

BURDEN OF PROOF

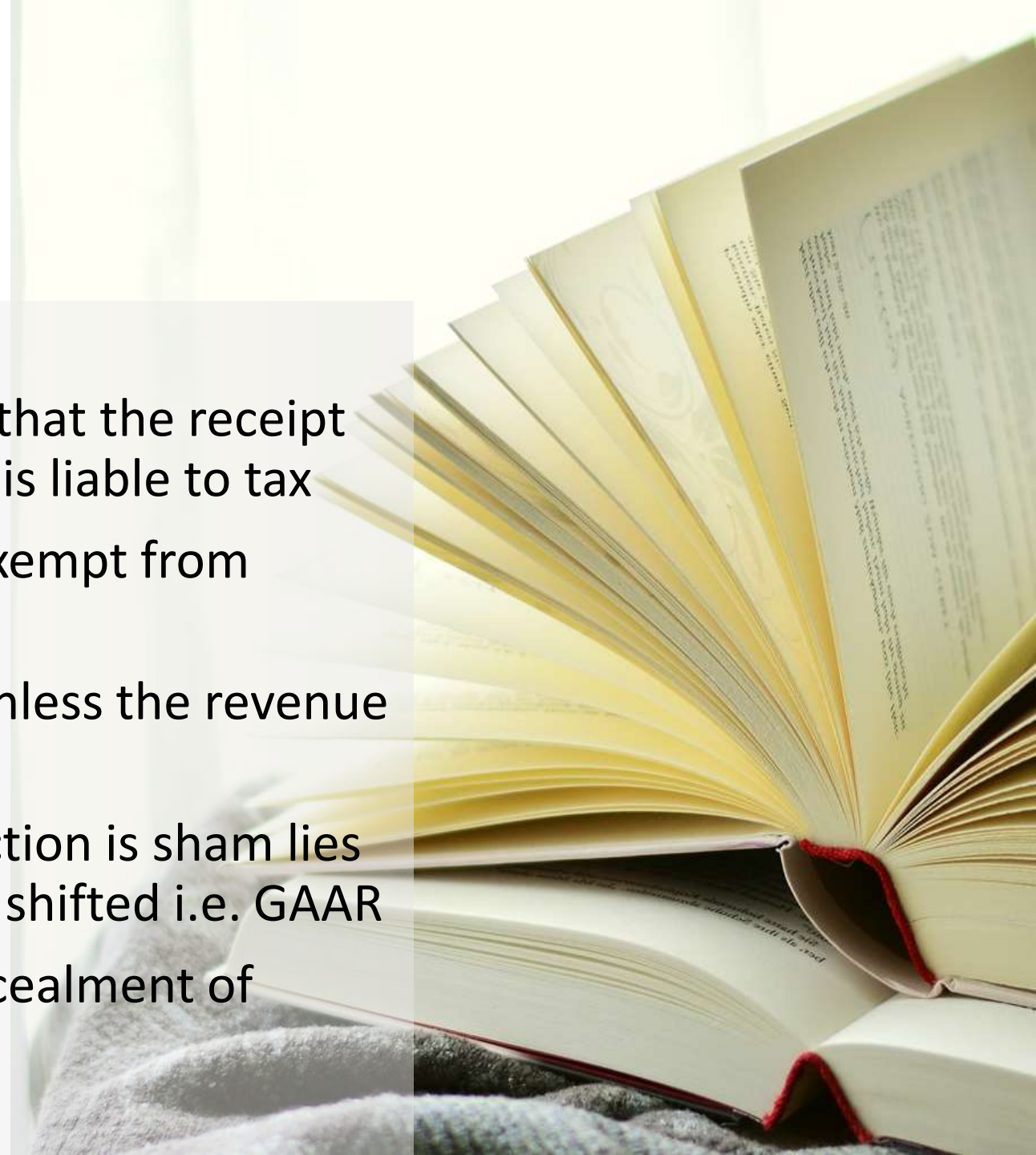
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Burden of Proof – Basic Principles

Onus of the burden of proof

- On the revenue authorities to show that the receipt constitutes income and that income is liable to tax
- A claim that a particular income is exempt from taxation lies upon the assessee
- Similarly, the state of affairs is real unless the revenue proves the contrary.
- The burden of proving that a transaction is sham lies upon the revenue, unless statutorily shifted i.e. GAAR
- Even the initial burden to prove concealment of income is on the Revenue.



Burden of Proof – judicial precedents

Parimisetti

**Seetharamamma v/s CIT
57 ITR 532 (SC)**

Where however a receipt is of the nature of income, the burden of proving that it is not taxable because it falls within an exemption provided by the Act lies upon the assessee.

**CIT v/s Ramakrishna Deo
35 ITR 312 (SC)**

The law is well settled that it is for a person who claims exemption to establish it, and therefore, it was for the assessee to prove that the income sought to be taxed was agricultural income exempt from taxation

**CIT v/s Sati Oil Udyog Ltd.
372 ITR 746 (SC)**

The burden of proving that the assessee has attempted to evade tax is on the revenue which it has to discharge by establishing facts and circumstances from which a reasonable inference can be drawn that, in fact, attempted to evade tax lawfully payable by it.

Changing times ...

- Form relevant (Duke of Westminster UK)
- Turbulence of Mcdowell (Indian SC) – Emphasis on substance
- Azaadi Bachao Andolan & Vodafone (Indian SC) – the balancing act
- Transfer Pricing regulations / Arm's length regime
- LOB
- FATCA
- BEPS
- GAAR / Impermissible arrangements
- Automatic Exchange of Information



Burden (/ Responsibility?) in changing times ..

- SAAR : Transfer Pricing regulations – Initial burden to disclose related party transactions and / or self benchmarking obligations
- FATCA – disclosures mandatory on the tax payer and intermediaries
- GAAR – Obligations changing with several countries framing provisions with presumptive impermissibility of the transactions unless proved to the contrary
- Checks though have been introduced in form of panels with higher officials to prevent misuse
- Exchange of Information “automatic” is the new normal
- On 5.12.2017, the Council of the European Union (the Council) included Panama on its list of “Uncooperative jurisdictions for tax purposes

Upon whom is the burden of proof under GAAR? (1/2)

Australia	Taxpayer
Belgium	Tax authority
Brazil	Taxpayer
Canada	Shared
China	Taxpayer
France	Tax authority
Germany	Shared
India	Taxpayer
Indonesia	Shared
Ireland	Taxpayer
Italy	Tax authority
Japan	Tax authority

Source:

[http://www.ey.com/Publication/vwLUAssets/Mapping_tax_enforcement's_evolution/\\$FILE/GAAR.pdf](http://www.ey.com/Publication/vwLUAssets/Mapping_tax_enforcement's_evolution/$FILE/GAAR.pdf)

as on 2013



Upon whom is the burden of proof under GAAR? (2/2)

Mexico	Tax authority
Netherlands	Tax authority
Poland	Shared
Russia	Taxpayer
Singapore	Taxpayer
South Africa	Shared
South Korea	Taxpayer
Sweden	Taxpayer
Switzerland	Shared
Turkey	Shared
UK	Tax authority
USA	Taxpayer

Source:

[http://www.ey.com/Publication/vwLUAssets/Mapping_tax_enforcement's_evolution/\\$FILE/GAAR.pdf](http://www.ey.com/Publication/vwLUAssets/Mapping_tax_enforcement's_evolution/$FILE/GAAR.pdf)

as on 2013



Mohan Manoj Dhupelia
(2015) 67 SOT 12 (Mum ITAT)

Income added on the basis of Information that was received as a part of tax information exchange treaty that taxpayer was a beneficiary of a Trust in foreign country in whose account a huge balance was maintained by taxpayer, despite denial by the taxpayer



Evidentiary standards –Search, seizure,
illegally collected evidence, tax avoidances.

India Evidence Act, 1872

Section 3- "Evidence" means and includes—

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
 - (2) all documents including electronic records produced for the inspection of the Court;
- such documents are called documentary evidence.

Types of Evidence

- Oral - statement of witness
- Documentary including electronic records
- Courts presumptions - conclusive and rebuttable.
- Surrounding circumstances
- Information available in public domain.
- An admission of fact - where contents are proved.
- Expert opinion- valuation or technical report

Applicability of Indian Evidence Act to Tax proceedings

- Rules of Evidence and Indian Evidence Act (IEA) are applicable to proceedings in the Courts before the judges and the Magistrates. They apply to judicial proceedings
- The AO is conducting quasi – judicial proceedings and is not a Court. However u/s. 131 and a few other provisions the Civil Procedure Code is made applicable to the IT proceedings.
- The CIT(A) and the ITAT also are quasi-judicial.
- The Rule of Evidence and the provisions of the IEA do not apply strictly apply to the proceedings under the IT Act.
- The proceedings however are to be concluded based on evidence only.
- Rules appealing to common sense in any case have to be applied in leading evidences in support of the case and in relying thereon to adjudicate the case
- IT Act being the law of taxation, a statute, shall also be governed by Rules of Evidence though not by the strictest application of the IEA.

Rules of Evidence –applicable to tax proceedings.

- If revenue is inclined to tax the receipt it is they to lead the evidence.
- law can shift the burden of proof on the assessee to prove that apparent is not real.
- evidence gathered behind the back of the assessee cannot be used unless an opportunity of rebutting same is given.
- the rules of Natural Justice shall apply in admission of the evidence – opportunity of hearing and cross-examination.
- statement made on oath is binding but not conclusive

Rules of Evidence –Cross Examination

- **State of Kerala v. K.T. Shaduli Grocery Dealer Etc: (1977) 2 SCC 777** held, *“The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity “to prove the correctness or completeness of such return”. Now, obviously “to prove” means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognized by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales Tax Officer.”*

Rules of Evidence –Cross Examination

- **CIT v. Virgin Securities & Credits: 332 ITR 396 (Del)**
- **CIT v. SMC Share Brokers Ltd: 288 ITR 345(Del)**
- **Gargi Din Jwala Prasad v. CIT: 96 ITR 97 (All)**
- **Moti Lal Padampat Udyog Ltd. v. CIT: (2007) 293 ITR 565.**
- **New India Assurance Company Ltd. v. Nusli Neville Wadia: (2008) 3 SCC 279.**

Evidentiary standards – illegally collected evidence

- *If the search being condemned as illegal, what consequence it would have on the seizure of the documents during such illegal search. Whether to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.*
- **Dr. Partap Singh v. Director of Enforcement 155 ITR 166(SC)**

Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material.

- **Pooran Mal v. Director of Inspection (Inv.) 93 ITR 505 (SC)**

Even though the search and seizure were in contravention of provision of section 132, material seized would liable to be used against person from whose custody it was seized.

Illegally Collected Evidence

USA

Exclusionary Rule applies, if criminal in nature

UK

Regina Khan (Sultan) 1997 AC 558 (HL) – There is no right of privacy which is sufficient to justify the exclusion of evidence which had been obtained illegally

India

Pooran Mal v. Director of Inspection (Investigation) [1974] 93 ITR 505 (SC) – Illegality of the search does not vitiate the evidence collected during such illegal search

Important of Electronic Evidence in Tax Dispute

- Introduction of the Information Technology Act, 2000
- Corresponding amendments to the Indian Evidence Act, 1872
- Statement of objects and reasons - *“New Communication Systems and digital Technology have made drastic changes in the way we live. A resolution is occurring in the way people transact business.”*
- New section were introduced – electronic records being more susceptible to tampering, alteration, transposition, excision etc. that could lead to travesty of justice.

Indian Evidence Act, 1872 – Section on Electronic Evidence

- Section 2(22AA) of the Income Tax Act, 1961- defines “documents” to include an electronic record as defined in clause (t) of sub-section(1) of section 2 of Information Technology Act, 2000.
- Section 2(1)(t) of the Information Technology Act, 2000
- "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche;

Indian Evidence Act -1872- Section

- Section 22A- oral Admission as to the contents of electronic records are not relevant unless the genuineness of the electronic record produced is in question.
- Section 39- When a statement forms part of a conversation, document, electronic record, book or series of letters or papers as the Court considers necessary on the particular case to the full understanding of the nature and effects of the statements , and the circumstances under which it was made.
- Section 45A- when the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resources or any other electronic or digital form, the opinion of the examiner of electronic evidence referred to in section 79A of the Information Technology Act, 2000
- Section 65A- the contents of electronic records may be proved in accordance with the provisions of section 65B

Indian Evidence Act -1872- Section

Section 65B – Admissibility of Electronic Records

- (1) Electronic Record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer will be admissible in court as evidence. No requirement to produce the original.
- (2) The conditions as mentioned in Sub-section (2) to allow admissibility:-
 - The computer must have produced the output in a period when it was regularly used to store/process information for activities regularly carried out by a person in lawful control over it;
 - Such information must have been regularly fed into the system in the ordinary course of the activities;
 - The system should have been operating properly if it was not working properly, then it must have been such as not to affect the electronic record or the accuracy of the information contained in it, and
 - Information in the electronic record must be a copy of or derived from, the information that was fed into the computer in the ordinary course of the activities.
- (3) one or more computer or combination of computer shall be constituted single computer for the purpose of sub-section (2)

Indian Evidence Act -1872- Section

Section 65B – Admissibility of Electronic Records (cont)

- Section 65B(4)- It is desired to give a statement in any proceedings pertaining to an electronic record
 - a) There must be a certificate which identifies the electronic Record containing the statement
 - b) The certificate must described the manner in which the electronic record was produced
 - c) The certificate must furnish the particulars of the device involved in the production of that record
 - d) The certificate must deal with the applicable conditions mentioned under section 65B(2)
 - e) The Certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant devise.
- The person only need to state in the certificate that the same is to be best of his knowledge and belief.

Indian Evidence Act -1872- Section

- Section 88A- The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be address corresponds with the message as fed into his computer for transmission; but that the court shall not make any presumption against the receipt.
- Section 131 – no one shall be compelled to produce documents in his possession or electronic records under his control, unless such person consents to their production.

Indian Evidence Act -1872- Section

Section 90A-Electronic Records beyond 5 years

- If the electronic record is proved to be five years old, the court has to make consider the document if they were in proper custody.
- The Electronic records are said to be in proper custody if they are in the under the control of the correct person or proved to be from legitimate origin or the circumstances of the particular case are such as to render such an origin probable.

Anvar P.V. versus P.K Basheer and Others (2014) 10 SCC 473

- Copies of the Electronic evidences is secondary evidence.
- Admissibility of electronic record depends upon the satisfaction of conditions as prescribed under section 65B.
- If original record itself produce before the court, will be admissible without compiling with the condition prescribed under section 65B
- If secondary evidence in electronic records to be accompanied by a certificate as prescribed under section 65B(4).
- In absence of such certificate, secondary evidence of electronic records cannot be admitted as evidence.
- The certificate ensures the source and authenticity- two hallmarks pertaining to the electronic records.
- Only if condition made under section 65B is complete, resort can be made to section 45A- opinion of Examiner of Electronic Evidence.
- Documents produced by the authorities would not require certificate.

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Soignee R. Kothari 386 ITR 466

- Information (bank account in HSBC, Geneva, Switzerland) received from the French Government.
- The CBDT passed the Information to the AO.
- The AO on the basis of information issued reassessment notice.
- The Assessee challenged the reassessment notice before the High Court
- The Court considered the Serious allegation raised against the Assessee and the assessee should have made available the documents, which it failed to do.
- The conduct on the part of the Petitioner is not forthcoming, and thereby no interference is called.

Right to Privacy in India (1/2)

- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India

Justice K.S. Puttaswamy (Retd) v/s Union of India (SC) (9 Judges)

The 11 Judges clarifying that privacy is a fundamental inalienable right, intrinsic to human dignity and liberty. (6 Judges opinion, 527 pages)

- The decision overruled the earlier two decisions of the Supreme Court in the case of

M P Sharma v Satish Chandra, District Magistrate, Delhi (1954) SCR 1077

Kharak Singh v State of Uttar Pradesh (1964) 1 SCR 332

- The decision only determines the right to privacy under the Constitution of India.



Right to Privacy in India (2/2)

- The Apex court upheld government decision to link Aadhar(Biometric Identification Card)- PAN but exempts those without Aadhar, subject to privacy issue
- 5 Judge Constitution Bench which is concerned with the obligations of Citizens and Taxpayers on mandatorily complying with Biometric Identification Cards in many areas, including Tax filing, hearing is currently underway



Taxpayer rights in India – others

- Taxpayers Charter 208 ITR 6 (st)
- It provides for what every taxpayer is entitled to expect from the Income Tax Authorities
- Rights and Duties of persons Searched
- Income tax department expectations from the Taxpayer



Right to Privacy and Tax Law

International Precedents

Comptroller of Income Tax v/s BKW 16 ITLR 344 (Singapore High Court)

- The Burden of proving that an order would be contrary to public policy as narrowly defined was on the taxpayer

Jussila v/s Finland 9 ITLR 662 (ECHR)

- Tax-related penalty could entail a criminal charge for the purpose of Article 6 of the European Convention on Human rights so that the fair trial rights (oral hearing)

Ferrazzini v/s Italy 3 ITLR 918

- Disputes over liability and quantum of tax fell outside Article 6

Aklagaren v/s Fransson 15 ITLR 698 (Court of Justice – EU)

- Double Jeopardy principle contained in Article 50 of the Charter of Fundamental Right of the European Union doesn't prohibit a tax penalty and a criminal penalty to be levied together but imposition of two criminal penalties are barred



Right to Privacy and Tax Law

International Precedents

John Geranzi Ltd v/s Director General Inland Revenue 2013 15 ITLR 434 (Maltese Constitutional Court)

- Rights to a fair trial in Article 6 of the European convention for the protection of human Rights applicable to tax disputes

Volokhy v/s Ukraine 9 ITLR 328 (ECHR)

- Article 8 of ECHR 'in accordance with law' does not just mean in accordance with domestic law but also with requirements of the Rules of Law. Interception of family mail is bad in law

JMA Accounting Pty Ltd v/s Carmody Commissioner of Taxation 9 ITLR 1013 (Federal Court of Australia) (Full Court)

- Downloading all emails under a search warrant without selecting those relevant would be illegal. Documents to be returned



Right to Privacy and Tax Law

International Precedents

Riener v/s Bulgaria 9 ITLR 1013 (ECHR)

- Travel ban on tax defaulter only appropriate when it serves the purpose

Re Helen S 19 ITLR 534 (French Constitutional Court)

- Disclosure of private information of trust by making it a part of public records and accessible to every person effects rights to privacy. Restricted to authorities, permissible

Rigena v/s State Tax Inspectorate 15 ITLR 237 (Supreme Administrative Court of Lithuania)

- The European Convention on Human Rights prohibits double punishment for the same offence the same applies to Fines/penalties.



Belgian Constitutional Court rulings

- Belgian Constitutional Court in its decision no. 141/2013 dated 30.10.2013 holds the new GAAR to be compatible with the Constitution
- In another judgement dated 14-02-2013, the Belgian Constitutional Court while deciding on the constitutional challenge to Articles 55 to 57 and 84 of the Law of 14 April 2011 under which the tax administration can require banks and other financial establishments to communicate data on a tax-payer where it has any circumstantial evidence of tax fraud against this person or where it wishes to ascertain the tax base «on the basis of signs and circumstantial evidence» which point to a lifestyle of a level higher than that suggested by the declared income. Article 84 of this Law, which was also challenged, makes the possibility of conducting a transaction between the public prosecutor's office and a tax-payer suspected of a tax offence subject to the agreement of the tax administration.
- The appellant parties there relied on the violation of the right to respect for private life. The Constitutional Court notes that the collection and processing of data relating to accounts and financial transactions constitute interference in the private lives of the data subjects and of persons having conducted financial operations with them. The Court then verifies whether this legal possibility meets the conditions for interference in the right to respect for private life and is therefore admissible.
- According to the Constitutional Court, the challenged legislative provisions pursue a public-interest aim in that proper determination of taxation is vital to ensure the country's economic prosperity.
- Recently, Belgian Constitutional Court in its decision dated 1 March 2018 has held Fairness Tax is unconstitutional and is therefore annulled. The Constitutional Court ruled that the Fairness Tax violates the principle of legality (Article 170, Section 1 Constitution) because its terms are too vague and obscure for taxpayers. Pursuant to the fiscal principle of legality, the criteria in a tax law should be precise, clear and unambiguous so the taxpayer understands the effective impact of the tax on its financial position

Ram Jethmalani 339 ITR 107 (SC)

- The Double Taxation Avoidance Agreement between India and Germany, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein. In the first instance, we note that the names of the individuals are with respect to bank accounts in the Liechtenstein, which though populated by largely German speaking people, is an independent and sovereign nation-state.
- The “information” that is referred to in Article 26 is that which is necessary for carrying out the purposes of the Indo-German DTAA. Therefore, the Union of India was not entitled to claim that it was proscribed by the Agreement. The agreement contains no absolute bar of secrecy. On the other hand it specifically provides that the information may be disclosed in public court proceedings.
- The Government cannot bind India in a manner that derogates from Constitutional provisions, values and imperatives.
- Consequently, it has to be understood that the phrase “public court proceedings” specified in the last sentence in article 26(1) of the Double Taxation Avoidance Agreement with Germany refers to court proceedings other than those in connection with tax assessment, enforcement, prosecution, etc., with respect to tax matters.
- The State has the duty, generally, to reveal all the facts and information in its possession to the court, and also provide the same to the petitioners.
- The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy.
- The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the state has acquired.
- The continued involvement of the court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values.