NATIONAL JUDICIAL ACADEMY

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

4TH – 6TH JANUARY, 2019

COORDINATOR: MS. ANKITA PANDEY, FACULTY, NATIONAL JUDICIAL ACADEMY, BHOPAL

List of Resource Persons

S. No.	Name	Designation
1.	Hon'ble Mr. Justice R.V. Easwar	Former Judge, Delhi High Court
2.	Mr. Porus Kaka	Senior Advocate
3.	Mr. V. Sridharan	Co-founder & Senior Advocate, Lakshmikumaran & Sridharan Attorneys
4.	Ms. Sonia Mathur	Senior Advocate, Delhi High Court
5.	Mr. Ajay Vohra	Senior Advocate
6.	Mr. Abhay Ahuja	Senior Government Advocate, Mumbai
7.	Mr. Girish Dave	Former Chief Commissioner of Income Tax
8.	Ms. N.S. Nappinai	Advocate

PROGRAMME SCHEDULE

DAY 1 **January 4, 2019** **Friday**	**SESSION 1** **09:30 AM– 11:00 AM** **Constitutional and Statutory Basis of Taxation** Proposed Scope of Discussion - Taxation as a constituent power - Constitutional provisions (Article 265, Schedule and Lists) - Statutory provisions (Income Tax Act, 1961and Finance Bills and Acts) - International Treaties	TEA BREAK	**SESSION 2** **11:30 AM – 1:00 PM** **Jurisprudence of Tax Administration: Neutrality and Professionalism** Proposed Scope of Discussion - Tax as revenue – Revenue and its importance in governance - Constitutional concerns of Equality and Due Process in taxation- concerns of the taxpayer. - Striking a balance between the interests of the State and the interests of the taxpayer	LUNCH BREAK	**SESSION 3** **2:00 PM – 3:30 PM** **Assessment Proceedings: Role of the Tribunal** Proposed Scope of Discussion - Defects in Assessment Proceedings - Solutions to address the defects in Assessment Proceedings
DAY 2 **January 5, 2019** **Saturday**	**SESSION 4** **09:30 AM – 11:00 AM** **Transfer Pricing** Proposed Scope of Discussion - Basic Principles of Transfer Pricing - Major Issues of Dispute in Transfer Pricing - Role of the ITAT		**SESSION 5** **11:30 AM – 1:00 PM** **General Anti-Avoidance Rules** Proposed Scope of Discussion - Understanding the concepts of 'Tax Planning' and 'Tax Avoidance' - Impermissible Avoidance Arrangement & Arrangements Lacking Commercial Substance under Chapter X-A of the Income Tax Act, 1961		**SESSION 6** **2:00 PM – 3:30 PM** **Evidence in Taxation Law** Proposed Scope of Discussion - Evidentiary Standards with reference to search, seizure, illegally collected evidences, tax avoidance etc. - Burden of Proof in Tax Law - Importance of Electronic Evidence in Tax Disputes

DAY 3 **January 6, 2019** **Sunday**	**SESSION 7** **09:30 AM– 11:00 AM** **Interpretational Issues in Tax and Treaty law** Proposed Scope of Discussion - Principles of Interpretation of Tax Statutes and Treaties - Issues in Interpretation		**SESSION 8** **11:30 AM – 1:00 PM** **International Tax Treaty Law and Double Tax Avoidance Agreements** Proposed Scope of Discussion - Overview and Fundamental Concepts of DTAA	

SE-04: NATIONAL SEMINAR FOR MEMBERS OF THE INCOME TAX APPELLATE TRIBUNAL

A three day programme for members of the Income Tax Appellate Tribunal was organised at the NJA from 4th to 6th January, 2019. The programme was divided in 8 sessions spread over three days and provided a forum for the Judges to have discussion on statutory basis of Taxation, Transfer Pricing, Evidence in Taxation law, the problems faced by the judicial fraternity and how to overcome them; international treaties; constitutional concerns of equality and due process in taxation; striking a balance between the interests of the state and the interests of the taxpayer; defects in assessment proceedings and solutions to address the defects in assessment proceedings; burden of proof in tax law and overview of Double tax avoidance agreements. The objective of the seminar is intended to provide the participant Members of the ITAT with a forum to discuss and examine the constitutional and statutory mandate of the ITATs, the adjudicatory challenges faced by the ITATs and solutions for any bottlenecks in the effective functioning of the ITATs. The seminar is also designed to provide a perspective of the 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.

DAY 1

Session 1 - Constitutional and statutory basis of taxation

Speakers – *Justice R.V. Easwar & Mr. Abhay Ahuja*

The discussion began with the interpretation of Article 265 of the constitution of India as the fundamental basis of levying taxes. The speaker emphasized that power to tax can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under article 265 which uses only the expression that no tax shall be levied and collected except authorised by law. It cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of state under article 73 by the union or article 162 by the state. It was stated that the term 'tax' under Article 265 should be read with Article 366(28). The power to levy taxes has been universally acknowledged as an essential attribute of sovereignty. In Jindal Stainless Ltd. & Anr. v.State of Haryana & Ors., the Supreme Court stated that the power to tax is inherent in the people and is meant to be levied in accordance with reasonable rules or apportionment for the purpose of public expenses. It was further stated that constitutional

provisions relating to the power of taxation do not operate as grants but merely constitute limitations upon that power. If the power is unreasonably exercised, it is then that the tribunals come into picture. A brief history of the Income Tax Act, 1961 was discussed. The speaker took the session forward by elaborating upon sections 4, 5 and 9 of the Income Tax Act, 1961 which are considered to be the charging provisions of the Act. The speaker further emphasized that an Act passed by the Parliament/Legislature cannot foresee all types of situations and all types of consequences therefore, it is for the court to see whether a particular case falls within the broad principles of law enacted by the legislature. In such situations the principles of statutory interpretation come in handy. In spite of the fact that experts in the field assist in drafting the Acts and Rules, there are many occasions where the language used and the phrases employed in the statute are not perfect, therefore judges and courts need to interpret them.

Session 2 - Jurisprudence of Tax Administration: Neutrality and Professionalism
Speakers – *Justice R.V. Easwar & Mr. Abhay Ahuja*

The session was premised on the jurisprudence of tax administration: neutrality and professionalism. The speaker initiated the session by stating that the study of tax law should not be merely confined to what the statutory provisions are or for that matter what the judge made law is. One should also study the effect the tax laws have on the society, the reason for their introduction, the purpose they have sought to achieve and the role they play in achieving desired economic goals.[1] He highlighted that in Commissioner of Income Tax v. K. Ravindranathan Nair[2] the Supreme Court held that the constitution guarantees equal protection of laws under Article 14 which must extend to taxing statutes. It was emphasised that every person may not be taxed equally but property of same character has to be taxed. Taxation must be of same standard so that the burden of taxation falls equally on all persons holding that extent of property. This is the role of equitable considerations in tax proceedings. The speaker further highlighted that a notice under any provision of this Act which is required to be served shall be deemed to be served on time. Such an assessee shall be excluded from making any objections in any proceeding or enquiry under the Act that the notice was not served upon him on time or that it was served upon him in an improper manner. The speaker emphasised upon striking a balance between the interest of the state and the

[1] D.A. Upponi, Tax Jurisprudence
[2] [1990]186 ITR 709(Ker)

interest of the tax payer by referring to the principles of estoppel, res judicata and rule of consistency. In CIT v. MRP firm, Muar[3], the Honourable Supreme court held that the doctrine of approbation and reprobation doesn't apply to income tax proceedings and are against the provisions of the statute. He stated that as long as it is the income, it will be taxed, whether it is legal or illegal. He enumerated that in CIT v. Brijlal Lohia[4] and New Jahangir Vakil Mills co. ltd. v. CIT[5], the rule of consistency has been explained.

Session 3 – Assessment Proceedings: Role of the Tribunal (Open Discussion)

Chair – *Justice R.V. Easwar*

The speaker began the session by giving an insight of what Assessment proceedings are. He further asked the participant judges to point out any defect in assessment proceedings that they have witnessed. The resource persons tried to provide methods for overcoming the defects which were faced during assessment proceedings. One of the issues that judges often face is with respect to the application of the concept of res judicata to Income Tax proceedings. It was asserted that res judicata principle, as affirmed in Azadi Bachao Andolan[6] case states that something which has been adjudicated cannot be re-adjudicated. The speaker emphasised that this principle applies to ratio-decidendi and not to obiter dicta. The charge of tax is imposed on income that the assessee has actually earned and not on any notional income. He discussed that in the context of transfer pricing, the provisions cannot result in taxing income which has not actually been earned or any notional or hypothetical income.

[3] 1965 SCR (1) 815
[4] 84 ITR 273
[5] 1959 AIR 1177
[6] 263 ITE 706

DAY 2

Session 4 – Transfer Pricing

Speakers – *Mr. Ajay Vohra & Mr. Girish Dave*

The speaker began discussion on the basic principles of transfer pricing; major issues of dispute in transfer pricing and the role of ITAT. He stated that the Indian Transfer pricing regulations bar corresponding adjustments in the hands of the other party. It may be available in the case where the treaty provisions provide for such an adjustment in terms of Article 9 of the Double Tax Avoidance Agreement. He explained the method of profit split, where two entities are restrictively involved in performing functions. It is difficult to segregate or allocate the functions performed by one entity and the return thereon that should be earned by that entity. In that situation, the combined profit is split between the two entities. Both the entities bring on the table their respective resources and their respective strengths and this contributes to the profit that is earned by the group as a whole. In such a situation, the profit split method seems to allocate the combined profit of the entities between the two transacting parties. The speaker further asserted that aggregation is also a disputable issue. The law, under Article 92(c) provides that each transaction shall be benchmarked separately. The OECD guidelines also advocate aggregation whether transactions are continuous, interlinked or closely connected. He explained pointer system which means that one has to take a transaction as it is and benchmark that particular transaction to determine the Advertisement, Marketing and Promotion (AMP). This principle was approved by the Delhi High court in Lakhwani's case wherein it was held barring certain exceptional cases the tax administration should not disregard the actual transaction or substitute other transactions. It was explained that the Indian Transfer Pricing Regulations prescribe six methods, Comparable uncontrolled price method, Resale price method, Cost plus method, Profit split method, Transactional net margin method, and such other method as may be prescribed by the Board. Further, the speaker discussed the major areas of dispute in transfer pricing such as creating of marketing intangibles, selection of comparable companies, corporate guarantee etc.

Session 5 – General Anti Avoidance Rules

Speakers – *Mr. Ajay Vohra & Mr. Girish Dave*

The session initiated with a brief introduction of the general anti avoidance rules with reference to

the concepts of tax planning and tax avoidance. The speaker defined the concept of tax planning and tax avoidance; impermissible avoidance agreements and arrangements lacking commercial substance under chapter X-A of the Income Tax Act, 1961. The GAAR provisions of various countries such as UK, China, Netherlands, USA, New Zealand, Canada and Australia were also discussed. Thereafter, the Vodafone case[7] was discussed wherein it was remarked that the concept of GAAR is not new to India and that India already had general anti avoidance rules earlier. But, in this case, the court invoked substance theory. He emphasised that these are the judicial anti avoidance rules and they are stated as part of the income tax tribunal and are codified. It was further explained that when tax payers expressed a lot of apprehension about the applicability of GAAR, a committee was designated to look into the grievances raised by the taxpayers and the committee came up with its report. It was recommended that where SAAR is applicable to a particular aspect, then GAAR should not be invoked to look into that particular aspect. However, the circular of 2017 issued by the Central Board of Direct taxes (CBDT) makes the position otherwise. The provision of GAAR and SAAR can co-exist and are applicable as may be necessary in the facts and circumstances of the case.

Session 6 – Evidence in Taxation law

Speakers – *Ms. Sonia Mathur & Ms. N.S. Nappinai*

The discussion of this session was premised on the evidentiary standards with reference to search, seizure, illegally collected evidences and tax avoidance. The speaker explained various sections under the Indian Evidence Act and emphasized on Section 31 of the Indian Evidence Act which states that admissions not conclusive but may estop. The Pooran judgement[8] and Dr. Paratap Singh v. Director of enforcement[9] has reaffirmed the view that evidence is admissible if relevant to the facts in issue. Section 65-B deals with the admissibility of electronic records. It was further asserted that there is a lot of litigation as to the service of notice under section 148. The notice is not only to be issued but also served. In Shubhashri Panicker (Mrs) v. CIT[10], the Rajasthan High court was concerned with the issue that whether ITAT was right in holding presumption of service

[7] [2012] 1 S.C.R. 573

[8] 92 ITR 505
[9] 1985 AIR 989
[10] 403 ITR 434 (2018)

of notice when the notice under section 148 was sent through speed post ignoring the fact that the address on which such notice was sent was a different one. It was held that no such presumption should have been made. The speaker proceeded with the session by explaining the importance of electronic evidence in tax disputes with particular reference to metadata.

DAY 3

Session 7 – Interpretational issues in Tax and Treaty Law

Speaker – *Mr. Porus Kaka*

The session was initiated with the assertion that there can be no tax in our law unless the words are extremely clear, showing an intention to burden the assesse with a charge. The speaker explained the various theories of interpretation including liberal, strict, contextual, harmonious, beneficial and golden rules of interpretation with reference to tax statutes. Elaborating upon the history of tax treaties the speaker explained that the first tax treaty was between India and British India. In 1920's the predecessors of the United Nations drafted the first model tax convention. There was huge debate between the source and resident countries for the reason that different countries had different definitions of source. The speaker further discussed the Vienna Convention and OECD Model Convention provisions with respect to the interpretational issues in tax and treaty law. He further emphasised on Essar Oil v. ACIT[11] and Sanofi Pasteur Holding SA v. The Department of Revenue[12] case, where the court discussed the interpretation of the term "may be taxed".

Session 8 - International Tax Treaty Law and Double Tax Avoidance Agreements

Speaker – *Mr. V. Sridharan*

The session initiated with a brief introduction of Double tax avoidance agreements and went on further to discuss model law convention provisions. It was stated that international tax treaties avoid and reduce the burden of double taxation that arises in two or more states on the same taxpayer in respect of the same subject matter and for identical periods. One of the most significant provisions that was discussed was Article 10 which was discussed and interpreted with the help of various illustrations. Further, it was explained that if a treaty is enacted without Article 23 which deals with double tax avoidance agreements then one has to be governed by the domestic law only. It was highlighted that for the purposes of the OECD Model tax convention, Article 4 defines the term "resident of a Contracting State" which means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature,

[11] 13 SOT 691
[12] TS-57-HC-2013 (AP)

and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein. Where an individual is a resident of both Contracting States, then his status shall be deemed to be a resident only of the State in which he has a permanent home available to him, or if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests), or if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement. It was clarified that in order to determine the question of dual residency the source country has to be ascertained. Another issue that was deliberated upon was that of double taxation wherein the speaker emphasized upon the gramophone case in which the Supreme Court stated that international law makes provision for extraterritorial taxation by various countries and therefore permitted double taxation.