

NATIONAL CONFERENCE OF HIGH COURT JUDGES ON "COMMERCIAL AND ECONOMIC LAWS (INCLUDING MARITIME LAWS)" (P-898)

(14 Feb 2015 - 15 Feb 2015)

INTRODUCTION

India witnessed a tremendous growth in the commercial and economic activities post liberalization of the economy. This has led to fast growing changes in commercial laws and a considerable increase in the number of commercial and economic disputes. These disputes need a faster adjudication to build the confidence in the commercial circles. Any delay in adjudication will not only affect the individual parties but also the economy as a whole. This conference would give an opportunity to the High Court Judges across the country to discuss on various aspects of commercial and economic disputes.

INAUGURAL SESSION:

The Director Prof. (Dr.) Geeta Oberoi began the Conference by welcoming the guests and speakers.

Justice Ruma Pal, the Chairperson for this Conference, spoke about the theme of the conference, wherein she highlighted the two cases given below:

1. *Azadi Bachao Andolan v. Union of India*¹, popularly known as the "Double Taxation case". Here the Hon'ble Supreme Court held that "This Court is not concerned with the manner in which tax treaties are negotiated or enunciated; nor is it concerned with the wisdom of any particular treaty. Whether the Indo-Mauritius DTAC ought to have been enunciated in the present form, or in any other particular form, is none of our concern. Whether section 90 ought to have been placed on the statute book, is also not our concern. Section 90, which delegates powers to the Central Government, has not been challenged before us, and, therefore, we must proceed on the footing that the section is constitutionally valid."

¹(2003) 263 ITR 706 (SC)

2. *Vodafone International Holding v. Union of India*²: Here the above decision was slightly changed. Now courts can look into the motive with which the corporation was set up. But the burden of proving this is on the revenue.

SESSION 1

INTERPRETATION OF INTERNATIONAL TAXATION LAW AND BEPS

By Mr. Porus Kaka

1. He began his discussion by referring to *AzadiBachaoAndolan v. Union of India*.
2. He referred to the history of tax treaty and told that the earliest treaty was with Prussia
3. OECD was the first to introduce the modern concept of international taxation. Later, this concept was further developed by the UN
4. Tax treaty can never create a taxation charge. It can only give reliefs between the contracting states.
5. BEPS is trying to prevent double taxation.
6. *AzadiBachao* is still a good law for Mauritius treaty. The only remedy to prevent treaty shopping of Indo-Mauritius treaty is political will to amend it.
7. Most of the Indian treaties are based on a mixture of OECD and UN models.
8. Forums to adjudicate tax laws include High Courts, Supreme Court, tribunal, Advance Pricing Agreement, Authority of Advance Ruling (AAR), settlement commission, mutual agreement procedure, Union Cabinet and arbitration.
9. About 75% of tax judgments arise in India.
10. In mutual agreement procedure, revenue officials of two states can sit together and negotiate to settle dispute.
11. AAR was set up for mighty objectives but presently is in the state of crisis and excessive delays are prevalent in it.
12. In taxing treaties, there is always a provision stating that if 2 states cannot achieve any result through negotiation, then matter shall be referred to a binding arbitration. But India does not agree to this view for the sovereignty issues.

²341 ITR 1 (SC)

13. How do tax treaties work:

- a. Good faith
- b. Parties cannot refer to their internal laws for avoiding their liability under treaties: 2012 was watershed year for India as retrospective amendment in the Income Tax Act introduced to nullify the effect of the Vodafone verdict.

14. HOW DO TREATIES WORK:

- a) Treaties are signed by diplomats and not lawyers. Thus rule for interpretation for treaties is very different from the interpretation of fiscal laws.
- b) Article 31 of Vienna convention is a general rule of customary law and thus can be invoked even when India not party to it
- c) Supplementary means of interpretation: MODEL OECD/UN, conduct through Mutual Agreement procedures, unilateral views of countries, expert witness, court decisions of concurrent jurisdiction.
- d) Article 3(3) UK DTAA: domestic laws are the last recourse and they shall be used only if there is no explanation of a term in the international law.

15. Referred to positions in different countries: Australia, China, Indonesia, Czechoslovakia, Germany, Ireland, Norway, USA.

16. USA has “*last in point of time*” view under which laws can override treaties if they succeed treaties. But US courts say only specific legislation on that point shall override treaty provision.

17. Indian courts freely use international conventions and decisions.

18. ***Azadi Bachao*** is often criticized as condoning treaty shopping. It is the government of India which has condoned treaty shopping with the Treaty with Mauritius.

19. Section 90 of the Income Tax Act gives power to the government of India to enter into treaties. Income Tax Act was amended retrospectively. Vodafone case was good for India. Amendments are good for Indian citizens. But they should be prospective and not retrospective. Retrospective amendments undermine system.

20. ***Sanofi Pasteur Holding SA v. The Department of Revenue***³: the Andhra Pradesh High Court has held that capital gains arising out of transfer of French company’s shares by French corporate shareholders to the assessee, will not be taxable in India, under the

³ TS-57-HC-2013 (AP)

beneficial provisions of the Double Taxation Avoidance Agreement between India and France. Further, it was held that the retrospective amendments to provisions of the Income-tax Act, 1961 do not have any impact on the interpretation of the tax treaty provisions.

21. He also made a passing reference to the cases of *Verizon Communications Singapore Pte Ltd vs. ITO*, *DIT v. Nokia* and *DIT v. TV Today Network*.
22. He further discussed regarding the concept of Person and stated that treaties can give relief only if that person is actually liable to pay tax in the country. Liable to tax does not mean he is actually paying tax. (*Azadi Bachao* case)
23. TRANSFER PRICING:
 - a. Object is to check manipulation of profits between related enterprises. Transaction is to be done at an Arm's Length Price (ALP).
 - b. Transfer pricing is a costly exercise as here it has to be seen what a 3rd party unrelated to the transaction would have done in an uncontrolled transaction.
24. BEPS stands for Base Erosion and Profit Shifting where global corporations can legitimately take advantage of tax treaties and reduce their tax liability.
 - a. BEPS allow countries to inquire about tax inversion without following any particular rules.
 - b. BEPS is said to be an "attempt by the world's major economies to try to rewrite the rules on corporate taxation to address the widespread perception that the [corporations] don't pay their fair share of taxes"

In conclusion, **Justice AK Patnaik** stated that taxing statutes are strictly interpreted. Thus both courts and the parliament should be fair to assessee and at the same time make an attempt to prevent tax avoidance.

FINANCIAL AND CAPITAL MARKET REGULATIONS

By Prof. Jayant Verma, IIM Ahmadabad

1. In his discussion, Prof. Verma emphasized on what is more important: Quick decisions or correct decisions. He stated that taxing cases are not as rigorous as death penalty. Thus decisions should be delivered quickly.
2. He referred to Indian Financial Code which lays down principles relating to regulatory governance and transparency.
3. Under Securities Contract (Regulation) Act (SCRA), SEBI can regulate insider trading. But the term 'insider trading' not defined.
4. Regulators like RBI and SEBI have following powers: legislative (power to frame legislation), executive (grant licenses, supervise entities) and judicial powers (impose penalties after adjudication).
5. He said all investigation should be time barred.
6. Persons investigating should be separate from persons adjudicating the matter and imposing penalties.
7. FSLRC (Financial Sector Legal Reforms Commission) also talk about judicial review of regulations, both of process of their issuance and substantive content.
8. This would require legislative changes and an appellate body.
9. FSLRC also endeavors to protect all consumers from unfair trade practices and grant them certain rights.
10. There should be a Financial Redressal Agency as financial products are much more complicated for consumer forums and courts to handle.
11. There is a need of a principle law which will articulate broader principles which need not be changed with the innovations in law or technology. Additionally, there can be subordinate legislations which can be changed with changes.
12. This combination of legislation and subordinate legislations will yield a body of law that evolves smoothly over time.
13. Financial disputes are like dispute over a melting ice cube. Thus they should be better decided quickly before ice melts.

14. Lehman Brothers Bank case referred wherein it was decided that the Bank should go bankrupt. The Bank was purchased by Barclays Bank. But by the time transaction was completed, value of all the assets had already reduced to half. The declaration of bankruptcy and entire sale transaction was completed within a week time.

In conclusion, the Chairpersons made following comments:

Justice Ruma Pal said that judges want to be correct because of the theory of precedents.

Justice BN Shrikrishna said following:

1. Regulators exist for consumers and not viceversa. Thus legislations should be consumer centric.
2. Principle of caveat emptor should be promoted with a few exceptions.
3. FSLRC will have a resolution corporation to keep a check on financially weak corporations.

Justice AK Patnaik referred to a circular on willful defaulters and the Kotak Mahindra case to show that interpretation of any law has to be in context.

SESSION 2: RISKS AND INSURANCE

By Mr. R.K. Nair, Member, IRDA

1. He began by emphasizing on the history of insurance. He said the concept of insurance existed earlier in the Roman times, but the modern concept started after a great fire of London, in Lloyd Café Shop and then evolved to cover maritime risks. In British time, Indians were required higher premium to get insurance policy. Today insurance can be taken against life and property. Almost all kinds of risks can be insured.
2. When we take insurance, we get a policy. This term is evolved from a word, which means promise.
3. Banks are first risk bearers in any economy. They play an important role in an economy.
4. Warren Buffet is the biggest re-insurer in the world.

5. Insurance is a promise to repay on happening of an event. Thus estimating risk is very essential.
6. Insurance companies should not undertake credit risk as they are not trained in that. Major reasons for the failure of AIG Inc were Credit Default Swaps, Credit Default Options, and liquidity in mortgage.
7. Importance of insurance is that it allows higher risk taking which is the essence of capital market system.
8. Indians are considered to be highly under insurance cover.
9. There are following risks for banks in insurance sector: credit risk, market risk, operational risk, liquidity risk and leverage risk.
10. Insurance is the only product wherein annuity products can be purchased.
11. He gave following principles of insurance: utmost good faith, insurable interest, indemnity, subrogation, contingent interest.
12. Legal regime for insurance include: Insurance Act 1938, IRDA Act, 26th December Ordinance on Insurance wherein foreign equity in insurance companies has been raised from 26% to 49%.
13. In India, insurance is the 2nd largest saving option after banking.
14. Now it is proposed that IRDA shall be subject to an Appellate Tribunal.
15. For crop insurance, we have a government institution called Agricultural Insurance Corporation of India.

GENERAL PRINCIPLES OF INSURANCE AND INSURANCE DISPUTES

By Mr. Rahul Narichania, Senior Advocate

1. He emphasized that courts should take equity in favour of the insured. But in case of conflict, law should be applied.
2. Insurance policy should be interpreted strictly according to its terms and conditions.
3. It is not open for the courts to make a contract unless parties have not made one for themselves.

4. Insurance is a unilateral contract where parties do not negotiate while entering onto a contract. Thus in case of ambiguity, courts should interpret the policy in favour of insured where insured is a common man and not where insured is a big business house.
5. Insurance is a contract of adhesion. Thus rule of “contra preferendum” should apply.
6. If the terms and conditions of the policy are too harsh, then courts should see whether notice of the insured was brought to those terms or not.
7. He talked about following duties of the insured:
 - a. Duty of utmost good faith, which is a continuing duty
 - b. Provide all necessary documents
 - c. Immediately notify the insurance company of the happening of insured event so that it can appoint a surveyor
 - d. Claims can be denied by the insurance company only in case of breach of warranties and not conditions. In case of breach of conditions, courts have to see the proximate cause of loss.
 - e. Insured has to take steps for right to recovery under the policy.
 - f. Doctrine of subrogation
8. Duties of insurer are:
 - a. Utmost good faith
 - b. It should not appoint 2nd surveyor as a means to avoid claims.
9. If an insured has taken full and final settlement from the insurer and then file a suit for recovering the balance, then such suits should be dismissed with heavy cost.
10. Contract of insurance is a contract of indemnity. Parties cannot make profit out of this.
11. Courts should award interest at the prevailing market rate.
12. If an insurance company delays claim unnecessarily, then heavy cost should be imposed upon it.
13. Duty of Uberrimae Fide: on both insured and insurer. It is a continuing duty. But facts in common knowledge need not be disclosed.
14. Construction of insurance policies: construe on the basis of terms and conditions of the policy. Court should not look at the general meaning of any term if such term is defined in the policy. Other aids can be used in absence of definition in the policy

15. In *United India Insurance Co. v. Pushpa*, it was held that in case of ambiguity, the view favoring insurer should be preferred.
16. Insurable Interest, in cases of life insurance, it should be present at the time of taking of policy. But in case of goods insurance, insurable interest should be present at the time of enforcing the policy.
17. Under the principle of Subrogation, insurance company is entitled to step in to the shoes of the insured on making payment. Based on this principle, insurer can sue any 3rd party for recovering of any amount to which insured has been entitled. But in subrogation, company cannot sue in its own name. Insured has to be made co-plaintiff. Co can sign on behalf of the insured as subrogee if insured not cooperating. In assignment, co. can sue in its own name.
18. Insurance company can recover excess of the loss that has already been paid by it under the principle of assignment.
19. LITIGATION IN INSURANCE:
 - a. Appointment of surveyor: they are sometimes biased in favour of insurance companies and if not biased, insurers always attempts to get a 2nd survey. Supreme Court frowned upon this practice in *Sri Venkateswara v. Oriental Insurance Co. Ltd.*
 - b. In *ML Sethi* case, it was held that you can ask the opponent to disclose all documents in his possession even when they are not admissible in court as long as they can throw some light on facts of the case.
20. JURISDICTION OF COURT: For jurisdiction, he referred to the case of *ABC Laminart* wherein it was held that parties on their own can confer jurisdiction upon one of the several courts having jurisdiction. But they cannot confer jurisdiction upon courts not having jurisdiction on the matter.
21. For time limit for filing a case, there is Section 46 of the Insurance Act 1938. It says three years from the denial of the claim and not from occurrence of the loss.
22. In case of fiscal laws also, ambiguity should be interpreted in favour of the assessee except in exemption provisions.
23. Heavy cost and interest should be imposed on insurance company avoiding genuine claim.

SESSION 3: CORPORATE CRIMINALITY

Justice Ruma Pal introduced the session by highlighting the need of liability of corporate bodies in today's context.

Speaker 1: Mr. Shri Singh, Advocate

1. This issue gained importance in 1915 after Lord Atkin's decision. The principle of criminalizing corporate entities was subsequently adopted by courts worldwide.
2. Now this is a settled principle of law that a corporate body can commit offence.
3. In *Sunil Bharti Mittal* case, the Supreme Court reversed it was held that liability of corporate can be extended to the persons in managerial power of the company and held that the theory of alter ego acts only against the company and not against the managing directors to hold them liable.
4. In *Tesco Super market* Case, the House of Lords said that in personal acts on behalf of the company, the intend with which the person acts is in fact intention of the company.
5. Corporations can also be held liable under principle of vicarious liability, which is the 2nd stage of liability. This is also given in Section 141 of the NI Act.
6. In *Maksood Syed* case, the Supreme Court held that vicarious liability in criminal law can only be extended to corporations only if statute provides.
7. In *Maliappa Textile* case, it was argued that where an offence is punishable with imprisonment or fine and imprisonment, company cannot be held liable under the offence. But the Supreme Court held that companies cannot escape their liability only because of this impossibility.
8. Then in *Standard Chartered* case, it was said that corporations stand on the same footing as individuals.
9. In *Neera Radia* case, it was held that unless you prosecute the company itself, liability under the Section 141 cannot be extended to individuals.
10. In Anti-bribery Act of the UK, a duty is placed upon every company to educate their employees.
11. Prevention of Corruption Act, 1988 is to be completely changed by a new law.
12. *Bhopal Gas Disaster's* case was referred wherein the liability of the disaster was extended to Union Carbide Corporation, the parent company and Warren Anderson.

13. As long as the cost of litigation goes up and their liability is increased, companies will be more than happy to self regulate themselves.

Speaker 2:Mr. Anand Desai, DSK Legal

1. ***Bhopal Gas disaster*** case referred in regard to the attribution of liability for an offence to a company.
2. In ***Satyam*** scam, a company indulged in fraud. Promoter has greatest stake. Who should be held liable? Promoter admitted his guilt. Then also, should the company or its auditors be held liable.
3. He put forth 2 issues: Who is beyond the fraud and who is going to suffer if liability is imposed upon the company.
4. Singapore has adopted a system where corporate are not made liable by putting them behind bars, but by making them do public services.
5. About 30% of the companies do not file their income tax return with stock exchanges.
6. But the New Companies Act 2013 provides for dealing with such situations.
7. In ***Iridium*** Case 2010, it was held that question of company being liable can arise only when offence is committed in relation to the business of the company.
8. Companies Act 2013 has introduced new offences many of which are non bailable.
9. Intent of a company is to carry on business. For the establishment of mensrea element for companies, different standards should be adopted.
10. Under Companies Act 2013, Key Managerial Personnel are to be attributed liability for the acts of the company.
11. Harshad Mehta case who used banking mechanisms to perpetrate scam, 2G, coal-gate, Satyam scam.
12. A big issue is if liability is put on few persons, should all other innocent members of the company be punished by simply closing the company.
13. Technology has multiplied problems. Electronic crime is increasing. CrPC, IPC and Evidence Act, Information Technology Act has been modified to cope with this problem.
14. Credit card frauds have also increased.

15. He referred to *Naveen Jindal's* case where Mr. Jindal complained that Zee news blackmailed JSW and tried to extort Rs. 100 crore for suppressing a news relating to the company.
16. Thus given the modes of communication and improving technology, issues relating to corporate criminality are likely to pang up.

Open Discussion:

1. Justice Patnaik: in India, we are trying to move towards a regime where we can have strict laws.
2. BN Shrikrishna: if company cannot be sent to jail, what is the need of prosecuting the company under a provision prescribing imprisonment only as punishment. Some countries like New Zealand has a provision saying in such cases, courts have power to levy equivalent amount of fine. But in India we do not have any such provision. The Supreme Court's Constitutional Bench ruled that courts in India also have such power. Justice Srikrishna does not favour such a view.
3. The Supreme Court has been innovating to impute liability to corporate.
4. Law is supreme. Rule of law should prevail.
5. Is there any distinction drawn between normal criminal liability and corporate criminality: there are some differences, especially cases involving offences against person which are considered more heinous. Courts look at the nature of offence and a different approach is adopted by courts where a company is alleged offender
6. High Courts are loaded with Section 482 CrPC cases. Remedy lies in resorting to plea bargaining.
7. *Uphaar cinema* case: where death is caused, corporate can be held for tort under civil law or under Section 304BIPC for negligence.
8. Mere absence of knowledge on part of the key managerial persons will not save them from criminal liability.

**SESSION: 4: GOODS AND SERVICES TAX: KEY FEATURES, ISSUES AND
COMPLEXITIES AS EMERGING FROM THE CONSTITUTIONAL AMENDMENT
BILL:**

By Sujit Ghosh, Partner, Advaita Legal

1. GST was introduced to avoid multiplicity of law regarding taxation of goods and services. Not much literature exists on this issue.
2. The concept of GST was introduced 1st in 2002. Significant changes have been made with the introduction of VAT.
3. Haryana was the 1st state to implement this.
4. GST already exists in many countries like USA, New Zealand.
5. GST helps in balancing the economy. UN also accepts this. It avoids multiplicity of taxations.
6. Taxation on only with respect to the value added should be the norm.
7. GST is agnostic to the place where you belong. Earlier tax was levied by states. Now it is irrelevant as to which state do you belong. Now tax will depend upon the nature of taxation. GST gives a set of norms for taxing different transactions.
8. Since only one tax is to be paid under GST, thus there are less chances of tax evasion. More compliance can be ensured.
9. Constitution provides for allocation of tax between centre and state. Article 246 read with list I and II and Article 248(residuary powers).
10. Under Article 289, the state is debarred from levying tax unless a statute provides.
11. While shifting to GST, we will have dual structure: centre GST and state GST.
12. GST shall be supply of goods and services. But meaning of the term 'supply' is not clear.
13. Integrated GST: sigma of centre GST and state GST.
14. Amendment Bill also contemplates that Centre sales tax shall continue for 2 years @ of 2%.
15. Tax shall be levied on the basis of place of destination and not in the erstwhile manner of state of origin. This is the point of controversy.
16. Quantum of compensation is to be given to the states by the centre is also a debated issue.
17. After GST, custom duty shall continue which shall be in addition to GST.

18. Both states and centre shall have equal and concurrent right to tax a transaction.
19. But the centre has exclusive right to tax interstate/integrated sale transaction.
20. For introducing GST, 1 article of the Constitution is deleted, 10 articles and 2 schedules are amended.
21. Articles 246A, 269A, 279A have been newly added in the Constitution.
22. Articles 248, 249, 250, 268, 269, 270, 271, 286, 366 have been amended.
23. GST exclude alcohol products.
24. Services are widely defined to mean anything other than goods. Whether it includes immovable property or is an issue.
25. Article 268A has been deleted completely.
26. GST Council is to be constituted, which will consist of Union Finance Minister, State Finance Ministers and Union Finance/Revenue Minister.
27. An addition tax is to be levied by the centre on inter-state supplies of goods. Revenue is to be assigned to origin states.

Service Tax Jurisprudence: Justice G Raghuram

1. Each state gives their own set of regulations and circulars creating more problems and confusion.
2. Airport Services: a circular was issued stating for renting of immovable property in airport, it is not a taxable service. The Delhi High Court passed a judgment.
3. Problems in service tax: complex federal issues come into play frequently. These judgments are state centric claims.
4. Finance Act 1984 which introduced Chapter 5 for taxing of services.
5. Disputes are resolved in a manner such that both the federal partners are at equilibrium.
6. When legislation is minimal, executive rule making increases.
7. What Articles 285 and 289 intended can be destroyed if taxing jurisprudence is not given clearly.
8. Defining services in such a wide manner will mean that services like surrogating can be subject to tax.
9. 87% of the assessee appeals succeed whereas only 11% of revenue appeals succeed.

10. Frequent thinker in legislation include expanding definition, giving new definitions, giving statements of objects and reasons and other tools of interpretation.
11. There is complete lack of incentive to adjudicate timely and qualitatively.

Speaker 3: Mr. Pramod Kumar, Accountant Member ITAT: Global Tax Controversies

1. He dealt with 3 case studies:
 - a) Transfer Pricing of generic drugs between Glaxo and Serdia
 - b) Double Irish Dutch Sandwich
 - c) Virtual projection of business in countries with no existing tax liability
2. 3 characteristics of tax havens are:
 - a) no tax, minimal tax
 - b) no transparency
 - c) favourable treaties with some countries leading to diversion of tax
3. DTAA are entered into for avoiding double taxation. But tax havens like Bermuda, Cayman Islands help corporations to avoid tax completely.
4. Method to prevent this is transfer pricing where transactions between associated enterprises are to be carried on at an Arms Length Price (ALP).
5. These associated enterprises are separate legal entities.
6. Shifting of profit can be checked with ALP and transfer pricing legislation.
7. The bottom-line is that transfer pricing is not science but an art and each case is to be dealt individually.
8. In India, in 2014 TP legislation involved about Rs. 70,000 crore.
9. In 84 countries, there is transfer pricing legislation and in 19 countries, transfer pricing legislation is completely absent.
10. In a case involving transfer pricing of generic drugs, Ranitidine was in issue. Zintac was manufacturer of this drug. They were aggressively marketing this drug as they were facing competition from the competitors. Glaxo Canada, a wholly owned subsidiary (WOS) of Glaxo UK. Canada co. had a supply agreement with Glaxo Switzerland and a license agreement with Glaxo UK. It was found that Canada co. was importing

ingredients from GlaxoSingapore which was making maximum profit as there is no taxation on manufacturing in Singapore. This profit was then shared by Glaxo UK.

- a) Proceedings were initiated against Glaxo Canada at a very low price. Glaxo took a defense that their product is superior.
 - b) Tax Court of Canada: CUP method of TP was preferred. It was held that only transaction at hand is to be looked. Other transactions including License Agreement are irrelevant.
 - c) Federal Court of Appeals: License agreement is relevant. CUP was preferred here also.
 - d) Appeal was filed before the Canadian Supreme Court, but Glaxo went for out of court settlement on 15th Jan 2015.
11. In India, we have a parallel case of SerdiaPharma which is a WOS of Servier France. Multiple subsidiaries were established and a complex structure was prepared to avoid tax. For using CUP method, comparable products are those products which have similar characteristics. ITAT held that there is no unfettered discretion on selection of any method.
12. Double Irish Dutch Sandwich is used mainly by technology and pharmaceutical industries as IPR is a significant asset. It is perfectly legal but is not accepted by authorities. Double Irish Dutch Sandwich is a tax avoidance technique employed by certain large corporations, involving the use of a combination of Irish and Dutch subsidiary companies to shift profits to low or no tax jurisdictions. The double Irish with a Dutch sandwich technique involves sending profits first through one Irish company, then to a Dutch company and finally to a second Irish company headquartered in a tax haven. This technique has allowed certain corporations to dramatically reduce their overall corporate tax rates.
13. This structure is used by major companies like Starbucks, Google, Apple.
14. Doctrine of form or substance comes into play here as these companies are established for no purpose.

SESSION 5:**SEBI AND INVESTOR PROTECTION****Mr. U.K. Sinha, Chairman, SEBI**

1. SEBI deals with only securities as defined under SCRA and not with every kind of security and intermediaries.
2. SEBI Act was amended to grant it power to regulate CIS (Collective Investment Scheme).
3. Legal regime:
 - a) Capital Issues (Control) Act 1947: repealed by the SEBI Act
 - b) SEBI Act and regulations
 - c) SCRA
 - d) Companies Act 1956 and 2013 under which few provisions are regulated by SEBI.
 - e) Depository Act: no paper security now, only demat ones issued
4. FSLRC recommendation: SAT should not confine itself to appeals from SEBI only but should also act as an appellate body for other regulators like IRDA, RBI.
5. SCRA Amendment Act 2014:
 - a. SEBI's right to call for information from any person: power of SEBI extended.
 - b. Legal presumption if money more than Rs. 100 crores, then that is CIS and SEBI has power to investigate (section 11AA(1)).
6. Companies Act 2013: additional powers given to the SEBI with respect to insider trading, forward dealing, SEBI can also regulate debt securities now (earlier only shares could be regulated).
7. SEBI has quasi judicial powers: Section 11(2) SEBI Act: under this SEBI could restrain a person from raising money, prohibiting a person from accessing market, suspend trading in security, cease and desist order, disgorgement order (cease what has been illegally acquired).
8. SEBI can frame regulations: they have force of law and violation are punishable.
9. Regulations for investor protection:
 - a. CIS Regulation
 - b. SEBI (Substantial Acquisition of Shares and Takeovers) Regulation

- c. Prohibition of insider trading Regulations
 - d. Clause 49 listing agreement
 - e. Delisting of Equity Shares regulations
 - f. ICDR regulations 2009
 - g. Listing regulations; to be notified soon
 - h. PFUTP Regulations 2003
10. Investor protection areas: there are major three kinds of manipulations in capital markets:
- a. Trade based manipulation: Harshad Mehta, Ketan Parekh scam: strong surveillance mechanism developed to tackle such manipulation
 - b. Information based manipulation
 - c. Miscellaneous
11. Collective Investment Schemes: there are 13 + 1 way of raising money through CIS: e.g.
- a. Chit Funds Act
 - b. Nidhi Companies
 - c. Deposits by NBFC
 - d. IPO/ private placement: Sahara scam
12. Section 11AA SEBI Act: certain exemptions regarding CIS regulations have been given, but this provision is misused to get out of regulatory framework.
13. Features of State Depositor's Protection Act: validity and state competence to enact such acts was upheld by the SC. The Act gives wide powers to authorities to prevent illegal trade practices.
14. SEBI has right to recover penalty but does not have power to recover penalty. Civil cases used to be filed. Now power to recover is also given under 2014 Amendment Act. SEBI can also impound passport of offender.
15. Prevention of Fraudulent and Unfair Trade Practices Regulations: Supreme Court commented that media houses are also involved in misrepresenting about a company. The offender was misrepresenting his account books.
16. In India, it is difficult to track insider trading unlike USA. In US, they are empowered to use criminal investigating agencies like FDI. In India, SEBI does not have such a power.
17. Insider trading aims at providing level playing field to all investors without discrimination.

18. Information shall be considered to be undisclosed if it is not revealed to stock exchanges. SEBI does not recognize analysts.
19. Merger and amalgamation scheme: HCs have to approve these schemes. After approval, it has to go to SEBI. Companies were not disclosing under SAST. Thus process revised.
20. The new process requires that the scheme is to be given to stock exchanges, after SEBI examines the scheme, it goes to high courts for approval.
21. Corporate Governance: new companies act and SEBI has made lot of provisions to ensure this, including independent director, audit committee and remuneration committee for deciding remuneration of the board, pre-approval of related party transactions by Audit Committee.
22. World Bank ranked India 7th in 2014 for shareholders protection.
23. SEBI also has a complaint redressal mechanism
24. People deliberately approach civil and writ courts against SEBI order when alternative remedy to SAT is available.
25. Special courts and special public prosecutors are to be set up in 4 metro cities: Delhi, Mumbai, Kolkata, Chennai.
26. The legal presumption of having access to undisclosed price sensitive information is rebuttable and does not mean that any person cannot share any information with connected person like spouse.

Mr. Neeraj Malhotra, Advocate:

1. In 1992, the regime shifted from control to information based. SEBI Act repealed earlier Act.
2. SEBI is vetting all documents submitted. After SEBI' approval only, a red-herring prospectus is issued.
3. *Morgan Stanley* case: SEBI is vetting document but not the offer.
4. Duties of SEBI: protect investor, regulate market, promote market.
5. Intermediaries are experts/specialists in their areas. SEBI grant registration and recognition to these intermediaries. After recognition, intermediaries are bound by code of conduct of SEBI.

6. In violation, SEBI has power: initiate criminal investigation, pass restrains order, adjudication proceedings.
7. Investors' confidence and protection depends upon how strong the market is.
8. SEBI as power to act suomoto. Further, on complain of a single investor also criminal action can be set in motion.
9. Writ petitions under article 226 are filed complaining SEBI has not decided complain, it refused complain or it is too long to decide.
10. SEBI forwards a copy of complaint to erring intermediary for a reply and then this reply is given to the complainant. Based on both complaint and reply, SEBI decides whether to go with the complaint. This cannot be said to be non application of mind by the SEBI.
11. Awareness of the investors is very important for both market and SEBI to function properly. Non awareness is the prime cause of filing writs and civil cases by investors.

TRANSFER PRICING AGREEMENT: Mr. Pramod Kumar, Member ITAT

1. The Supreme Court emphasized upon the need for transfer pricing methods of taxation for domestic transaction. After this, a new provision was introduced in the Income Tax Act.
2. Transfer pricing legislation was meant to avoid tax evasion. But these days revenue authorities trying to generate more and more tax for this legislation.
3. But such illegitimate demands are quashed through a system of judicial intervention. System of checks and balance work here. It causes loss to our goodwill. It increases tax uncertainty.
4. Normative effect of court rulings: Not many judgments exist. Thus high court rulings are important.
5. Transfer pricing provides for taxation of international transaction at an Arms Length Price (ALP). International transaction is a transaction between 2 associated enterprises.
6. ALP is the price at which 2 unassociated enterprises shall trade in an uncontrolled transaction.
7. But it is difficult to find out who actually owns the company because of lack of transparency in some jurisdictions.

8. Cyprus notified by the government of India as a non cooperating territory.
9. Associated enterprises need not be under the same ownership, they can have common management, control, capital etc.
10. Key areas for transfer pricing are associated enterprises, international transaction, ALP, valuation of intangibles, locational savings.
11. For associated enterprises, courts place emphasis on the scope of associated enterprises. To what extent deeming fiction can be placed on 2 enterprises to hold them associated.
12. Is issuance of guarantee an international transaction? After this issue, there was a retrospective amendment to the definition of Associated enterprises to cover all kinds of services.
13. Valuation of intangibles: it is almost impossible to compute the exact value of intangibles. Thus there is a lot of litigation in this area.
14. Companies change location for cost saving. E.g. US companies have call centres in China. It is suggested to include this cost also while calculating tax.
15. ALP: it is the price paid or charged in comparable uncontrolled transaction. On paper it looks very simple, but is very complicated to decide.
16. Nature of comparable: internal (the price at which co is selling the same product to non AE) and external.
17. It is difficult to determine comparables. Different perspectives are looked at: consumer perspective, accountants' perspective, economist perspective.
18. Methods of transfer pricing:
 - a) direct methods: CUP and resale price method
 - b) Indirect methods:
 - i. Cost Plus Method: very difficult to determine and depend on cases to case basis
 - ii. Profit split method: when multiple jurisdictions involved
 - iii. Transactional Net Margin Method (TNMM): It is the method of last resort, but most popular as here process of computing comparables not transparent and ambiguity persists. Assessee never files screen shots where he has filtered transactions. Revenue on the other hand, chooses company with high profits.
 - c) Residuary method came after decision in Vatika case decision.
19. Dispute resolution mechanisms:

- a. Dispute resolution Panel
 - b. Advance Pricing Agreement
 - c. ITAT
 - d. Authority of Advance Ruling
 - e. Mutual agreement procedure
 - f. Arbitration is strongly opposed by Indians
 - g. BEPS: recognized Dispute resolution as a core area.
20. Sogo shosha, a Japanese model was referred to here.
21. Courts should be more liberal with the decisions of fact finding bodies like ITAT.
22. Relevance of TP in domestic transactions is to ensure that fair tax can be charged at the hand of each entity, difficulty in determining fair price for transaction between associated enterprises.

SESSION 6:

INTERNATIONAL INVESTMENT ARBITRATION: (Investment Treaty Disputes)

By Mr. Vikram Nankani, Senior Advocate

1. He discussed about the Bilateral Investment Treaties (BIT) in detail. It was said that a BIT is an agreement between 2 nations.
2. When under a BIT a matter is referred to arbitration, then one of the parties is state and other party is a foreign investment.
3. Article 51(c), (d) (DPSP) of the Constitution put an obligation on the State to adhere to treaty obligations.
4. Every foreign investor wants a neutral body for adjudication, he does not trust municipal forums.
5. India has signed more than 100 BIT.
6. NAFTA is the only multilateral investment treaty. All others investment treaties are bilateral.
7. International Centre for Settlement of Investment Disputes is a multilateral treaty for promoting international investment and settlement of disputes. India not a signatory.

8. Every BIT has a clause relating to arbitration under which resolution is to be done amicably within a 6 months cooling off period.
9. If dispute does not settle, party by consent submit to international conciliation or municipal courts.
10. If no consent could be sought, then there is arbitration.
11. Typical BIT has following features:
 - a. Expropriation
 - b. Fair and equitable treatment
 - c. Full protection and security: every foreign investor should get treatment which is less favourable than investor of any 3rd country
 - d. National treatment: no policy can be framed by the government favoring nationals
 - e. Most Favored Nation treatment: no discrimination between Indian investor and a foreign investor
12. **White Industries** Case was referred to. The case is based on the expropriation clause. Under this clause, contracting states promise not to expropriate unless for public purposes. Fair compensation is to be given to the investor. But the arbitration tribunal cannot intervene with municipal laws and criminal investigation.
13. Fair and Equitable Treatment clause can be compared with Article 14 under which no arbitrary treatment can be made. e.g. **Vodafone** case.
14. Under Full protection and security clause, state is to exercise due diligence.
15. Award made against the GOI under BIT shall be fully enforceable under NY Convention.
16. India's Tryst with BITs: Devas Mauritius BIT case, White Industries.
17. White Industries Case: following issues were involved
 - a. Whether White Industries an investor?
 - b. Whether judicial acts be considered as the acts of the state?

It was held that states actions include acts of the judiciary. White Industries relied upon India and Kuwait BIT to claim that they were denied justice and fair and equitable treatment.

PREVENTION OF MONEY LAUNDERING AND COMBATING FINANCING OF TERRORISM

By Mr. AC Singh, Deputy Legal Advisor

1. Prevention of Money Laundering Act, 2002 (PMLA) was enacted with an object to prevent money laundering, provide power for confiscation of property acquired through money laundering.
2. The act does not cover every kind of laundering.
3. Money laundering takes place in 3 stages:
 - a. Placement: entry of funds derived from criminal activity
 - b. Layering:
 - c. integration
4. PMLA gives 2 ways to nail money launderer:
 - a. attaching the property and taking possession,
 - b. prosecuting launderer before a special court
5. Authorities under the Act are directorate enforcement, adjudicating authority (quasi judicial body), PMLA tribunal.
6. In *Radha Mohan Lakotiya* case (Bombay High Court), it was held that what is required for the confirmation of attachment order is only a prima facie case. Entire evidence need not be evaluated before ordering attachment.
7. Presumptions given under Section 22 and 23: Presumptions in inter-connected transaction and in regard to records or property in certain cases. If department can prove one transaction is illegal, then the entire transaction shall be deemed to be violating PMLA.
8. Burden of proof under the Act is on the accused.
9. Search and freezing of property can be done under Section 17 of the PMLA.
10. Whole Act revolves around the term “proceeds of crime”. But the Act does not define what amounts to criminal activity.
11. Any property acquired with the proceeds of crime can be seized wherever located, need not be in India. There are provisions for reciprocal arrangement for this.
12. Jharkhand High Court in *Hari Narayan Rai v. Union of India* interpreted the definition of money laundering and held that therelevant date is not acquisition of money but date

on which money is being processed for projecting it untainted. Provisions are not violative of Article 20(1).

13. In *Rakesh Kothari v. Union of India*, it was held that PMLA is a special law and is a self contained code.

Mr. PK Tiwari, Chairman, Financial Intelligence Unit, India

1. Financial Action Task Force (FATF) Body is an international body consisting of 34 countries. It has certain norms which are required to be followed for investigating economic offences.
2. But even non members are required to comply with certain standards of preventing money laundering. Non compliance results in black listing of countries.
3. Proceeds of crime from specified offences only are subject to confiscation. Under international standards, offences are given in a generic manner, while in PMLA, specific sections and acts are provided.
4. A debate is going on the term “projecting” in the definition of money laundering.
5. Terrorism can be financed even with legitimate money.
6. FATF recommendations:
 - a. Identify risk so that adequate resources can be allocated
 - b. Taking preventive measures
 - c. Powers and responsibility of competent authorities
 - d. Transparency and availability of beneficial ownership
 - e. International cooperation as laundering is not confined to the domestic boundaries.
There is always cross border transaction.
7. Statistically, about 2-5% of the world’s GDP is involved in money laundering.
8. OECD report says that annually about 1 trillion dollar is on account of corruption.
9. Under FATF, a Financial Intelligence Unit (FIU) has to be established by each country which has responsibility of seeking information, penalty for non compliance and disclosing information to notified bodies.

10. Section 12 lays down the responsibility of financial institutions vis-a-vis FIU. FIU does not collect this information; rather it is entitled to receive information under the force of law. Duty is on financial institutions to provide this information
11. Indian FIU can receive information from regulators like RBI, SEBI, IRDA, EOW of CBI and Police, ED, IB, foreign FIU, financial institutions and also share information with other regulators and foreign FIU through a secured web.
12. India is one of the few FIUs in the world with such an integration.
13. Obligations of the reporting entities: maintain records, furnish reports, perform KYC, maintain confidentiality.
14. A privilege is given to reporting entities under which they have immunity from civil and criminal liability.
15. Types of reports: banks have to report every cash transaction and non profit transaction above Rs. 5-8 lakhs.
16. Number of unique persons reported to FIA is 1.45 crores
17. Most popular technique of money laundering is
 - a) over invoicing and under invoicing
 - b) Cash structured through shell companies invested in stock market and converted to capital gains
 - c) Multiple use of bills of entry and fake BOE
 - d) 3rd party remittances
 - e) Cash deposited in different locations, withdrawn from one
 - f) Use of surrogate accounts for soliciting funds including MNREGA accounts
 - g) Funds transfer abroad as advance soliciting
18. Money laundering is a distinct and separate offence. A person can be prosecuted under PMLA even if prosecution under main offence fails.

Minutes Prepared By: Ankita Sharma, Intern, National Judicial Academy.