

**SEMINAR FOR MEMBERS OF THE INCOME TAX APPELLATE TRIBUNAL (SE-
1)
SEPTEMBER 21-23, 2018**

OBJECTIVE

National Judicial Academy organised the Seminar for members of the Income Tax Appellate Tribunal (ITAT) with the objective of facilitating discussion and critical examination of the constitutional and statutory mandate of the ITATs, identification of the adjudicatory challenges faced by the ITATs and solutions for any bottlenecks in the effective functioning of the ITATs. The seminar also designed aimed to provide a perspective on emerging issues in tax law by engaging the participants in discussion with domain experts, on evolving jurisprudence in tax law, seminal rules of interpretation and evidentiary standards in tax law.

SESSION 1

Constitutional and Statutory Basis of Taxation

Speaker: Ms. Sonia Mathur

Chair: Justice A.K. Jayasankaran Nambiar

In Session 1 on the theme *Constitutional and Statutory Basis of Taxation*, the speakers emphasised the social interest rationale for tax. The speakers dwelt on the objectives of taxation i.e. equity, convenience, economy and certainty as the basis of a fair taxation system. The speakers dwelt on the social contract basis of taxation i.e. the people decide to be governed by the rule of law including being subjected to tax in the expectation that the state will provide for social welfare, security and development in return. The speakers discussed Article 265 as the basis of levy and collection of tax, and the statutory provisions enabling the State to levy tax. The speaker stressed on the 4 crucial elements of a valid tax statute i.e. nature of taxable event, person on whom the tax is to be imposed, rate of tax and measure or value to which the rate will be applied for computing tax liability. The speakers also discussed the basis of applicability of taxation on the person – residence and source based (in cases of income arising outside India). The speakers discussed the *KT Moopil Nair* and *Azadi Bachao* case to highlight the jurisprudence on the validity of taxing statutes and stated that challenge to taxing statutes can only be on the grounds of legislative competence or violation of fundamental rights. The speakers also distinguished between tax and fee.

SESSION 2

Assessment Proceedings: Role of the Tribunal (Round Table Discussion)

Chair: Justice A.K. Jayasankaran Nambiar

In Session 2 on the theme *Assessment Proceedings: Role of the Tribunal*, the participants were engaged in group discussions to highlight challenges faced by the ITATs due to defects in the Assessment Proceedings and to identify solutions to address such defects. The major concerns expressed were the manner in which the assessment is conducted, the failure to send requisite intimation or notice to assessee, improper approvals taken by the assessing officers, the assessing officer's lack of technical expertise and knowledge, use of search orders to extend the time for investigation, failure to record grounds of satisfaction necessitating search by the assessing officer, failure to issue notice to the assessee for visiting penalty under Section 271C specifying whether the penalty is attracted for concealment or for inaccurate statement of particulars resulting in striking down of penalties in most cases. The speaker stated that the assessing officer is bound to inform the assessee of the provisions attracting tax as well as the provisions beneficial to the assessee. The speaker referred to *ACIT v. Hotel Blue Moon* to emphasise that issuance of notice is mandatory in assessment proceedings. The speaker also stated that in cases of approvals taken from the improper authorities, approval from a lower authority is incorrect but approvals from higher authorities is ok. However, in cases of approval by higher authorities the possibility of bias or prejudice is a concern as the assessee is denied the effective right to appeal because the authorising and appellate authority are the same.

SESSION 3

Interpretational Issues in Tax and Treaty law

Speaker: Ms. Sonia Mathur

Chair: Justice A.K. Jayasankaran Nambiar

In Session 3 on the theme *Interpretational Issues in Tax and Treaty Law*, emphasis was placed on understanding the objective of the statute and the history behind the enactment of the statute to interpret its provisions. The participants were advised not to play with the words of the statute unless absolutely necessary and if the import of the provision is clear and unambiguous then the provision must be interpreted strictly. The interpretation tool of 'reading down' should be used very rarely. The speakers elaborated on the Cardinal and Subsidiary Rules of Interpretation and their applicability. The speakers emphasised that taxing statutes must be interpreted strictly. In cases of ambiguity, taxation provision should be interpreted in favour of the assessee and exemption provisions should be interpreted in favour of the revenue. In cases

of doubt, the charging provision in a taxing statute is to be strictly interpreted and the machinery provision is to be liberally interpreted. However, the charging section and machinery provision are interdependent and if either is struck down, the other cannot survive. Exemption notifications and provisions creating deeming fictions are to be strictly interpreted.

SESSION 4

Jurisprudence of Tax: Neutrality and Professionalism

Panel: Justice S. Ravindra Bhat & Mr. Sujit Ghosh

Chair: Justice A.K. Jayasankaran Nambiar

In Session 4 on the theme *Jurisprudence of Tax: Neutrality and Professionalism*, the speakers discussed the basic principles of taxation as propounded by Adam Smith – equity, clarity reasonable in administration and convenience, and the constitutional principle that that a person cannot be taxed without the authority of law. The role of the ITAT in the administration of justice as a fact finding authority and the first independent authority to analyse the case was discussed and it was emphasised that the powers of the ITAT are circumscribed by the statute and the ITAT are bound to decide the case as per law and to interpret law to ensure justice to the assessee and the revenue. The role of the ITAT in ensuring precedential stability in tax law was emphasised. The participants were encouraged to ensure that the assessee is given a fair hearing. This is beneficial to the ITAT as this gives the ITAT an opportunity to examine the case. Fairness in search and seizure process and imposition of penalties was stressed on. The speakers also emphasised on ensuring equity, certainty and fairness in the methods and processes for collection of tax. The canons of tax – elasticity, productivity, simplicity, diversity and expediency were emphasised on. The attributes of a fair taxation system i.e. equal distribution of burden of tax (progressive taxation), vertical equity (the rich pay more than the poor) and horizontal equity (persons on the same level bear the same burden of tax) in view of the mandate of Article 38 of the Constitution of India was discussed to emphasise the role of tax in ensuring social and economic justice.

SESSION 5

Transfer Pricing

Speaker: Mr. Porus Kaka

Chair: Justice S. Ravindra Bhat

In session 5 on the theme *Transfer Pricing*, the speaker elucidated on the concept of transfer pricing as a system which treats your income on the basis of another person's income. Transactions between related entities can be used to manipulate prices, reduction of tax liability and result in base erosion. The speaker discussed the concept of Associated Enterprise which is the basis on transfer pricing. The methods adopted in transfer pricing and the methods of income attribution were discussed. The speaker discussed the concept of Arm's Length Price and Formulary apportionment. The speaker also discussed on the issues regarding determining the value of intangibles in transfer pricing. The speaker highlighted the major issues in transfer pricing – determining associated enterprise, concept of deemed associated enterprise, reference to transfer pricing officer, whether automatic or not, challenges in use of contemporaneous data, availability of proper comparables, faults in process adopted for transfer pricing, taxation of location savings and valuation of marketing intangibles.

SESSION 6

Evidence in Taxation Law

Panel: Mr. Porus Kaka, Mr. Sujit Ghosh & Ms. N.S. Nappinai

Co-Chair: Justice S. Ravindra Bhat & Justice A.K. Jayasankaran Nambiar

In Session 6 on the theme *Evidence in Taxation Law*, the speakers discussed the basic principles of burden of proof in taxing statutes and the judicial precedents on this issue. Under taxing statutes the onus in respect of inclusion of receipts in income is on the Revenue while the onus of proving exemptions is on the assessee. The burden of proving that a transaction is sham lies upon the Revenue, unless statutorily shifted i.e. GAAR. The initial burden to prove concealment of income is on the Revenue. The speakers discussed the burden of proof and evidentiary standards in GAAR cases and in search, seizure, illegally collected evidence and tax avoidance cases. The speakers also discussed the provisions of the Evidence Act and its application in tax cases. Electronic evidence, its sources and relevance in tax cases was discussed. The methods to check authenticity of electronic evidence, the standards of proof in cases involving electronic evidence were elaborated on.

SESSION 7

International Tax Treaty Law and Double Tax Avoidance Agreements

Speaker: Mr. V. Sridharan

In Session 7 on the theme *International Tax Treaty Law and Double Tax Avoidance Agreements*, the rationale for Double Taxation Avoidance Agreements (DTAA) was discussed. Tax treaties are entered into to prevent juridical double taxation of cross border transactions in differing tax systems and to avoid situations where tax is imposed repeatedly due to differing definition of residence and jurisdiction overlap between countries. The speaker elaborated on the structure, application and distributive rules of international tax treaties. The speaker also discussed the Equalisation levy which was introduced as a separate levy in the Finance Act, 2016 as a levy on online advertisement, provision for digital advertising space etc. and potential impact on DTAA. The speaker also discussed Section 90 of the Income Tax Act, 1961 regarding applicability of treaty as law in India. The speaker discussed the buyback of shares and its treatment under DTAA. The speaker also discussed the taxation of intangibles

SESSION 8

General Anti-Avoidance Rules

Speaker: Mr. V. Sridharan

In Session 8 on the theme *General Anti-Avoidance Rules*, the speaker elaborated on the background of General Anti-Avoidance Rules (GAAR). Sham transactions, whether illegal in form or substance as a mode of tax evasion was discussed and tax evasion was distinguished from tax avoidance. The legislative provisions – Chapter X-A and Section 144BA of the Income Tax Act, 1961 were discussed. The applicability of GAAR, the procedure under Section 144BA of the Income Tax Act, 1961 and the concepts of Impermissible Avoidance Arrangements and Commercial Substance were discussed. The tax consequences for Impermissible Avoidance Arrangements were explained. The issues highlighted by the speaker were – the conflict between Rule 10U(1)(d) and Rule 10U(2) of the Income tax Seventeenth Amendment) Rules, 2013, invocation of GAAR provisions in court approved arrangements and retrospective application of GAAR.
