



CONSTITUTIONAL AND STATUTORY BASIS OF TAXATION

*NATIONAL SEMINAR FOR MEMBERS OF THE INCOME TAX
APPELLATE TRIBUNAL*

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POWER OF TAXATION

- Citizens Savings and Loan Association V/s Topeka, 20 Wall 655,662,664 (1874)

- Justice Miller of United States Supreme Court –

“The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of peopleTo lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon the favoured individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. This is not legislation. It is a decree under legislative formsWe have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose.”

ARTICLE 265

*No tax shall be levied or collected except by
the “Authority of law”*

Chottabhai vs. Union of India 1962 SCR Supl (2) p. 1006

Article 265 is applicable not only for “levy” but also for the collection of taxes and the expression “assessment” within its compass covers both the aspects carried out by the executive functionary.

S. Gopalan vs State of Madras (1958) 2 MLJ 117

- :“Law” means an act of legislature and it:-
 - should be within the legislative competence of the legislature
 - Should not be prohibited by any constitutional provisions like Article 27, 276, 286 and 301 etc.
 - Should not be in violation of any fundamental right
 - Should not be violative of any constitutional limitations like Article 301 and Article 304

Vikram Cement V State of Madhya Pradesh (2015) 11 SCC 708

- Explanation in Notification –
- while reducing entry tax, appended Explanation stating that amount which was already paid by dealer at higher rate would not be refunded.
- Explanation resulted in discrimination.
- There was no objective which was sought to be achieved. Held to be clearly violative of Article 265 of Constitution.

G.K.Krishnan & Ors vs. State of Tamil Nadu (1975) 1 SCC 375

- Vehicle tax under Section 4 of Madras Motor Vehicles Taxation Act, 1931 and Articles 14 and 301 of Constitution of India.
- Motive behind imposition of tax immaterial. Giving wrong reason for imposition of tax does not derogate from validity of tax.
- Tax held to be not restricting freedom of trade, commerce as guaranteed under Article 301.

CHAMBER OF TAX CONSULTANTS
v/s
UNION OF INDIA (2018) 400 ITR 178 (Del)

- *Section 145(2), to be read down to restrict the power of the Central Government to notify income computation and disclosure standards that do not seek to override binding judicial precedents or provisions of the Act.*
- *The power to enact a validation law is an essential legislative power that can be exercised, in the context of the Act, only by Parliament and not by the Executive. If section 145(2) of the Act as amended is not so read down it would be ultra vires the Act and article 141 read with articles 144 and 265 of the Constitution.*

Binoy Viswam v. Union of India

[2017] 396 ITR 66 (SC)

- Section 139AA of IT Act makes it compulsory for all persons who are Income-tax assesseees to obtain an Aadhaar card and quote their Aadhaar number to the prescribed Income-tax authority.
- Held valid, within the legislative competence of Parliament and neither discriminatory nor violative of article 19(1)(g) of the Constitution. Proviso to section 139AA(2) cannot be read retrospectively, but prospectively.
- A legislation cannot be declared unconstitutional on the ground that it is “arbitrary” inasmuch as examining whether or not a particular Act is arbitrary implies a value judgment and courts do not examine the wisdom of legislative choices and, therefore, cannot undertake this exercise.

RMDC (Mysore) Private Ltd. vs. State of Mysore AIR 1962 SC 594

■ LEGISLATIVE COMPETENCE

Challenge to the constitutionality of the Mysore Act on the ground that

(1) Mysore Legislature by adopting the Central Act was no longer competent to pass any law in regard to prize competitions because the whole matter including the power of taxation was surrendered in favour of Parliament.

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(2) Mysore Act as amended violated Article 252(2) of the Constitution in as much as it indirectly amends the Central Act by adding a new method of control by imposition of penalties of a monetary nature

(3) Mysore Legislature could not amend an Act which stood repealed as a result of the enactment of the Central Act.

(4) Mysore Act as amended was repugnant to the Central Act and is therefore, to the extent of repugnancy, void under Article 254(1) of the Constitution and

(5) It was colorable legislation inasmuch as the tax was imposed on the prize competitions with the object of controlling them.

- **Court held** that by passing the resolution States did not surrender their power of taxation.
- Not a colourable piece of legislation by an indirect attempt to amend Central Act
- Tax imposed under Mysore Act was not penalty but was exercise of power which the legislature possessed of imposing tax under Entry 62.

Additional Commissioner of Income-Tax vs. Bharat V. Patel (2018) 404 ITR 037 (SC)

- CIRCULARS — can not be used to introduce new tax provision in Statute which was otherwise absent.
- *It is a fundamental principle of law that a receipt under the Act must be made taxable before it can be treated as income.*
- *Courts cannot construe the law in such a way that brings an individual who otherwise is not liable to pay tax, within the ambit of the Income-tax Act, 1961 to pay tax.*
- *In the absence of any such specific provision, if an individual is subjected to pay tax, it would amount to violation of his Constitutional right. Taxing provisions must be construed strictly so that no person who is otherwise not liable to pay tax, be made liable to pay tax.*

Indian Express Newspapers (Bombay) P. Ltd. v. Union of India (1985) 1 SCC 641

- Validity of a subordinate legislation levying customs duty on imported news print examined.
- Subordinate legislation may be questioned on the ground of legislative competence or being ultra vires the constitution and also additional grounds such as, being ultra vires the parent statute or being in conflict with any other statute or being so arbitrary that it could not be said to conform to the statute or violative of Article 14 of the Constitution.

Kunnathat Thathunni Moopil Nair v. State of Kerala and Anr. (1961) 3 SCR 77

The tax proposed must be within the legislative competence of the Legislature imposing a tax and authorising collection.

The tax must be subject to the conditions in Article 13 of the Constitution. Article 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Article 14.

State not to deny to any person equality before the law or the equal protection of the laws of the country.


Medical Council of India vs. State of Kerala W.P. No.178. 2018 -12.09.2018

- SC examined that whether the State of Kerala is competent to promulgate the Kerala Professional Colleges (Regularization of admissions in Medical Colleges) Ordinance, 2017 notified on 20.10.2017 which intended to nullify the judgments and orders of SC and encroaches upon the power of the judiciary.
- Impugned Ordinance declared ultra vires and entrenching upon the field earmarked for the judiciary as it sought to nullify the judgments of the High Court and the Supreme Court

Shayara Bano vs. Union of India (2017)

9 SCC 1

- Court issued directions to Union of India under Article 142 of the Constitution to consider appropriate legislation with reference to talaq-e-biddat.
- Till such time the legislation is considered, Court injuncted Muslim husbands from pronouncing talaq-e-biddat, for a period of six months in the first instance.

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SEVENTH SCHEDULE
TO THE
CONSTITUTION

CONSTITUTION OF INDIA-FEDERAL

- Powers of Union/ Central Government and State Government bifurcated.
- Three lists to the seventh schedule to the Constitution of India:-
 - Union List- only parliament can make law
 - State List- only state legislatures can make laws
 - Concurrent List- both central government and state government have power to make laws.

UNION LIST

- **Entry No. 82:-** Tax on Income other than agriculture income
- **Entry No. 83:-** Duties of customs including export duties.
- **Entry No. 84:-** Duties of excise on goods manufactured or produced in India namely petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, tobacco and tobacco products.
- **Entry No. 85:-** Corporation tax
- **Entry No. 86:-** Taxes on capital value of the assets, exclusive of agricultural lands, of individuals and companies; taxes on the capital of companies

- Entry No.87:- Estate duty in respect of property other than agricultural land
- Entry No.88:-Duties in respect of succession to property other than agricultural land
- Entry No. 89:- Terminal taxes on goods or passengers, carried by railways, sea or air, taxes on railway fares and freight.
- Entry No. 90:- Taxes other than stamp duties on transactions in stock exchanges and future markets.
- Entry No. 91:- Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

- **Entry No. 92 A:-** Taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce or
- **Entry No. 92B :-** Taxes on consignment of goods (whether the consignment is to the person making it or to any other person) where such consignment takes place in the course of Inter-state trade or commerce
- **Entry No. 96:-** Fees in respect of any matters in the Union List, but not including fees taken in any court.
- **Entry No. 97:** Any other matter not enumerated in List II or List III including any tax not mentioned in List II and List III.

STATE LIST

- **Entry No. 46:-** Taxes on agricultural income
- **Entry No. 51:-** Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-
 - a. Alcoholic liquors for human consumption;
 - b. Opium, Indian hemp and other narcotic drugs and narcostics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
- **Entry No. 53:-** Taxes on the consumption or sale of electricity.

- **Entry No. 54:-** Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-state trade or commerce or sale in the course of international trade or commerce or sale in the course of international trade or commerce of such goods.
- **Entry No. 56:-** Tax on goods and passengers carried by road or inland waterways.
- **Entry No. 60:-** Tax on professionals, trades, callings and employment.

- Entry 61:- Capitation taxes
- Entry 62:- Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or Regional Council or a District Council.

CONCURRENT LIST

- Entry 43:- Recovery in a state of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that State.
- Entry 44:-Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.
- Entry 47:- Fees in respect of any of the matters in this List, but not including fees taken in any court.

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DIRECT TAXES AND CONSTITUTIONAL PROVISIONS

DIRECT TAX is imposed directly on the taxpayer and paid directly to the government by the persons (juristic or natural) on whom it is imposed.

INCOME TAX: (Entry No. 82 of the Union list)

- Income Tax Act, 1961 imposes tax on the income of the individuals or Hindu undivided families or firms or co-operative societies (other than companies) and trusts (identified as bodies of individuals associations of persons) or every artificial juridical person.

- In case of non resident corporations, tax levied on income earned from business transactions in India or any other Indian sources depending on bilateral agreement of that country.

PROPERTY TAX

- Tax power vested in the states and it is delegated by law to the local bodies, specifying the valuation method, rate band, and collection procedures.
- Tax base is the annual rateable value (ARV) or area- based rating.
- Vacant land is exempted from the assessment.

- Section 56 (2) of the Income Tax Act, 1961 deals with Gifts.
- According to section 56(2), money received without consideration by any individual or Hindu Undivided Family (HUF) in excess of Rs. 50,000 in a year would be taxable.
- Amendment in section 56(2)(vii)(viia) made operative w.e.f 01.04.2017. Clause (x) inserted in section 56(2) to provide that specified receipts would be taxable in the hands of any person under the head “income from other sources.”

CORPORATION TAX:

- Companies and business organizations in India are taxed on their worldwide transactions under the provision of Income Tax Act, 1961.
- Corporation is deemed to be resident if incorporated in India or if its control and management is situated entirely in India.



INDIRECT TAXES
AND
CONSTITUTIONAL
PROVISIONS

- The relevant entries in these three lists for collection and levy of indirect taxes by the Central government are provided in the Union list.

CUSTOM DUTIES (Entry 83)

- Custom laws are enacted with an authority drawn from the constitution.
- Entry 83 of the Union list provides for the levy and collection of duties of customs including export duties.

- Customs duties are trading taxes.
- Concerned with the commodity in respect of which the taxation is imposed not the person from whom the tax is extracted.

GOODS AND SERVICE TAX (Entry 92 C)

- GST has subsumed Central Excise, State VATs, Entry tax, Luxury taxes, Octroi etc.

CONSTITUTIONAL DISTRIBUTION OF REVENUES

- ARTICLE 268: DUTIES LEVIED BY THE UNION BUT COLLECTED AND APPROPRIATED BY THE STATE
- ARTICLE 269: TAX LEVIED AND COLLECTED BY THE UNION BUT ASSIGNED TO THE STATES
- ARTICLE 270: TAXES LEVIED AND DISTRIBUTED BETWEEN THE UNION AND THE STATES

Govind Saran Ganga Saran vs. S.T. Commercial AIR 1985 SC 1041

- Components of tax:
 - Nature of the taxable event
 - The person on whom the levy is imposed
 - Rate at which tax is imposed
 - Measure or value to which the rate will be applied for computing the tax liability.

CIT vs. S.V. Gopala & Ors. (2017) 396 ITR 694 (SC)

- CBDT issued circular under section 119 of the Income Tax Act, 1961 amending Rule 68B of the IInd schedule to the Act, which otherwise has statutory force.
- **HELD:** Such legislative provisions cannot be amended by CBDT in exercise of its power under section 119. Circular held to be ultra vires and quashed it.

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INTERNATIONAL TREATIES & THE OBJECT

TERRITORIAL BASIS

- Inclusion of a particular income in the total incomes of a person for income-tax in India is based on his residential status.
- There are three residential status, viz.,
 - 1 Resident & Ordinarily Residents (Residents)
 - 2 Resident but not Ordinarily Residents and
 - 3 Non Residents.
- All residents are taxable for all their income, including income outside India.
- Non residents are taxable only for the income received in India or Income accrued in India.

CONNECTING FACTORS

- Location of the source,
- Residence of the taxable entity,
- Maintenance of a permanent establishment, and so on.
- Depending on the factors to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries.
- In order to avoid such an anomalous and incongruous situation, Governments of different countries entered into bilateral treaties, conventions or agreements for granting relief against double taxation.

EVOLUTION OF TREATY LAW

1899	First tax treaty signed in Austria
1920	League of Nations began to play a leadership role
1921/1922	After First World War, Germany signed treaties with Czechoslovakia and Austria
1923	League of Nations began publication on tax treaties
1928	First internationally important Model Tax convention published
1961	OECD founded
1963	OECD first draft model treaty published
1979	United Nations published a manual for negotiations of bilateral tax treaties between developed and developing countries
1990	OECD amendment
2001	UN Model Tax Convention
2011	New UN Model Tax Convention

■ *Union of India V/s Azadi Bacho Andolan*

(2004) 10 SCC 1

The principles adopted in interpretation of treaties are not the same as those in interpretation of statutory legislation. An important principle that needs to be kept in mind in the interpretation of the provisions of an international treaty, including one for double taxation relief is that treaties are negotiated and entered into at a political level and have several considerations as their bases.

Held that treaties cannot levy tax but can give relief.

BASIC TREATY PRINCIPLES

- Treaty commitments must be honored by the parties in good faith
- A party may not invoke the provisions of its internal law as justification for its failure to honour its treaty commitments
- A treaty should be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context and in light of its object and purpose

Commissioner of Customs, Bangalore vs. G.M. Exports and Ors. 2016(1) SCC 91

INDIA NOT SIGNATORY:

- Rules not contrary to domestic law are followed by the courts.
- Conflict between domestic law and international law, domestic law will prevail.

INDIA IS A SIGNATORY:

- Statute is passed pursuant to such treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

LATEST UPDATES ON INTERNATIONAL TREATIES

INDIA, PANAMA TO EXPEDITE TIEA NEGOTIATIONS

- Indian Government strongly pursuing a Tax Information Exchange Agreement (TIEA) with Panama
- Objective of the Agreement: To promote international cooperation in tax matters through exchange of information.
- Nature of information varies from agreement to agreement

INDIA SIGNED A TAX TREATY WITH HONG KONG-19.03.2018

- India entered into a tax treaty with Hong Kong for avoidance of double taxation and fiscal evasion of taxes on incomes.
- Hong Kong is a significant economic partner for India in terms of trade and investment.
- INDIA AND OMAN NEGOTIATING TO UPDATE TAX TREATY (July 2018)

THANK YOU!!