorized levy and unconstitutional levy was also discussed.

## **Session 2- Jurisprudence of Tax Administration: Neutrality and Professionalism**

**Chair- Justice R. V. Easwar**

**Speaker - Mr. S. Ravi**

The speaker stated that the members of ITAT's should be neutral and should treat State and taxpayer equally. The ITAT is the final fact finding body and therefore, more responsibility is cast upon its diligent functioning. It was advised that the members of ITAT should maintain utmost professionalism while adjudicating cases and should apply law according to the letter of the law. It was stated that a judgment of the ITAT should not be affected by personal bias, beliefs or ideologies. Further, it was suggested that cases must be decided with utmost care, precaution and with utmost responsibility. Coordination mutual synergy between the members with open mind was emphasized. It was also stated that the principles of natural justice should be followed strictly while conducting the proceedings.

## **Session 3- Theory of Precedent**

**Speakers- Justice Ram Mohan Reddy, Justice R.V. Easwar and Prof V.K. Dixit**

The session included discussions on principles and theory of precedent. The speaker highlighted the value of binding precedents and stated that it is required for maintaining certainty, uniformity and predictability. It was stated that a judgment includes *ratio* (binding part) and *obiter dicta* (non-binding). It was asserted that judgment should not be affected by prejudices, emotions, habits and deep convictions of the adjudicator. The concept of *stare decisis* was discussed and it was stated that one should stand by what had been decided and not disturb a settled position. The speaker also discussed limitations to application of precedents which include overruled precedent, erroneous

judgments, misapplication of law to facts, *sub silentio*, *per incuriam* judgment etc. It was stated that the court should maintain judicial discipline and should follow the judgments of larger bench. The session also included deliberations on the issues of conflicting decisions of different High Courts; decisions of special benches; and conflicting judgments of coordinate benches of ITAT located in different regions.

#### **Session 4- Assessment Proceedings: Role of the Tribunal**

**Chair- Justice R. V. Easwar**

**Speaker - Mr. S. Ravi**

The speaker discussed various situations arising before the ITAT's and discussed whether the ITAT should annul an assessment or remand it to the lower court. It was stated that the ITAT should take into account the transgression or violation of law to ascertain the required route to be taken by the court. The speaker also discussed challenges due to defects in assessment proceedings by the officers and stated that in situations of procedural irregularity the case should be remanded back. It was stressed that the lackadaisical approach of assessing officers in adhering to the principles of natural justice while conducting assessments adversely impacts the assessee. The speaker also opined that in situations of violation of principle of natural justice, the matter should be remanded to the lower court.

## **Session 5 - Transfer Pricing**

**Chair- Justice R. V. Easwar**

**Speaker – Mr. Sujit Ghosh and Mr. S. Ravi**

The speaker commenced the session by elaborating upon the concept of “transfer pricing” and “arm’s length pricing”. It was stated that in certain cases corporations shift their profit to related/associated enterprises so that they have to pay less amount of tax. It was explained that the sale to related enterprises should be at 'arm’s length pricing'. The different methodologies for determination of 'arm’s length pricing' were discussed which included comparable uncontrolled price method (CUP); transactional net margin method (TNMM); cost-plus method (CPM); resale-price method (RPM) and profit-split method (PSM). It was stated that the major challenge is to ascertain whether arrangement pricing meets with the yardstick. The speaker highlighted various challenges in transfer pricing which included identifying transactions and getting details of the transaction; application of methodologies; locational advantages and disadvantages; ignorance of risk as a factor in determination of price; valuation of intangibles. It was opined that segmental analysis and ascertaining functionally similar enterprises required for comparables is also a major hurdle. It was further opined that mere size of the enterprise should not be a factor for non-consideration as a comparable. However if the enterprise is functionally dissimilar then it should not be considered. It was also opined that determination of comparable is the most critical and important factor of transfer pricing. It was further stated the ascertaining the correct methodology for determining arm length pricing is very difficult.

## **Session 6 - General Anti-Avoidance Rules (GAAR)**

**Chair- Justice R. V. Easwar**

**Speaker – Mr. Sujit Ghosh and Mr. S. Ravi**

The speaker initiated the session by discussing about GAAR provisions which were introduced by Chapter X-A- sections 95-102 of the Income Tax Act, 1961. It was stated that tax avoidance is the subject matter of GAAR. It was opined that this raises a challenge since a regular innocent appearing transaction could be used as a garb for tax avoidance and it becomes the responsibility of the judge to determine whether the case falls within the ambit of GAAR. The speaker also focused upon the term “impermissible avoidance arrangement” and arrangements “lacking commercial substance”. Thereafter, the speaker discussed about the powers of the Approving Panel and also gave a brief overview of Section 144BA of the Income Tax Act, 1961.

## **Session 7 - Court and Case Management**

**Speaker – Justice Ram Mohan Reddy and Justice R.V. Easwar**

The speaker discussed the importance of court and case management in enhancing justice delivery and streamlining processes. It was opined that the members of the tribunal should undertake management of their docket so that the simple cases are dealt within a particular timeframe. It was also advised that ICT should be incorporated in the ITAT for enhancing productivity and curtail wastage of time. It was stated that judges could try to streamline and reduce issues and complexity of cases. The advocate can be asked to submit written submissions so that the length of arguments can be curtailed. It was also asserted that the judges should conduct as the leader of their court instilling confidence amongst parties. Furthermore, the judge should have character, integrity and be honest in his dealings or proceedings.

## **Session 8 - Evidence in Taxation Law**

**Chair- Justice R. V. Easwar**

**Speaker – Mr. Sujit Ghosh and Mr. S. Ravi**

The session involved discussion on admissibility of a document as an evidence. It was discussed that admissibility of document has to be determined at the earliest point of time. Thereafter, the speaker discussed the scope of electronic evidence and its manner of admissibility. It was stated that a document is a proof of everything written in it. Furthermore, it was stated that the Parties should provide the best evidence in their possession and if it is not provided then it may be liable to draw adverse inferences. The judges were advised to carefully sift through the evidence enabling them to adjudicate effectively. It was stated that strict rules of evidence are not applicable in tax proceedings.

## **Session 9 - Interpretational Issues in Tax and Treaty Law**

**Speaker- Mr. Porus Kaka**

The speaker initiated the session by stating that no tax can be imposed on any subject without the enactment of legislation laying a burden of taxation in light of the judgment of the *Supreme Court in CIT v. Mr. P. Firm, Muar* [(1965) 56 ITR 67 (SC)]. Thereafter, the speaker focused upon various principles of interpretation *viz.* literal, strict, contextual, mischief rule, harmonious construction, golden rule, liberal construction etc. It was emphasized that the burden of proof of taxability is always on the revenue and the burden of proof of proving exemption is always on the taxpayer. The speaker also focused on the utility of various tools of interpretation and enumerated different types of internal and external aids to interpretation. It was opined that the tax treaties should be

interpreted liberally and holistically. The speaker referred to the "Vienna Convention on the Law of Treaties, 1969" and highlighted Article 31 and 32. Multilateral Instruments i.e. MLI and their importance was discussed. It was opined that the court should interpret international treaties according to the following precedence i.e. definition, context of the word and the views of the contracting parties. It was further stated that preamble of the treaty should be relied upon only in situations wherein the provision is ambiguous.

## **Session 10 - International Tax Treaty Law and Double Tax Avoidance Agreements**

### **Speaker- Mr. Porus Kaka**

The session initiated by providing a historical perspective on the development of tax treaties. It was stated that the treaties were signed with the intention of avoiding double taxation. Initially, the taxation levies were based on territorial nexus, which subsequently started to be based upon economic allegiance. The OECD Model Treaties and commentaries and their development was discussed. The importance of DTAA was discussed and highlighted in light of the judgment of the Andhra Pradesh High Court in *Sanofi Pasteur S.A. v. Department of Revenue* [(2013) 354 ITR 316 (AP)]. The speaker opined that interpretation of terms in tax treaties should be according to the ordinary meaning of the term. The judgment of the Supreme Court in the case of *Union of India v. Azadi Bachao Andolan* [(2003) 263 ITR 706 (SC)] and *Vodafone International Holding B.V v. Union of India* [(2012) 341 ITR 1(SC)] were contextually referred. The various dispute resolution mechanisms in India were discussed and the significance of increase in arbitration in international taxation disputes in recent times was emphasized. Subsequently, concepts of 'fiscal domicile', 'permanent establishment' and the 'principle purpose test' was elaborated upon by the speaker.